EQUAL PROTECTION V. AT WILL EMPLOYMENT:
Engquist v. Oregon Dept. of Agric., 128 S. Ct. 2146 (2008)

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EQUAL PROTECTION V. AT WILL EMPLOYMENT
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KATRINA GRIDER

I. INTRODUCTION

A. Public Employees and Equal Protection

Public employers have long understood that their employees have an additional set of protections provided by the U.S. Constitution that are not available to private sector employees. For example, public employees have speech and association rights under the First Amendment as well as protection from unreasonable searches and seizures un der the Fourth Amendment. If a public employee can be discharged only for just cause, the Fourteenth Amendment's Due Process Clause requires notice and hearing before his/her dismissal can be final.

The Equal Protection Clause also places constraints on public employers. It prohibits them from treating employees differently because of their membership in a particular class. For example, a public employer cannot refuse to hire an individual because of age, race, sex, national origin, or disability. The same alleged conduct may violate other such laws as the Title VII of the Civil Rights of Act of 1964 (Title VII), the Americans with Disabilities Act (ADA), or the Age Discrimination in Employment Act (ADEA).

The fact that a public employee may have an equal protection claim in addition to other claims is significant. For example, there's a long statute of limitations for filing an equal protection claim than there is for claims filed under Title VII. Additionally, claims filed under the Equal Protection Clause create greater liability for damages (including punitive damages) and contain no limit for compensatory damages for emotional distress. A public employee with a valid equal protection claim can expose his/her employer to substantial liability.

B. Class-of-One Equal Protection Claims

Equal protection claims have traditionally been limited to circumstances in which an individual is treated less favorably by the government because of his membership in a particular class. However, in 2000, the Supreme Court heard *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In its decision, the Court clarified that the Equal Protection Clause also applies to arbitrary governmental decisions regardless of whether the decision is class-based. The *Olech* case involved a zoning decision in which a property owner requested that the municipality connect her property to the village's water supply. The village conditioned connection on the property owner's agreement to provide a 33-foot easement even though it had required only 15 feet from other property owners. The Supreme Court concluded that such arbitrary decisions, even though not class-based, violate the Equal Protection Clause. These claims are generally referred to as "class-of-one" equal protection claims.

C. Applying *Olech* in Public Employment

After the *Olech* decision, public employees began challenging employment decisions using the class-of-one equal protection theory. Federal courts split on whether the Equal Protection Clause was intended to cover employment claims that weren't class-based. In June, the U.S. Supreme Court resolved the conflict. In *Engquist v. Oregon Dept. of Agric.*, 128 S. Ct. 2146 (2008), the Court ruled that "such a 'class-of-one' theory of equal protection has no place in the public employment context."

II. THE ENGQUIST DECISION

A. Key Holding

The class-of-one theory of equal protection does not apply in the public employment context.

In rejecting class-of-one equal protection claims, the Supreme Court based its decision on a number of commonsense factors. First, it recognized that employment decisions are often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. Given that subjectivity, nearly every employment decision could result in a lawsuit. The Court noted the significant costs that would be imposed on municipalities to defend against such claims if they were available.

The Supreme Court also recognized that to allow public employees to challenge every discharge decision based on a class-of-one equal protection theory would, in essence, eviscerate the employment-at-will doctrine. The general rule in Texas is that a person's employment is at will. That means she can quit her job whenever she wants, and her employer can dismiss her for any reason that is not illegal (*e.g.*, based on a protected category such as gender or race). Allowing an at- will employee to challenge a discharge

decision because she believes it was arbitrary or irrational would have the effect of employment no longer being at will.

B. Issue

The question in this case was whether a public employee can state a claim under the Equal Protection Clause by alleging that she was arbitrarily treated differently from other similarly situated employees, with no assertion that the different treatment was based on the employee's membership in any particular class

C. Background

1. Engquist's Employment

Anup Engquist (Engquist) was hired in 1992 by Norma Corristan (Corristan) to be an international food standard specialist for the Export Service Center (ESC), a laboratory within the Oregon Department of Agriculture (ODA). During the course of her employment, Engquist experienced repeated problems with Joseph Hyatt (Hyatt), another ODA employee, complaining to Corristan that he had made false statements about her and otherwise made her life difficult. Corristan responded by directing Hyatt to attend diversity and anger management training.

