U.S. SUPREME COURT REFUSES TO APPLY CLASS OF ONE THEORY OF EQUAL PROTECTION TO PUBLIC EMPLOYMENT

In a six to three decision, the United States Supreme Court recently refused to extend the umbrella of protections provided by the so-called "class of one" theory of equal protection to employees in the public employment realm. *Engquist v. Oregon Department of Agriculture et al.*, 552 U.S. _____ (2008).

To appreciate the impact of this case requires an understanding of what is meant by the class of one theory of equal protection. The Equal Protection Clause of the 14th Amendment states:

"… nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal protection of the laws*." (Emphasis added.)

The Equal Protection Clause stands for the core principle that government must treat similarly situated individuals equally. Ordinarily, equal protection claims touch upon governmental classifications that result in disparate treatment. (" 'Equal Protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *San Antonio Independent School Dist. v. Rodriguez*, 41 U.S. 1, 60 (1973)).

Rather than alleging class-based discrimination, a class of one equal protection claim alleges that one has been irrationally singled out not due to membership to an identified class (race, sex, ethnicity, etc.) but for "arbitrary, vindictive, and malicious reasons." The Court first articulated this theory as it applied to the regulatory context in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000) holding that "(o)ur cases have recognized successful equal protection claims brought by a 'class of one,' where the 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 issue before the Court in the Engquist case was whether this theory had application in the public employment context.

Anup Engquist was hired in 1992 by the Oregon Department of Agriculture as an international food standard specialist. Over the years, Engquist encountered repeated problems with another employee for whom she was later passed over for a vacant managerial position. In 2002, Engquist was informed that, due to reorganization, her position was being eliminated. Unqualified to take another position at her level and unwilling to take a demotion, Engquist was eventually let go. Thereafter, Engquist brought suit against the State (her employer) alleging, among other things, that under the class of one equal protection theory she was intentionally singled out for adverse treatment unrelated to any legitimate government purpose.

The Court rejected Engquist's attempt to require the same type of judicial review of the government's behavior when it acts as an employer as when it acts as sovereign by regulating, licensing, or making law. The Court justified this distinction on the basis that "(t)he government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer." The Court went on to distinguish the application of the class of one equal protection theory in the public employment context from that in the regulatory context as evidenced in the *Olech* case by reasoning that there are some forms of state action, such as its actions as an employer, "which by their nature involve discretionary decision making based on a vast array of subjective, individualized assessments. 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."

To hold otherwise, the Court posited, would undermine the discretionary authority of government officials and constitute a repudiation of the doctrine of at-will employment. For these reasons and more, the Court held that the class of one theory of equal protection has no application in the public employment context.

This decision is on its face beneficial to municipalities in that it does afford broad protections to municipalities whose employees are at-will. However, as the dissenting opinion notes, "the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." A property interest in employment arises when an employee has a legitimate interest or expectation in continued employment. Although federal constitutional procedural requirements govern termination of an employee with a property interest in continued employment, state law governs whether the employee actually has a property interest in his or her employment.

In Vermont, an employment contract for an indefinite term is an at-will agreement, which may be terminated at any time or for any reason or no reason at all. However, the at-will principle is one of construction, which can be defeated by evidence to the contrary. Personnel policies and employee handbooks have been interpreted to create a binding contract when the employer's discretion to terminate indefinite employment is limited, when procedures for termination are established and communicated to the employee, where a progressive disciplinary procedure is set forth, or when implied promises have been made that undermine the at-will relationship. This at-will presumption may also be overcome by statute, charter, or collective bargaining agreements. It is precisely because of the malleable nature of this relationship that municipalities should avoid the compulsion to rely too heavily on the potential protection offered by this decision and, instead, continue to treat similarly situated employees equally.

- Garrett Baxter, Attorney, VLCT
Municipal Assistance Center