OREGON
CIVIL RIGHTS
NEWSLETTER

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Supreme Court Rejects Class-of-One Theory in Public Employment

Janet Metcalf
Loren Collins
Oregon Department of Justice

In *Engquist v. Oregon Department of Agriculture*, 553 U.S. ___, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008), the United States Supreme Court held that the so-called class-of-one theory of equal protection does not apply in the public employment context. The Court thus foreclosed class-of-one claims brought by public employees against their employers.

Factual Background

Anup Engquist, the plaintiff, a native of India, was hired to work in an Oregon Department of Agriculture (ODA) laboratory. During the course of Engquist's employment, she experienced repeated problems with Joseph Hyatt, another ODA employee. Engquist complained that Hyatt made false statements about her and made her life difficult.

John Szczepanski, an assistant ODA director, later assumed responsibility over the lab, supervising Hyatt and Engquist. Szczepanski told a client that he could not "control" Engquist, and that Engquist and a woman manager "would be gotten rid of." When Engquist and Hyatt both applied for a lab management position, Szczepanski chose Hyatt despite Engquist's greater experience and her educational credentials. Szczepanski subsequently explained that he believed Hyatt's business background was more significant.

During a round of state budget cuts, Szczepanski eliminated the woman manager's position. Later, Engquist was informed that her position was being eliminated because of lost revenue at the lab and reorganization. Engquist's collective bargaining agreement allowed her either to "bump" into another position at her level or to take a demotion. She attempted to "bump" into another position at her level, but was found unqualified for the only other position at that level, and was therefore laid off.

District Court Proceedings

After being laid off, Engquist brought suit 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. In her equal protection claim, she alleged that the defendants had discriminated against her based on her race, sex, and national origin. She also brought a class-of-one equal protection claim, "alleging that she was fired not because she was a member of an identified class . . . , but simply for 'arbitrary, vindictive, and malicious reasons.'" *Engquist*, 170 L. Ed. 2d at 982.

The jury rejected Engquist's claims of discrimination based on membership in a suspect class—her race, sex, and national origin claims—but found in her favor on her class-of-one claim. The jury found that Hyatt and Szczepanski "intentionally treated her differently than others similarly situated with respect to the denial of her promotion, termination of her employment, or denial of bumping rights without any rational basis and solely for arbitrary, vindictive or malicious reasons." *Id*. She was awarded compensatory and punitive damages.

Court of Appeals Decision

In a 2–1 decision, the Ninth Circuit held "that the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees." *Engquist v. Oregon Department of Agriculture*, 478 F.3d 985, 996 (9th Cir. 2007). That court had applied class-of-one analysis in other contexts, but the court had not yet decided whether the theory "should be extended to public employment decisions." *Id*. at 993. The majority determined that the theory should not apply in this context, noting that the state has broader authority and discretion when it acts as employer rather than as regulator. *Id*. at 994. Moreover, "[i]n other areas of constitutional law, the [United States Supreme] Court has limited the rights of public employees as compared to ordinary citizens." *Id*. The court concluded that "[t]he class-of-one theory of equal protection is

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Supreme Court Update

Kyle Busse
Busse & Hunt

Rachelle Hong Barton
Knowledge Learning Corporation

Decided

***Boumediene v. Bush*, No. 06-1195 (June 12, 2008)**

The United States Supreme Court reversed the D.C. Circuit in this 5–4 decision, holding that detainees captured as "enemy combatants" are entitled to habeas corpus. Petitioners in this case were detainees at Guantanamo Bay U.S. Naval Station. After their capture and designation as enemy combatants, petitioners sought a writ of habeas corpus in the district court. The district court dismissed the case for lack of jurisdiction, and the D.C. Circuit affirmed. Although the U.S. Supreme Court reversed that decision, holding that 28 USC § 2241 extended habeas corpus protection to Guantanamo detainees, Congress subsequently passed the Detainee Treatment Act of 2005 and the Military Commissions Act of 2006, which amended § 2241 to restrict and deny federal courts' habeas jurisdiction over enemy combatants. In this case, the Court held that the petitioners were entitled to habeas corpus or to seek review under the protections of the suspension clause in the district court.

***Davis v. Federal Election Commission*, No. 07-320 (June 26, 2008)**

The Supreme Court unanimously reversed this case out of the D.C. Circuit, holding that §§ 319(a) and (b) of the Bipartisan Campaign Reform Act of 2002 violate the First Amendment. The plaintiff in this case sought to enjoin the Federal Election Commission from enforcing § 319, part of the so-called Millionaire's Amendment, during his 2006 campaign for the U.S. House of Representatives. The Supreme Court held that § 319 impermissibly burdened his right to spend his own money for campaign speech and seriously infringed on his privacy of association and belief, both of which are guaranteed by the First Amendment.

***District of Columbia v. Heller*, No. 07-290 (June 26, 2008)**

The Supreme Court affirmed the D.C. Circuit in a 5–4 decision, holding that the Second Amendment protects an individual's right to possess a firearm unconnected with service in a militia, and to use it for traditionally lawful purposes, including self-defense in the home. The Court in this case found unconstitutional a District of Columbia law banning handgun possession and requiring residents to keep lawfully owned firearms unloaded and disassembled or bound by a trigger lock or similar device. While the Court did recognize that the Second Amendment right is not unlimited, a total prohibition on handguns, as well as a requirement that all firearms in the home be kept nonfunctional even when necessary for self-defense, violates that right.