In 2001, John Szczepanski (Szczepanski), an assistant director of ODA, assumed responsibility over ESC, supervising Corristan, Hyatt, and Engquist. Szczepanski told a client that he could not "control" Engquist, and that Engquist and Corristan "would be gotten rid of." When Engquist and Hyatt both applied for a vacant managerial post within ESC, Szczepanski chose Hyatt despite Engquist's greater experience in the relevant [***7] field. Later that year, during a round of across-the-board budget cuts in Oregon, Szczepanski eliminated Corristan's position. Finally, on January 31, 2002, Engquist was informed that her position was being eliminated because of reorganization. Engquist's collective-bargaining agreement gave her the opportunity either to "bump" to another position at her level, or to take a demotion. She was found unqualified for the only other position at her level and declined a demotion, and was therefore effectively laid off.

2. Engquist's Claims

Engquist subsequently brought suit in district court against ODA, Szczepanski, and Hyatt, alleging violations of federal antidiscrimination statutes, the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and state law. As to Engquist's equal protection claim, she alleged that the defendants discriminated against her on the basis of her race, sex, and national origin. She also brought what is known as a "class-of-one" equal protection claim, alleging that she was fired not because she was a member of an identified class (unlike her race, sex, and national origin claims), but simply for "arbitrary vindictive, and malicious reasons."

a. *The District Court*

The district court granted the defendants' motion for summary judgment as to some of Engquist's claims, but allowed others to go forward, including each of the equal protection claims. Specifically, the district court found Engquist's class-of-one equal protection claim to be legally viable, and decided that the class-of-one theory was fully applicable in the employment context. The court held that Engquist could succeed on that theory if she could prove "that she was singled out as a result of animosity on the part of Hyatt and Szczepanski" -- *i.e.*, "that their actions were spiteful efforts to punish her for reasons unrelated to any legitimate state objective" -- and if she could demonstrate, on the basis of that animosity, that "she was treated differently than others who were similarly situated."

b. *The Jury*

After an 11-day trial, a jury awarded Engquist a total of $425,000, but $75,000 of the award went to the State of Oregon (Oregon has a punitive damages statute that gives the state 60% of the punitive damage amount awarded on a state claim). More specifically, Engquist's $425,000 was divided as follows: $175,000 in compensatory damages (not tied to any particular claims) and $250,000 in punitive damages, half of which was based on the state law tort claim and half of which on the equal protection claim. The court also awarded $172,740 in attorneys' fees as well as costs.

D. The Ninth Circuit's Opinion: *Engquist v. Oregon Dept. of Agric.*, 478 F.3d 985 (9th Cir. 2007).

The Ninth Circuit reversed in relevant part. It recognized that the Supreme Court had upheld a class-of-one equal protection challenge to state legislative and regulatory action in *Village of Willowbrook v. Olech*, 528 U.S. 562, (2000) (*per curiam*). The Ninth Circuit also acknowledged that other circuits had applied *Olech* in the public employment context, but it disagreed with those courts on the ground that our cases have routinely afforded government greater leeway when it acts as employer rather than regulator. *Engquist*, 478 F.3d at 993-96. The court

concluded that extending the class-of-one theory of equal protection to the public employment context would lead to undue judicial interference in state employment practices and "completely invalidate the practice of public at-will employment." *Id.* at 995. Departing from a majority of the circuits, the Ninth Circuit accordingly held that the class-of-one theory was "inapplicable to decisions made by public employers with regard to their employees." *Id.* at 996.

Judge Reinhardt dissented, "agree[ing] with the other circuits that the class-of-one theory of equal protection is applicable to public employment decisions." *Id.* at 1010.

E. The Equal Protection Clause Issue

The Equal Protection Clause, which ensures that 'all persons similarly situated should be treated alike,' has primary significance when you have several people in one class and one of those in the class has been sort of "singled-out" for poor treatment. The Supreme Court's 2000 *Olech* decision applied this clause to a "class-of-one" for the first time. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). In *Olech*, a municipality conditioned water service for a property on the plaintiff-owner's granting a 33-foot easement, even though it required only a 15-foot easement from every other property owner. In its *per curiam* decision, the Court allowed the plaintiff to proceed on the "class-of-one" theory, recognizing claims where "a plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The Court stated that allegations of irrational and wholly arbitrary treatment, even without allegations of improper subjective motive, were sufficient to state a claim for relief under equal protection analysis.

Based on *Olech*, the Ninth Circuit, as well as the other circuits, have applied class-of-one theory in the regulatory land-use context to forbid government actions that are arbitrary, irrational or malicious. The kind of analysis used by the court to review the actions of government regulators is known as "rational basis" scrutiny. Generally government actions are rational if they are tied to a legitimate government interest, but if they betray malicious, irrational or arbitrary action, they don't have a rational basis.

However, in *Engquist*, the Ninth Circuit panel chose not to extend this analysis into the sphere of government employment. The reason the Ninth Circuit declined was because they claimed there is a significant difference between "government as regulator" and "government as employer"/"government as proprietor." As the majority in the panel explained, "government as employer" must be given wider latitude in its hiring and termination of people. When "government as regulator" is acting, however, it is often a powerful entity against a hopeless and, often, hapless, taxpayer. Thus, in this case, the panel decided that there were no federal constitutional routes available to Ms. Engquist. In reaching this decision, the Ninth Circuit opposed nearly every other circuit which had looked at this question.

F. The Supreme Court's Opinion

1. The Majority View:
(Justices Roberts, Scalia, Kennedy, Thomas, Breyer, and Alito)

In an opinion authored by Chief Justice John G. Roberts Jr., the Supreme Court ultimately agreed with the Ninth Circuit. The majority of the U.S. Supreme Court agreed, ruling against this "constitutionaliz[ing] [of] the employee grievance.

"Our traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications, combined with unique considerations applicable when the government acts as employer as opposed to sovereign, lead us to conclude that the class-of-one theory of equal protection does not apply in the public employment context." *Id* at. 2151. The majority perceived practical problems with Engquist's class-of-one equal protection theory:

> We agree that, even if we accepted Engquist's claim, it would be difficult for a plaintiff to show that an employment decision is arbitrary. But this submission is beside the point. The practical problem with allowing class-of one claims to go forward in this context is not that it will be too easy for plaintiffs to prevail, but that governments will be forced to defend a multitude of such claims in the first place, and courts will be obliged to sort through them in a search for the proverbial needle in a haystack. *Id.* at 2157.

There is a crucial difference between the government exercising "the power to regulate or license, as lawmaker," and acting "as proprietor, to manage [its] internal operation." *Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886, 896 (1961). Thus, in the public employment context, the Court has recognized that government has significantly greater leeway in its dealings with citizen employees than in bringing its sovereign power to bear on

citizens at large. *See, e.g., O'Connor v. Ortega*, 480 U. S. 709, 721–722 (1987). The relevant precedent establishes two main principles: First, government employees do not lose their constitutional rights when they go to work, but those rights must be balanced against the realities of the employment context. *See, e.g., id.* at 721. Second, in striking the appropriate balance, the Court considers whether the claimed employee right implicates the relevant constitutional provision's basic concerns, or whether the right can more readily give way to the requirements of the government as employer. *See, e.g., Connick v. Myers*, 461 U. S. 138 (1983).

The Court's equal protection jurisprudence has typically been concerned with governmental classifications that "affect some groups of citizens differently than others." *McGowan v. Maryland*, 366 U. S. 420, 425 (1961). *Olech* did recognize that a class-of-one equal protection claim can in some circumstances be sustained. Its recognition of that theory, however, was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle to the facts in that case: The government singled *Olech* out with regard to its regulation of property, and the cases upon which the Court relied concerned property assessment and taxation schemes that were applied in a singular way to particular citizens.

What seems to have been significant in *Olech* and the cited cases was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed. This differential treatment raised a concern of arbitrary classification, and therefore required that the State provide a rational basis for it. There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases treating like individuals differently is an accepted consequence of the discretion granted to governmental officials.

This principle applies most clearly in the employment context, where decisions are often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify. Unlike the context of arm's length regulation, such as in *Olech*, treating seemingly similarly situated individuals differently in the employment context is par for the course. It is no proper challenge to what in its nature is a subjective and individualized decision that it was subjective and individualized. That the Court has never found the Equal Protection Clause implicated in this area is not surprising, given the historical understanding of the at-will nature of government employment. *See, e.g., Cafeteria & Restaurant Workers v. McElroy*, 367 U. S. 886, 896 (1961). Recognition of a claim that the State treated an employee differently from others for a bad reason, or for no reason at all, is simply contrary to the at-will concept. The Constitution does not require repudiating that familiar doctrine. Finally, the Court is guided, as in the past, by the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick, supra,* at 143. If class-of-one claims were recognized in the employment context, any personnel action in which a wronged employee can conjure up a claim of differential treatment would suddenly become the basis for a federal constitutional claim. The Equal Protection Clause does not require "[t]his displacement of managerial discretion by judicial supervision." *Garcetti v. Ceballos*, 547 U. S. 410, 423 (2006).