***Engquist v. Oregon Dept. of Agriculture*, No. 07-474 (June 9, 2008)**

The Supreme Court held 6–3 that the so-called class-of-one theory of equal protection does not apply in the public employment context. The Court thus foreclosed class-of-one claims brought by public employees against their employers. [See the article on page 1 of this newsletter.]

***Giles v. California*, No. 07-6053 (June 25, 2008)**

In this 6–3 opinion, the Supreme Court vacated the ruling of the California Supreme Court, holding that "forfeiture by wrongdoing" is not a valid exception to the Sixth Amendment's confrontation requirement when the defendant caused the unavailability of the victim's testimony through an intentional criminal act but not an act designed to prevent the witness from testifying. In this case, the trial court admitted statements by the murder victim on the theory that the defendant had forfeited his right to confront the victim's testimony because he had

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

Recycled/Recyclable

Two Recent Cases Confirm Supreme Court's Commitment to Protecting Employees from Retaliation

Katelyn S. Oldham
Oldham Law Office

Two recent cases confirm that the U.S. Supreme Court will continue to protect employees from retaliation as a result of complaints of discriminatory conduct. In *CBOCS West, Inc. v. Humphries*, 553 U.S. ___, 128 S. Ct. 1951 (2008), the Court determined that 42 USC § 1981, which prohibits race discrimination in the making and enforcing of contracts, encompasses retaliation claims. In *Gomez-Perez v. Potter*, 553 U.S. ___, 128 S. Ct. 1931 (2008), the Court held that a private right of action for retaliation asserted under the federal-sector provision of the Age Discrimination in Employment Act of 1967 (ADEA) is cognizable.

In both *Gomez-Perez* and *Humphries*, the Court emphasized precedent in finding that protection from retaliation was covered, even though the respective statutes interpreted by the Court did not expressly prohibit retaliation or provide for a private right of action for retaliation. Both Justice Alito and Chief Justice Roberts, the Court's most recent appointees, joined Justice Breyer's opinion in *Humphries* (Justices Thomas and Scalia dissented). And in *Gomez-Perez*, Justice Alito delivered the majority opinion, while Chief Justice Roberts and Justices Scalia and Thomas dissented.

In *Humphries*, the majority relied on prior cases interpreting 42 USC § 1982, derived from the Civil Rights Act of 1866, and determined that because § 1982 and § 1981 were enacted at the same time, prior decisions holding that retaliation is a discriminatory act in § 1982 claims should be similarly extended to § 1981 claims.

Gomez-Perez concerned the Court's interpretation of a provision of the ADEA that does not expressly state that retaliation is prohibited, only that discrimination is prohibited. In reaching its decision, the Court reviewed similar statutory language in other antidiscrimination statutes in which retaliation for reporting discrimination was held itself to be a prohibited intentional act of discrimination. The majority opinion cited *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), and its language holding that "[r]etaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination." 544 U.S. at 173.

This interpretation direct conflicts with the view held by the dissent. The dissent sided with the First Circuit's analytical distinction between a cause of action for discrimination and one for retaliation, finding that no private right of action for retaliation was expressly authorized in the ADEA. The majority took a more expansive and practical view, protecting employees from retaliation by looking to the purpose of antidiscrimination statutes and relying on stare decisis.

At first blush, these decisions may seem out of line with the current Court's conservative shift in other employment cases, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. ___, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007) (barring as untimely a pay discrimination claim under Title VII when the "lingering effects" of the discriminatory decision had been used by the plaintiff to argue that the conduct fell within the 180-day EEOC filing deadline) and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006) (limiting the "matter of public concern" element of free-speech retaliation claims brought by government employees).

However, *Humphries* and *Gomez-Perez* are in conformance with other Supreme Court cases, as the majority in both decisions painstakingly illustrated. In a sense, the *Humphries* and *Gomez-Perez* line of reasoning is even evident in *Garcetti*. While *Garcetti* limited public employees' rights to sue for free speech retaliation under the First Amendment, in dicta the Court indicated that it would continue to recognize private rights of action for statutory whistleblower and retaliation claims.

What these decisions ultimately indicate is the Court's continued recognition that society has an interest in ensuring that employees who complain of unlawful conduct are protected from retaliation. These cases also indicate an ongoing analytical divide between the justices with respect to how to interpret antidiscrimination statutes that are silent on whether "retaliation" is a discriminatory act and whether statutes authorizing a private right of action for discrimination necessarily include a private right of action for retaliation. ✦

Katelyn S. Oldham represents individuals in employment, civil rights, and licensing board matters.

Save the Date

Litigating Public Discourse: How High Is the Cost of Free Speech?

The OSB Civil Rights Section will present a one-day CLE on this topic on Friday, October 10, 2008, at the Oregon Convention Center in Portland.

Please mark your calendar and plan to attend.

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committed an intentional criminal act that made the victim unavailable to testify—her murder. The U.S. Supreme Court disagreed, finding that although exceptions to the confrontation clause may be made when the defendant committed a crime designed to prevent the witness from testifying, no exception exists when the crime was not so designed.