2. The Dissenting View:
(Justices Stevens, Souter and Ginsburg)

The dissenting justices, led by Justice John Stevens, disagreed with the majority's characterization of *Olech*, noting "the outcome of *Olech* was dictated solely by the absence of a rational basis for the discrimination," regardless of whether the plaintiff was a property owner or an employee. Furthermore, the complete lack of a performance-based (or any) rationale for the government action in this case was sufficient to bring it within the category of equal protection violations. "Instead of using a scalpel to confine so-called 'class of one' claims to cases involving a complete absence of any conceivable rational basis for the adverse action and the differential treatment of the plaintiff, the Court adopts an unnecessarily broad rule that tolerates arbitrary and irrational decisions in the employment context." *Id.* at 2158.

The dissent also addressed these practical concerns:

> Presumably the concern that actually motivates today's decision is fear that governments will be forced to defend against a multitude of "class of one" claims unless the Court wields its meat-axe forthwith. Experience demonstrates, however, that these claims are brought infrequently, that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial. Experience also demonstrates that there are in fact rare cases in which a petty tyrant has misused governmental, power. Proof that such misuse was arbitrary because

> unsupported by any conceivable rational basis should suffice to establish a violation of the Equal Protection Clause without requiring its victim also to prove that the tyrant was motivated by a particular variety of class-based animus. *Id.* at 2160-61.

III. POST *ENGQUIST* DECISIONS

A. *Appel v. Spiridon*, No. 06-5723, 2008 U.S. App. LEXIS 13848 (2d Cir. July 2, 2008).

Sometimes, the Supreme Court issues a ruling that kills your case midstream. That's because Supreme Court decisions have retroactive effect. There is no grandfathering. That's the lesson of *Appel v. Spiridon*.

The plaintiff sued her employer under the Equal Protection Clause because she was required to submit to a psychological examination in order to maintain her teaching position at Western Connecticut State University. Her legal theory was "class of one." This means that, as a lone plaintiff, she can maintain that a government entity treated her arbitrarily and that she is the only member of the class who was treated this way. The trial court granted plaintiff's motion for a preliminary injunction, reasoning that she had a strong likelihood of success on the merits of the case and that she would suffer irreparable harm without the injunction. For a plaintiff, there can be nothing better than a preliminary injunction, as it means you have temporarily "won" the case and that the defendant has to leave you alone for the time being.

Here's the problem for plaintiff. Appel's lawyer and the trial court did not have the benefit of *Engquist* when her case was pending. That doesn't matter. *Engquist* requires the Second Circuit to vacate the preliminary injunction. Appel loses.

What is more, recognizing that it had previously interpreted the Equal Protection Clause to govern workplace decisions, the Second Circuit expressly "overrule[s] any precedent of this Circuit to the extent that it conflicts with the holding of *Engquist*." Those cases are: *Skehan v. Vill. of Mamaroneck*, 465 F.3d 96 (2d Cir. 2006) and *Neilson v. D'Angelis*, 409 F.3d 100 (2d Cir. 2005).

B. *Cranford v. McNesby*, No. 3:07cv203/MCR/MD, 2008 U.S. Dist. LEXIS 47979 (N.D. Fla. June 23, 2008).

This case arose from Cranford's resignation from his position as a deputy sheriff with the Escambia County Sheriff's Office ("ECSO"). Plaintiff filed a four-count complaint in the Circuit Court of Escambia County, Florida, seeking damages for violation of his Fourteenth Amendment procedural due process and equal protection rights (Count I); duress (Count II); fraudulent misrepresentation (Count III); and breach of contract (Count IV).

Specifically, Cranford alleged that his supervisors treated him differently than other officers who had been involved in or charged with domestic violence incidents. Cranford alleges that while he was forced to resign or be fired due to the minor charges against him, the ECSO has employed or continued to employ officers who have faced much more serious accusations. Cranford, however, has not asserted that this differential treatment was caused by his membership in any suspect class. Cranford's claim must therefore be based on a "class-of-one" theory of equal protection as described in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) (*per curiam*).

The Supreme Court, however, has recently held that the "class-of-one" theory of equal protection has no application in the public employment context. In *Engquist*, the Court noted that allowing such claims would "impermissibly constitutionalize the employee grievance." 2008 U.S. LEXIS 4705 (*quoting Connick v. Myers*, 461 U.S. 138 (1983) (internal quotation marks omitted)). Having failed to allege membership in any suspect class, Cranford's equal protection claim must fail. Finally, the court held that because Cranford failed to show a violation of his equal protection rights, defendants, in their individual capacities, were entitled to qualified immunity on Cranford's equal protection claim.

C. *Siao-Pao v. Connolly*, No. 06 Civ. 10172, 2008 U.S. Dist. LEXIS 48697 (S.D.N.Y. June 25, 2008).

Pro se petitioner Leopold Siao-Pao ("Siao-Pao") sought a writ of habeas corpus pursuant to 28 U.S.C. § 2254, in connection with his denial of parole on August 27, 2003 by the New York State Parole Board (the "Parole Board"). Siao- Pao raised four claims in his petition: (1) the Parole Board's determination was arbitrary and capricious; (2) the Parole Board violated Siao-Pao's constitutional due process rights ("Due Process") by failing to provide a written statement of reasons for parole denial; (3) the Parole Board violated Siao- Pao's equal protection rights ("Equal Protection"); and (4) the denial of parole for Siao-Pao was arbitrary because the Parole Board permitted political pressure and public opinion to influence its decision-making. The district court denied his petition.

Specifically, the court held that the record also did not support Siao-Pao's Equal Protection claim on a "class of one" theory. To establish a "class of, one" claim, a plaintiff must allege that "[] he has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The court stated that is "has interpreted the *Olech* standard to require that differential treatment be both intentional and irrational to satisfy the class of one standard." *Id*. at *27 (citations omitted). The court further noted, "[a]dditionally, the Supreme Court recently clarified the *Olech* holding by limiting class of one claims in contexts characterized by individualized and subjective determinations where 'allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.'" *Id*. at *27-28.

The court found there was no evidence here that Siao-Pao was similarly situated to his comparators or subjected to "irrational and wholly arbitrary acts" and "intentional disparate treatment." *Id*. at *28. Given the numerous factors considered by the Parole Board, it is unlikely that he can do so. *See Seltzer v. Thomas*, No. 03 Civ. 00931, 2003 U.S. Dist. LEXIS 12912, (S.D.N.Y. July 28, 2003). Pursuant to Executive Law § 259-i(2)(c), the Parole Board is required to weigh criteria specific to a particular inmate, and need not enumerate or give equal weight to each factor. This process is discretionary, as was the decision in *Engquist*, where the Supreme Court rejected a class of one argument and accorded deference to the state's determination based on the subjective and individualized nature of the decision. The Parole Board's written statement demonstrates that it considered Siao-Pao's prior offenses, housing and employment plans, and achievements in prison. The Parole Board specifically relied on a concern for the public welfare, which is a entirely rational basis for parole denial. *Id.* at *29,

In sum, the court concluded that there was no evidence that the Parole Board's decision to deny Siao-Pao's petition was irrational, arbitrary, or intentionally disparate. Accordingly, the Parole Board's denial of parole to Siao-Pao, while granting parole to his comparators, was not a violation of Siao-Pao's Equal Protection rights based on a class of one theory.

D. *Clayton v. City of Middletown*, No. 3:06cv667, 2008 U.S. Dist. LEXIS 51935 (D. Conn. July 8, 2008).

Plaintiff William Clayton was formerly a police officer in Middletown, Connecticut. In 2002, Clayton was involved in an on-duty altercation with a superior officer which resulted in a suspension pending an internal investigation and a separate criminal investigation. Eight months later, the Middletown Chief of Police, Defendant Edward Brymer, Jr., recommended to the Mayor, Defendant Dominique Thornton, that Clayton be terminated, although the final hearing on the recommended termination never took place as Clayton instead retired. Clayton subsequently sued the City of Middletown, Thornton, Brymer, and former police captain Philip Pessina, claiming that he suffered adverse employment action in retaliation for protected First Amendment activities, that the defendants violated his equal-protection rights under both "class of one" and "selective prosecution" theories, and that he was denied due process in the disciplinary proceedings which led to his retirement. The defendants moved for summary judgment on all of his claims.

Clayton asserted that he was "singled out for unfair and intentionally discriminatory treatment compared to other similarly situated employees of Middletown" without any rational basis for the disparate treatment. Clayton characterized that treatment as a "class of one" equal-protection claim. *Id.* at *20. The district court noted, "the Supreme Court held that the "class-of-one theory of equal protection does not apply in the public employment context." *Id*. (citations omitted). Therefore, the court held that Clayton's claims were no longer viable.

E. *Robles-Claudio v. Town of Enfield*, 2008 U.S. Dist. LEXIS 54043 (D. Conn. July 16, 2008).

In her complaint, plaintiff Antonia Robles-Claudio asserted that defendants Town of Enfield, former Chief of Police Ronald Marcotte and former Town Manager and Director of Public Safety Scott Shanley violated her constitutional rights to equal protection and due process of law. The plaintiff also asserted state law claims of defamation and intentional infliction of emotional distress. The plaintiff was a former police officer who was terminated for her failure to obtain an EMT certification after four unsuccessful attempts. The plaintiff argued that her termination was without just cause. The defendants argue that they were entitled to summary judgment on plaintiff's equal protection claims based on her status as a Hispanic woman and as a class of one.