***Kennedy v. Louisiana,* No. 07-343 (June 25, 2008)**

The Court reversed the Louisiana Supreme Court in this 5–4 decision, holding that the Eighth Amendment's protection against cruel and unusual punishment bars the imposition of the death penalty for the rape of a child when the crime did not result, and was not intended to result, in the victim's death. The Court noted that while the permanent and devastating impact of child rape suggests moral grounds for questioning a rule barring capital punishment simply because the crime did not result in the victim's death, it cannot compare to murder in its "severity and irrevocability," and the death penalty is not a proportional punishment for the crime.

***Kentucky Retirement Systems v. EEOC,* No. 06-1037 (June 19, 2008)**

In this case from the Sixth Circuit, the Court held 5–4 that a pension plan may treat employees differently based on pension status, even when age is a factor in determining that status, as long as the pension status is not a proxy for age. To state a claim under the Age Discrimination in Employment Act (ADEA), a plaintiff must show that the differential treatment was "actually motivated" by age, not pension status.

***Meacham v. Knolls Atomic Power Laboratory,* No. 06-1505 (June 19, 2008)**

In a unanimous decision, the Court vacated the ruling of the Second Circuit, holding that an employer defending a claim brought under the ADEA bears the burden of production and the burden of persuasion when asserting the affirmative defense that it relied on reasonable factors other than age in making layoff decisions that had a disparate impact on older workers.

***Munaf v. Geren,* No. 06-1666 (June 12, 2008); *Geren v. Omar,* No. 07-394 (June 12, 2008)**

In deciding these cases from the D.C. Circuit, the Supreme Court unanimously held that while U.S. courts have jurisdiction to hear the habeas petitions of Americans held overseas by American forces, federal district courts may not exercise that jurisdiction to enjoin the United States from transferring individuals to a foreign sovereign on whose soil the individuals are alleged to have committed crimes and are being held. Here, two Americans charged with committing crimes while traveling in Iraq filed habeas petitions seeking to prevent a transfer from American to Iraqi custody for prosecution. In vacating the D.C. Circuit rulings, the Court reasoned that although the habeas statute applies to individuals in custody under color of U.S. authority, habeas corpus does not bar the United States from transferring a prisoner to the sovereign authority that has a right to prosecute him.

***Rothgery v. Gillespie County,* No. 07-440 (June 23, 2008)**

In an 8–1 decision, the Court ruled that a criminal defendant must be provided with a lawyer at the first formal proceeding against him. The indigent plaintiff in this case brought a 42 USC § 1983 action against the respondent county after it denied him a lawyer following his initial hearing before a magistrate judge. In vacating the Fifth Circuit's ruling, the Court held that a criminal defendant's first appearance before a judicial officer, at which he learns of charges against him and his liberty is subject to restriction, marks the occasion that triggers the attachment of the Sixth Amendment right to counsel. There is no requirement that a prosecutor be aware of that initial proceeding or be involved in its conduct for the Sixth Amendment right to attach.

Certiorari Granted

***Arizona v. Johnson,* No. 07-1122 (June 23, 2008)**

The Court will decide whether the Fourth Amendment permits an officer to conduct a pat-down search of an individual when there is an articulable basis to believe that he may be armed and dangerous, but no probable cause exists to believe that he has committed, or is committing, a crime. This case comes from the Arizona Court of Appeals, which held that the pat-down search was unconstitutional.

***AT&T Corp. v. Hulteen,* No. 07-543 (June 23, 2008)**

The Court agreed to hear a case from the Ninth Circuit regarding whether an employer's retirement package violates federal civil rights law by allowing fewer credited days for some pregnancy leave than it does for other temporary disability leave. The Court will resolve a split among the circuits on whether the 1978 amendments to Title VII of the Civil Rights Act of 1964, amending Title VII to cover pregnancy-related absences, require employers to recalculate pregnancy leave that took place before the amendments' enactment.

***Fitzgerald v. Barnstable School Committee,* No. 07-1125 (June 9, 2008)**

In this case from the First Circuit, the Court will determine whether Title IX of the Education Amendments of 1972 provides the sole remedy for claims of sexual harassment at a federally funded school. Specifically, the Court will decide whether a sexual harassment plaintiff bringing a Title IX claim is precluded from bringing a claim under 42 USC § 1983 based on the same conduct. ✦

Kyle Busse is an associate of Busse & Hunt, which represents employees in employment cases, concentrating in civil rights, discrimination, harassment, wrongful discharge, defamation, and fraud. Rachelle Hong Barton is an attorney at Knowledge Learning Corporation and focuses her practice on employment law and litigation.

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Social Security Administration "No-Match" Letters: An Overview and General Advice for Employers

Heidi D. Evans
Brisbee and Stockton, LLC

The Immigration and Nationality Act as amended by the Immigration Reform and Control Act of 1986 and subsequent amendments passed in 1996 (INA) requires employers to verify and document a worker's identity and authorization to work in the United States on a Form I-9.[1] The law imposes penalties on employers who have actual or constructive knowledge of hiring or continuing to employ an individual who is not authorized to work in the United States.[2]

Social Security Administration "No-Match" Letter Program

Each year employers send the Social Security Administration (SSA) approximately 245 million wage reports on W-2 forms, covering approximately 153 million workers and identifying the amount of social security deductions withheld from each employee's wages. Up to 4% of the names and numbers reported by employers do not match the SSA's records each year. In 1994, the SSA began comparing the names and social security numbers submitted by employers to their own records and sending letters to employers when information did not match.[3] A main purpose of the letters is to obtain corrected information so the person to whom the earnings belong is properly credited.