The district court stated, "[a]s an initial matter, summary judgment will be granted on plaintiff's class of one claim in light of the United States Supreme Court's recent holding that a class-of-one equal protection claim is not cognizable in the context of public employment." *Id*. at *7 (citing *Engquist*).

F. *Torres v. Bowles*, No. 7:07cv00600, 2008 U.S. Dist. LEXIS 54646 (W.D. Va. July 17, 2008).

This case was before the court pursuant to defendants' Renewed Motion to Dismiss the Complaint. The district court granted the defendants' motion and dismissed the plaintiff's complaint.

On December 26, 2007, Torres filed suit against defendants Margaret Bowles, Torres's former supervisor, and Mr. Jarvis, the Warden of Bland Correctional Center ("Bland"), alleging that their decision to terminate her employment at Bland was based on her disabilities, rather than her job performance. Accordingly, Tones alleged that defendants violated both her liberty and equal protection rights, in violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. On June 4, 2008, the court dismissed plaintiff's Due Process claim, but denied defendants' motion to dismiss plaintiff's Equal Protection claim, finding that plaintiff's complaint sufficiently alleged an Equal Protection Claim.

Defendants filed a Renewed Motion to Dismiss the Complaint on June 23, 2008, in light of the Supreme Court's recent ruling in *Engquist*. In this case, the court noted that Torres did not allege that her employment was terminated based on her membership in a protected class, nor did she allege that she was a member of a distinct group of individuals treated categorically differently by defendants. Rather, Torres alleged a class-of-one theory of discrimination in which she asserted that she was discharged from her employment for an improper, namely, because of her disabilities. The court found that under *Engquist*, Torres, an at-will government employee, could not raise a class of one claim under the Equal Protection Clause.

IV. LEGAL COMMENTARY

A. The Future of Class-of-One Claims

Bill Araiza
http://prawfsblawg.blogs.com/prawfsblawg/2008/06/the-future-of-c.html (June 19, 2008).

What I want to focus on here are the implications of *Engquist*. It seems clear that class-of-one claims, even those alleging vindictive or malicious government action, will no longer be cognizable in the government employment context. I might be wrong about that if lower courts are willing to distinguish *Engquist* on the grounds that in *Engquist* there was no "objective standard" against which to judge the reasonableness of the supervisor's employment decision. So, assume an employment decision where employees are by and large treated according to a particular rule, but then one employee is treated more harshly than the rule would suggest. This places the hypo squarely within the *Engquist* Court's description of *Olech*, yet the Court expressly states that "the class-of-one theory ... does not apply in the public employment context." Presumably this statement from the Court will control and will in fact defeat any class-of-one employment claims; still, it might be interesting to see if a willful lower court judge works with the tension in the Court's opinion.

More likely, I think, will be non-employment cases that potentially raise some of the concerns the Court found to characterize class-of-one claims in the employment context. Zoning cases come to mind. Here's a key sentence from *Engquist*: "There was no indication in *Olech* that the zoning board was exercising discretionary authority based on subjective, individualized determinations -- at least not with regard to easement length, however typical such determinations may be as a general matter." Significantly, later the Court cited such "subjective, individualized determinations" as exactly the sort not amenable to analysis under a class-of-one theory. This to me seems a hint to the lower courts (and government defendants) in zoning cases to distinguish *Olech* on that ground. Because a lot of zoning decisions are in fact based on facts unique to the affected parcel (I discussed this in an article from last year) this statement in *Engquist* may constitute an invitation to make equal protection off-limits to most challenges to zoning variance decisions.

I suspect there are other categories of government decisions that will fit within *Engquist's* description of subjective, individualized decisions to which the class-of-one theory is inapplicable. On the other hand, I also suspect there's no bright line separating those decisions from the type of decision in *Olech* that is amenable to a class-of-one claim. In *Olech* there was a letter from the village to the plaintiffs telling them that the village's policy was to require only the smaller easement that the plaintiffs alleged they were constitutionally due. In future cases does there have to be such a policy in order for there to be the "objective standard" against which equal protection claims can be judged? What about consistent but unwritten practice? Or a formal policy, but one that is only inconsistently enforced?

There are lots of permutations here. Interestingly, and maybe perversely, the Court's approach in *Engquist* -- to cut off such claims but on this fuzzy "lack of an objective standard" reasoning -- may encourage the precise litigation the Court hoped to cut back on. Before *Engquist*, class-of-one claims challenging fact-intensive government

decisions were easy for the government to win, since the very fact-intensiveness of the decision made the plaintiff not similarly-situated to better-treated persons. But now there may well have to be litigation about whether the government's policy (however defined) contained sufficiently objective standards as understood by *Engquist*. In other words, easy, fact-based dismissals may now give way to more difficult, and more costly, litigation over the legal standards at issue. Of course, a court could simply skip the latter question and hold that, regardless of the objectiveness of the standard, the plaintiff was not similarly situated to anyone else, and get rid of the case that way. But in that case the *Engquist* Court will have accomplished little.

Moreover, in accomplishing little the *Engquist* Court will have tossed out of court class-of-one claims alleging animus. I made this point in my second post, but I'll close with a repetition: if there are any class-of-one claims that deserve to be heard as a matter of doctrinal logic, then I would think claims alleging "a bare desire to harm" the plaintiff should be among the survivors. Such claims fit with the Court's rational basis-plus cases from the 80's and 90's, and are consistent with equal protection's basic insistence that government singling-out (of which class-of-one cases are the most egregious example) should be at minimum supported by some appropriate government interest -- or at least not supported only by "a bare desire to harm" for harm's sake.

B. Engquist v. Oregon: Right Result, Wrong Reason

Deborah Hellman
http://balkin.blogspot.com/2008/06/enquist-v-oregon-right-result-wrong.html (June 9, 2008).

Today in *Engquist v. Oregon* the Supreme Court rejected the Equal Protection claim of a government employee who claimed she had been dismissed for arbitrary and malicious reasons. The Court held that this so-called "class-of-one claim" – in which the plaintiff alleges that she is wrongly discriminated against not because she is a member of a protected class but just because she is herself – cannot be brought by government employees because when the government acts as an employer rather than a sovereign it enjoys broad discretion to decide whom to hire and fire. The Court's rationale here (rightly rejecting the plaintiff's claim in my view) exposes a flaw in the Supreme Court's approach to irrational governmental action.

The majority opinion, written by Chief Justice Roberts and joined by Justices Scalia, Kennedy, Thomas, Breyer and Alito, rests on the claim that where the governmental actor has discretion, her action cannot be challenged for irrationality. While discretionary governmental action can be challenged as based on illegitimate criteria (the race or sex of the person affected, for example), irrationality alone is insufficient. But why? The dissent rightly takes the majority to task for its claim that where governmental actors enjoy discretion – and only there – governmental action cannot violate Equal Protection for failing rationality review. But rather than conclude, as does Justice Stevens' dissenting opinion, joined by Justices Souter and Ginsburg, that all governmental action (whether by governmental employers or other government actors) must at least be rational, this case and the examples – both real and hypothetical – explored by the Justices in this case, expose why rationality has nothing to do with the values underlying Equal Protection at all. Irrational decisions by governments are stupid, irritating (often in the extreme), possibly quite harmful but not, without more, actions that violate Equal Protection.

The majority must distinguish the facts of this case from its prior decision in *Village of Willowbrook v. Olech* in which the Court allowed a homeowner to sue the municipality for requiring him to provide a larger easement to the village in order to connect to the public water supply than it required of all other homeowners. There the Supreme Court held that because the Equal Protection Clause protects individuals not groups, it must be the case that this so-called "class of one" claim was possible. But that conclusion does not follow. The question is not whether the Equal Protection Clause protects individuals rather than groups (which is correct) but what it protects them from? As we all know, sometimes the government is stupid and irrational. Equal Protection is not a cure for government ineptitude or for the hazards of bureaucracy more generally. If it were, the courts would be busy indeed. More importantly, this isn't a harm that relates to the guarantee that Equal Protection provides. The value that underlies that clause is the moral equality of all persons. As such, it protects us from governmental actions that treat some people as of less worth than others. In my view, state action that demeans anyone it affects violates Equal Protection. Truly irrational governmental action (action based on no reason) does not demean. It is simply careless, stupid and harmful but as it is based on no reason at all, it doesn't treat some people as less worthy than others.

In the majority's view, the reason that Oregon didn't violate the Equal Protection clause was grounded in part on the at-will employment doctrine. Implicit in the contrast with *Olech* is the claim that when the government acts as a regulator, it is required to act rationally because no analogous background law exempts it from rationality

review. The problem with this explanation is that it is hard to see why the background law of at-will employment (which has been limited anyway by statute) would or could exempt the governmental actor from a constitutional requirement (as the dissent points out).