Prior to the changes in the regulations promulgated under the INA by the Department of Homeland Security (DHS) that are discussed in this article, the SSA sent "no-match" letters to all employers whose wages reports contained any name and number that did not match the same information in the SSA's records. After the rule changes were first proposed in 2006, the SSA began sending no-match letters only to employers who submit more than ten W-2s with no-match information and when the number of no-matches exceeds at least 0.5% of all W-2s included in the wage report.

Federal Agencies' Positions Regarding the Letters

The Social Security Administration

The SSA position on the implications of a no-match letter with respect to a worker's immigration status or authorization to work in the United States has been consistent and clear. One version of the form letter provides that it makes no statement about an employee's immigration status and informs the employer that "you should not take any adverse action against the employee, such as laying off, suspending, firing, or discriminating against the individual. Doing so could, in fact, violate state and federal anti-discrimination law and subject you to legal consequences."

Under the INA, employers are subject to discrimination charges if they take adverse action against applicants or workers because they assume the worker is undocumented or they perceive that the worker is not a citizen or has a different national origin, or if they require more or different documents than the law requires for employment verification.[4] Consequently, employers must not draw conclusions regarding an applicant or new employee's immigration or authorization to work status or even innocuously suggest what types of documentation the worker might present to satisfy the identification and authorization section of Form I-9.

The Former Immigration and Naturalization Service

An employer can be in violation of the INA if it has actual or constructive knowledge that an employee is an unauthorized worker.[5] The former Immigration and Naturalization Service (INS) standard for constructive knowledge was whether a reasonable person would infer from the facts that the employee was unauthorized.[6] An inference could be found when (1) the employer did not properly complete the Form I-9, including proper supporting documentation; (2) the employer had actual knowledge from other individuals or sources of information that the employee was unauthorized to work in the United States; or (3) the employer acted with reckless and wanton disregard for the legal consequences of permitting an individual to introduce an unauthorized person into the employer's workforce.[7]

Though Department of Justice and former INS officials had indicated that an employer who received an SSA no-match letter should take reasonable steps to resolve discrepancies, there had been no clear guidance on acceptable procedures for employers to follow. Moreover, there was little to no meaningful enforcement of the Form I-9 process. Between fiscal years 2003 and 2006, the highest total amount of annual administrative fines imposed on employers in any year was $46,480.[8]

The Bureau of Immigration Control Enforcement (ICE)

The Homeland Security Act of 2002, 6 USC § 101 et seq., was signed into law on November 25, 2002. The act transferred the immigration service and enforcement functions of the INS to a new agency, the Department of Homeland Security (DHS), under which different bureaus were established, including the Bureau of Immigration Control and Enforcement (ICE). The DHS quickly began pursuing a multifaceted plan to prevent and enforce unauthorized employment of foreign workers. This focus is evident. For the period October 1, 2006, through July 31, 2007, ICE obtained fines, restitution, and civil judgments

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The supplemental proposed rules again provide that if the employer follows the guidance to rectify the no-match within 90 days of receiving the letter, the employer will have a safe harbor from the letter's being used as evidence of constructive knowledge in any enforcement action.

from employers and executives totaling over $30 million.[9] The DHS also proposed amended rules, published in final form in August 2007, which describe the employer's obligations that are triggered by receipt of an SSA no-match letter and, for the first time, tied an employer's receipt and response to a no-match letter to constructive knowledge of continued employment of an unauthorized worker.

Labor unions and employers joined in a rare collective force and filed a lawsuit against the DHS to stop the regulations from taking effect.[10] The court granted the plaintiffs' motion for preliminary injunction, thereby enjoining the agency from taking enforcement actions based on the regulations. Rather than appeal the decision, the DHS withdrew the regulations. In March 2008, the agency republished the proposed rules in identical form except with additional commentary and justification directed at three findings of the court. The supplemental proposed rules again provide that if the employer follows the guidance to rectify the no-match within 90 days of receiving the letter, the employer will have a safe harbor from the letter's being used as evidence of constructive knowledge in any enforcement action.

In April the SSA publicly stated that it does not plan to send the 2007 tax year letters before the litigation is resolved. It is unlikely, however, that the SSA will indefinitely suspend the letters. In the meantime there are actions employers can and should take to minimize the likelihood of receiving a no-match letter from the SSA or its equivalent from the DHS.

Actions Employers Should Take Now

1. Irrespective of the outcome of the litigation and the related supplemental proposed rules, all employers should become well versed on their obligations to complete Form I-9s and how to do so properly. In a nutshell, all U.S. employers are responsible for completing and retaining a Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. On the form, the employer must verify the employment eligibility and identity documents presented by the employee and record the document information. There are several traps for the unwary when administering completion of the form. Some of the more common mistakes:

- Do not insist or even suggest specific documents (e.g., U.S. passport, or valid driver's license and social security card). Rather, rely on the lists of acceptable documents printed on Form I-9.
- Verify that the form being used is the most current version. The form finally has been updated and now provides the correct list of acceptable documents. The latest form (in English and Spanish) can be found on the DHS website (www.uscis.gov/portal/site/uscis).
- Do not over-document or request more than the form requires; simply take one document listed in column A, or one from column B *and* one from column C.
- Create a calendar tickler system regarding any employee who provides documents indicating temporary work status. Provide the employee 90 days' notice from the expiration date in order to minimize disruption of employment or problems with unauthorized work periods.
- Double-check the form to ensure that the employee and the employer's agent completed all the necessary sections and boxes, including signing the document.
- Know and follow the record retention rules (one year from termination or three years from date of hire, whichever is longer). If audited, the DHS may ask for all forms on file, even those that could have been discarded.