A better way to think of these two cases is this: Equal Protection doesn't require rationality but sometimes the government's action violates other norms or constraints on its action. Consider the third case (a hypothetical) introduced by the majority in *Engquist*. A police-officer who stops some but not all speeders for no particular reason. The majority argues that the police officer has discretion to stop only some speeders and so is exempted from Equal Protection rationality review. This account seems doubly wrong. First: as I already argued, why think that the discretion accorded police officers could exempt this governmental actor from complying with what the constitution requires. After all, the fact that the police office has discretion doesn't allow him to stop only Blacks.

Second, there does seem to be something disturbing about a police officer who uses his discretion to in a "malicious" way – to stop people based on bad reasons that don't track any customary Equal Protection categories. What about a police officer who stops speeding SUVs but not speeders of more fuel efficient cars? But what is wrong with this is NOT an equal protection issue (unless and until our attention to global warming changes enough so that being singled out based on ones polluting habits becomes stigmatizing). In the mean time, what makes this action wrong is that it conflicts with the police officer's obligations as a police officer to be guided by some criteria and not others in exercising that discretion. In other words, the police officer does not enjoy absolute discretion. Rather, he has discretion to act within limits. But the limits are not Constitutional in scope. Instead, they derive from the internal standards of policing, both those explicit in his job description and those implicit in his role as a police officer.

What this trio of cases demonstrate (*Engquist*, *Olech* and the hypothetical police officer) is the fallacy in seeing rationality as constitutionally required. As the rationality review "with bite" cases show – cases like *Cleburne* and *Romer* – rationality review is best seen as a catch-all category. It catches those instances of discrimination that distinguish among people on the basis of a trait that we don't subject more generally to heightened review but which can, on occasion, be used in a manner that treats some people as less worthy than others.

In these cases, the problem is not that the classification is irrational but rather that it is demeaning. Irrationality itself has nothing to do with equality.

C. Class of None

Alliance for Justice
http://afjjusticewatch.blogspot.com/2008/06/class-of-none.html (June 9, 2008).

In yet another case with implications for workers across the country, the Supreme Court today released *Engquist v. Oregon Department of Agriculture*, a 6-3 decision limiting public employees' ability to sue for workplace discrimination. Chief Justice Roberts authored the majority opinion, joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito. The ruling carves out an exception to the Equal Protection Clause for individual public employees who claim they were intentionally treated differently than other similarly situated employees, even though the employer had no "rational basis" for the differing treatment. Nine federal appeals courts had previously ruled that this Equal Protection right—called a "class of one" claim because it does not rely on proving discrimination based on membership in a class like race, sex, religion, or national origin—applied to employees in the public sector.

In support of today's decision, Chief Justice Roberts says, "we have often recognized that government has significantly greater leeway in its dealings with citizen employees." He attempted to distinguish contrary Supreme Court precedent, pointing to the difference between the government in its role as a regulator and the government acting as an employer. In throwing out Ms. Engquist's jury award and exempting public employers from this kind of discrimination claim, Chief Justice Roberts said the exception was necessary to stop "undue judicial interference." The majority's reasoning relied heavily on a familiar legal bogeyman—opening the proverbial floodgates to lawsuits by aggrieved workers.

But three justices were not swayed by fears of floodgates. Justice Stevens, joined by Justices Souter and Ginsburg, warned in dissent, "In sum, there is no compelling reason to carve arbitrary public-employment decisions out of the well-established category of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions." The dissenters criticized the majority for "refus[ing] to give effect to the congressionally mandated remedy" and "carv[ing] a novel exception out of state employees' constitutional rights." Together with the Court's decision in *Garcetti* two years ago, limiting First Amendment protection for government whistleblowers,

Justice Stevens points to a recent trend of decisions undermining the rights of public employees. He counters the majority's "floodgate" justification saying, "Even if some surgery were truly necessary to prevent governments from being forced to defend a multitude of equal protection 'class of one' claims, the Court should use a scalpel rather than a meat axe."

It should not surprise court-watchers that the most conservative justices voted to limit the rights of workers. Justice Alito, for example, had a long and reliable history of doing just that before he was even nominated to the High Court. But the reasoning behind the decision contradicts the method of constitutional interpretation espoused by the Court's "textualists." As the dissent points out, the majority's decision "creates a new substantive rule excepting state employees from the Fourteenth Amendment's protection against unequal and irrational treatment at the hands of the State." Remind us where the words "except public employees" appear in the Constitution?

Many of these same justices refused to consider the practical effects of their decisions last term when they eviscerated civil rights laws and the promise of *Brown v. Board of Education* in *Ledbette*r and the school integration cases. Perhaps the most important lesson from this decision is that real world consequences only matter when it's convenient.