2. Consider signing up for and using the SSA e-verify program. The e-verify program is not without its own errors. But it is a free system available to employers, who can use it at the time of hire to match a worker's name and social security number with the SSA database for U.S. citizens and with the immigration database for workers not claiming U.S. citizenship. The system cannot be used for current workers, but moving to this system will help employers identify problems early and may limit an employer's exposure as turnover occurs. In addition, the DHS takes the position that employers who use the e-verify system will be presumed to not have constructive knowledge of hiring an unauthorized worker.

3. Be mindful and in compliance with the antidiscrimination provisions of the INA. Fear of receiving an SSA no-match letter should not motivate employers not to hire or continue to employ foreigners authorized to work in the country or to perceive an applicant or worker as being unauthorized. The Department of Justice, Office of Special Counsel (OSC), not the DHS, has enforcement responsibility over INA's antidiscrimination provisions. OSC published a guidance notice in March reaffirming its position that an employer discriminating based on national origin or prohibited characteristics may be found to have engaged in unlawful discrimination.

Additionally, employers should become familiar with and follow the supplemental proposed final rules'

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recommended actions in the event that a no-match letter is received once the SSA begins sending them. Compliance with the following actions will provide safe harbor protection from a DHS enforcement action based on constructive knowledge under the current proposed rules:

- **Check the employer's records.** Check to determine if the letter is a result of a clerical error on the part of the employer, and if so, correct the records and verify the correction with all relevant federal agencies within 30 days of receiving the no-match letter.

  This requires the employer to verify with the SSA or DHS that the employee's name matches the name in the SSA's records assigned to the related social security number, *and* that the number is valid for employment, with or without DHS authorization. Because of the short deadline and the need to interface with at least one, if not more, federal agencies, employers should not delay in taking action.
- **Check with the employee.** If it does not appear that the employer made an error, the employer must contact the employee and request confirmation that the information is correct. If it is incorrect, the employer must correct the employee information in its records, inform the relevant agencies of the corrected information (as noted above), and match the new information with the agency's records.
- **Ask the employee to follow up with the SSA.** If the employee states that the existing records are correct, the employer must ask the employee to pursue the matter individually with the SSA. Here as well, the employer who acts within 30 days of receiving the no-match letter will be deemed by the DHS to have acted reasonably and within the safe harbor.
- **Complete a new Form I-9 if unresolved.** If the discrepancy is not resolved within 90 days of receipt of the no-match letter, the employer and employee must complete a new Form I-9 with the following additional restrictions:
  - Section 1 must be completed within 93 days of receiving the no-match letter;
  - The employer may not accept any document that was the subject of the SSA no-match letter to establish employment; and
  - The employer may only accept documents that contain a photo of the employee, which vastly limits the types of documents an employer can accept.

In its recent notice of guidance, OCS stated that "if an employer follows all of the safe harbor procedures outlined in DHS's no-match rule but cannot determine that an employee is authorized to work in the United States, and therefore terminates that employee, and if that employer applied the same procedures to all employees referenced in the no-match letter(s) uniformly and without the purpose or intent to discriminate on the basis of actual or perceived citizenship status or national origin, then OSC will not find reasonable cause to believe that the employer has violated section 1324b's anti-discrimination provision, and that employer will not be subject to suit by the United States under that provision."

Employers should be careful in relying on this statement. First, affected workers or their legal counsel will almost always raise an issue of discriminatory intent. Second, agency guidelines, like administrations, are subject to change. A better practice in this lawyer's opinion is for the employer to have in place a job-abandonment policy and to terminate under that policy rather than based on the safe harbor or no-match letter.

Conclusion

The final rules have many negative practical effects on businesses. Administratively, the final rules create risk for all employers, including those

Under the old rules, employers were in compliance with the Form I-9 rules as long as they timely and correctly completed the form after receiving facially valid documents presented by the employee. No longer.

dedicated to compliance. Under the old rules, employers were in compliance with the Form I-9 rules as long as they timely and correctly completed the form after receiving facially valid documents presented by the employee. No longer. In addition, the new rules shrink the fine line employers were already required to observe between the INA compliance provisions and the antidiscrimination provisions. Until the legal battle regarding the proposed rules is resolved, it will be difficult to provide employers clear direction. However, there are best practices that can and should be put into place that can mitigate the employer's risk with both the prohibition on hiring and continuing to employ unauthorized workers and the antidiscrimination rules. ✦

Heidi D. Evans practices law at Brisbee and Stockton, LLC, focusing on "Simply HR Law: consultation, prevention, employment and labor advice and defense of claims.™"

Endnotes

1. 8 USC § 1324a(a)(1)(B).
2. 8 USC §§ 1324a(a)(1)(A) and 1324a(a)(2).
3. *See* 20 CFR § 422.120(a).
4. 8 USC § 1324b.
5. 8 USC § 1324(a)(2); 8 CFR 274A(a)(2).
6. 8 CFR 274a.1(1).
7. *Id*.
8. Eric Krell, "Unmasking Illegal Workers," 52 *HR Magazine* 12, 48–53 (December 2007).
9. *Id*.
10. *AFL-CIO, et al. v. Chertoff*, ___ F. Supp. 2d ___, 2007 WL 2972952 (N.D. Cal. 2007).

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Recent Decisions

Richard F. Liebman
Christina Thacker
Barran Liebman LLP

Ninth Circuit Court of Appeals

***Johnson v. Riverside Healthcare System, LP*, 516 F.3d 759 (9th Cir. 2008)**

Johnson, an African American physician formerly under contract with Riverside Hospital and a member of its medical staff, sued the hospital and others, alleging that termination of his medical staff membership and his contract was due to racial and sexual orientation discrimination, and asserting claims under 42 USC § 1981 and California civil rights statutes.

The Ninth Circuit affirmed the district court's dismissal of Johnson's federal and state claims. First, because Johnson had an employee relationship with the hospital, he could not bring race and sexual orientation discrimination claims against the hospital under California's Unruh Civil Rights Act. Next, although claims alleging a hostile work environment based on race are cognizable under § 1981, Johnson demonstrated only a single serious incident of racial discrimination by a colleague. This incident did not amount to severe or pervasive discrimination that would support a § 1981 hostile work environment claim.

Finally, the court affirmed the dismissal of Johnson's remaining state law claims because he failed to demonstrate that his relationship with the defendants was similar to that of a customer in a customer-proprietor relationship (the court found that the relationship was materially indistinguishable from that of an employer-employee) and because he failed to comply with the applicable statue of limitations.

***Lanier v. City of Woodburn*, 518 F.3d 1147 (9th Cir. 2008)**

Lanier applied for a job as a library page with the city of Woodburn and filed suit against the city when it rescinded her job offer because she refused to comply with the city's policy requiring preemployment drug testing for all job applicants.

The Ninth Circuit reversed in part a grant of summary judgment for the city, finding that although the policy was not facially unconstitutional, it was unconstitutional as applied to Lanier because testing her was a suspicionless search in violation of the Fourth Amendment to the United States Constitution. Had the city been able to demonstrate a specific need or substantial justification for the testing, for example, because the position was a safety-sensitive position or involved exercising responsibility for children, it might have been upheld.

***Surrell v. California Water Service Co.*, 518 F.3d 1097 (9th Cir. 2008)**

Surrell, an employee of the California Water Service Company, brought suit against her employer, asserting discrimination, retaliation, and hostile work environment claims under Title VII and § 1981, and a physical-disability discrimination claim under state law.

The Ninth Circuit affirmed summary judgment for the employer, but held that Surrell's failure to obtain a 90-day right-to-sue letter from the EEOC on her Title VII claims was not fatal to those claims. Surrell timely filed a charge with the state agency, the charge was deemed filed with the EEOC pursuant to a workshare agreement, and she received a right-to-sue letter from the state agency.

The Ninth Circuit determined that the failure to obtain a federal right-to-sue letter does not preclude federal court jurisdiction. Rather, it is a general requirement for a Title VII claim that may be excused in particular cases. The court held that once a plaintiff is entitled to receive a right-to-sue letter (as Surrell was once the EEOC did not timely act on her properly filed charge), it makes no difference whether the plaintiff actually obtained it. Surrell was entitled to an EEOC right-to-sue letter and had received one from the appropriate state agency. Accordingly, her failure to obtain a right-to-sue letter from the EEOC was not fatal to her claims.

The court held that once a plaintiff is entitled to receive a right-to-sue letter . . . it makes no difference whether the plaintiff actually obtained it.

***Williams v. Boeing Co.*, 517 F.3d 1120 (9th Cir. 2008)**

Williams was one employee of a class who sued Boeing under 42 USC § 1981, alleging race discrimination. After the class was certified, the district court entered partial summary judgment for Boeing, determining that the employees' claim for compensation prior to May 2000 was barred by the four-year statute of limitation. The Ninth Circuit affirmed this part of the district court's decision.

A long and complicated procedural history surrounds this case, but, in short, the plaintiffs alleged that between June 4, 1994, and May 28, 2000, Boeing paid African American salaried employees less than similarly situated Caucasian employees. The action was filed in June 1998, with a second amended complaint filed in May 2004. The second amended complaint explicitly included a claim of compensation discrimination and included factual allegations relevant to the compensation discrimination claim, which the original and first amended complaints did not.

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The Ninth Circuit held that (1) the original and first amended complaints did not state a cause of action for compensation discrimination; (2) even if they had, the allegations in the second amended complaint did not "relate back" to the earlier filings; (3) Boeing was not judicially estopped to assert that the plaintiffs did not state a cause of action for compensation discrimination in the original or first amended complaint; and (4) equitable tolling would not allow the compensation allegations to proceed.

U.S. District Court for the District of Oregon

***Hedum v. Starbucks Corp.*, ___ F.Supp.2d ___, 2008 WL 361202 (D. Or. Feb. 7, 2008)**

Hedum brought suit against her former employer, Starbucks, for religious discrimination, retaliation, workers' compensation discrimination, and wrongful discharge. Hedum, a member of the Wiccan religion, claimed that Starbucks subjected her to discriminatory treatment and terminated her employment because of (1) her religious practices, (2) her resistance to Starbucks's discriminatory practices, and (3) her invocation of the workers' compensation system. Starbucks claimed that Hedum was fired solely because of her poor attendance record, and filed for summary judgment on each of Hedum's claims.

The court found that Hedum established a prima facie case on each claim and that Starbucks articulated a legitimate, nondiscriminatory reason for Hedum's termination. But the court also found that material questions of fact remained regarding whether Starbucks's legitimate reason was a pretext for discrimination, and therefore denied summary judgment on all claims.

Oregon Court of Appeals

***Lauderdale v. Eugene Water and Electric Board*, 217 Or. App. 551, 177 P.3d 13 (2008)**

City utility board retirees and an employee nearing retirement brought an action against the board and city, alleging that the defendants breached their contract for company-sponsored retiree health care benefits by raising the amount retired employees were required to contribute. The court ruled that (1) the statute of frauds did not render a promise of lifetime free or low-cost retirement health care benefits unenforceable, because employees fully performed within one year; (2) managers' promises regarding costs were not unenforceable on the grounds that managers lacked authority; (3) employees' rights to the benefits vested when the employees began working for the board; (4) the employees accepted modifications as accord and satisfaction; and (5) accord and satisfaction did not reserve to the board the right to make future changes. The statute of frauds does not apply if either party has performed within one year: here, the plaintiffs fully performed the agreement by accepting employment and, thus, the employer's pension benefits.

The statute of frauds does not apply if either party has performed within one year: here, the plaintiffs fully performed the agreement by accepting employment and, thus, the employer's pension benefits.

Rick Liebman and Christina Thacker represent employers in labor and employment law.

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In a 6–3 decision, the Court agreed with the Ninth Circuit and held that a class-of-one equal protection claim . . . "has no place in the public employment context."

another constitutional area where the rights of public employees should not be as expansive as the rights of ordinary citizens." *Id*. at 995.

The panel was concerned about "upset[ting] long-standing personnel practices." *Id*. "[E]mployers have traditionally possessed broad discretionary authority in the employment context," and applying class-of-one analysis would "invalidate the practice of at-will employment." *Id*. The panel discussed the Supreme Court's decision in *Village of Willowbrook v. Olech*, 528 U.S. 562, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (per curiam), but concluded that the opinion was "too slender a reed on which to base such a transformation of public employment law." *Id*. at 996. Thus, the panel majority held that the class-of-one theory does not apply to a public employer's decisions regarding its employees. *Id*.

The dissent disagreed, and noted that the majority's holding "creates inter-circuit conflict." *Id*. at 1011. The dissent suggested that "[t]he majority's approach is . . . at odds with" Supreme Court precedent, citing *Village of Willowbrook v. Olech*. *Id*. The dissent would have affirmed the award of damages on the class-of-one claim. *Id*. at 1014–1015.

U.S. Supreme Court Decision

The United States Supreme Court granted certiorari "to resolve th[e] disagreement in the lower courts" about whether class-of-one analysis applies in the public employment context. 170 L. Ed. 2d at 983. In a 6–3 decision, the Court agreed with the Ninth Circuit and held that a class-of-one equal protection claim—one "alleging that [the employee] 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"—"has no place in the public employment context." *Id*. at 981.

Chief Justice Roberts's majority opinion—joined by Justices Scalia, Kennedy, Thomas, Breyer, and Alito—stressed the "crucial difference" between government exercising the power to license or regulate and government managing its own internal operations. *Id*. The Court found that distinction particularly significant in the public employment context. *Id*. at 983–984.

In other contexts, the Court often has recognized "that government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large." *Id*. at 984. Although government employees do not lose all their constitutional rights, "those rights must be balanced against the realities of the employment context." *Id*. at 985.

The Court's equal protection jurisprudence "has typically been concerned with governmental classifications that affect some group of citizens differently than others." *Id*. Nevertheless, in *Olech* the Court had recognized that "an equal protection claim can in some circumstances be sustained even if the plaintiff has not alleged class-based discrimination, but instead claims that she has been irrationally singled out as a so-called 'class of one.'" *Id*. But *Olech* "involved the government's regulation of property," and the cases cited in *Olech* "concerned property assessment and taxation schemes." *Id*. at 986. "What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed." *Id*.

In contrast, "[t]here are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Id*. at 987. "In such cases the rule that people should be 'treated alike, under like circumstances and conditions' is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted." *Id*. Employment decisions "are quite often subjective and individualized, resting on a wide array of factors that are difficult to articulate and quantify." *Id*. "[T]he class-of-one theory of equal protection . . . is simply a poor fit in the public employment context." *Id*. at 988.

The Court also concluded that "recognition of a class-of-one theory of equal protection in the public employment context . . . is simply contrary to the concept of at-will employment." *Id*. at 989. Although at-will public employment has been largely replaced with statutory schemes giving public employees greater rights, "a government's decision to limit the ability of public employers to fire at will is an act of legislative grace, not constitutional mandate." *Id*. And "[t]he practical problem" with allowing class-of-one claims to proceed "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 990. "In short, ratifying a class-of-one theory of equal protection in the context of public employment would impermissibly constitutionalize the employee grievance." *Id*.

Justices Stevens, Souter, and Ginsburg dissented, accusing the majority of having "carve[d] a novel exception out of state employees' constitutional rights." *Id*. at 991 (Stevens, J., dissenting).

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The dissenters asserted that a customary rational-basis review would adequately limit public employee class-of-one claims "to only wholly unjustified employment actions." *Id.* at 995.

Practical Implications

Requiring an employment decision to be based on overall considerations of fairness flies in the face of the fundamental concept in Oregon that the employment relationship, unless altered by contract or law, is at will. Under this doctrine, the employer may discharge the employee at any time and for any reason—even a "bad" reason or no "reason"—as long as it does not violate the contract or a specific statutory or constitutional restriction. *See, e.g., Simpson v. Western Graphics,* 293 Or. 96, 99, 643 P.2d 1276 (1982). This at-will concept is important for the many employees—often executive employees—who are not protected by collective bargaining agreements or other statutory or constitutional protections.

The importance of the at-will relationship goes beyond that, however. This concept is also relevant in analyzing the claims of those public employees who are protected by contractual, statutory, or constitutional provisions, but who do not seek protection under those provisions or whose claims simply do not fit within the confines of those protections. In those situations, as well, the at-will doctrine recognizes that the public employee can be discharged for any reason or no reason as long as it does not violate a contract or regulation.

In Oregon a common-law wrongful discharge claim may be available for some of those erstwhile at-will employees, but the wrongful discharge doctrine is itself restricted to those who show that their discharge was for having (1) performed an important societal obligation or (2) exercised an employment-related right of important public interest. *Patton v. J.C. Penney Co.,* 301 Or. 117, 719 P.2d 854 (1986). Recognizing the class-of-one theory in the public employment context threatened to toss out these limitations in favor of converting employment litigation into tests of "arbitrariness" and "fairness." Not surprisingly, the Ninth Circuit found that *Village of Willowbrook v. Olech* was "too slender a reed on which to base such a transformation of public employment law." *Engquist v. Oregon Department of Agriculture,* 478 F.3d 985, 996 (9th Cir. 2007). And not surprisingly, the U.S. Supreme Court agreed.

While the plaintiff sought protection in the argument that few class-of-one claims actually succeeded, that contention simply misses the point. The problem with the class-of-one theory was not just that it provided possible success to at-will employees, but that it required employers to defend claims that should have been treated as arising from at-will employment relationships—either because the employee was an at-will employee or because the public employee, while protected by some contractual provisions or laws, was not seeking the protection of those contractual provisions or laws. The class-of-one theory made arbitrariness itself a claim, thereby fundamentally altering the very nature of the at-will doctrine. A "bad" reason for an employment decision or a "subjective" reason could now become grounds for liability, with very few—if any—boundaries for determining what qualified as a bad reason.

Defending a class-of-one claim is distinctly different from defending a claim of protected-class discrimination. At the summary judgment stage, one may attempt to defeat the plaintiff's prima facie case or proffer a legitimate nondiscriminatory purpose to defeat the *McDonnell Douglas* burden-shifting scheme. At trial, to defend a claim of protected-class discrimination, the defense may produce statistical or other direct or circumstantial evidence to rebut

The class-of-one theory made arbitrariness itself a claim, thereby fundamentally altering the very nature of the at-will doctrine.

alleged disparate treatment of those in the protected class. However, a class-of-one claim under 42 USC § 1983 becomes a battle of "fairness" without the objective tests that attend the more traditional protected-class employment discrimination claims.

Although a test of "fairness" may make sense in an administrative setting such as land-use regulations, which are expected to treat all affected citizens the same, it makes no sense in the employment context, where the very nature of the employment decisions that are challenged *requires* making subtle distinctions and treating citizens differently. Typically only one employee will be hired, and the distinctions between the hired employee and the rejected applicant are often subtle and subjective. The same is true with decisions about whom to lay off. Not everyone will be laid off, and decisions about whom to lay off are often based on subtle and subjective factors. Similarly, deciding whether a certain employee who has been laid off qualifies for the position into which that employee wishes to "bump" under the collective bargaining agreement often involves subtle and subjective considerations.

All of these employment decisions, by their very nature, call for subjective—and what may appear to the outside observer as arbitrary—decisions. As Judge Posner stated in *Lauth v. McCollum*, 424 F.3d 631 (7th Cir. 2005), if "any unexplained or unjustified disparity in treatment by public officials is therefore to be deemed a prima facie denial of equal protection, endless vistas of federal liability are opened." *Id*. at 633. More-

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over, "[c]omplete equality in enforcement is impossible to achieve; nor can personal motives be purged from all official actions." *Id.*, citing, *inter alia, Olech*. This inherent subjectivity is particularly present in the employment context.

These were the types of employment decisions that were at issue in *Engquist:* Who should be hired? Who should be laid off? Did Engquist qualify for a position into which she wished to bump? When the issue was whether Engquist was treated differently on the basis of gender or race or national origin, the jury had no problem saying no. When the issue was the more general consideration of arbitrariness, i.e., fairness, the jury found liability. The landscape has now changed as a result of the Supreme Court's rejection of the class-of-one theory. ✦

Janet Metcalf is an assistant attorney general with the Oregon Department of Justice (DOJ). She successfully argued *Engquist v. Oregon Department of Agriculture* before the U. S. Supreme Court.

Loren Collins is the DOJ's chief trial counsel. He was the lead attorney on the *Engquist* case at trial and argued the case before the Ninth Circuit Court of Appeals.

Views and opinions expressed in this article do not necessarily reflect the views or opinions of the DOJ.

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Oregon State Bar
Civil Rights Section
P.O. Box 231935
Tigard, OR 97281-1935