Scope of Class-of-One Equal Protection Claims

In Engquist v. Oregon Department of Agriculture, 128 S. Ct. 2146 (2008), the United States Supreme Court held that a public employee cannot assert a claim under the Equal Protection Clause of the Fourteenth Amendment alleging that their employer made an employment decision in an arbitrary or irrational manner if the employee does not also allege that the different treatment was based on the employee’s membership in a particular class. Engquist is the Supreme Court’s first limit on the scope of class-of-one claims, since it recognized such claims eight years ago. The Engquist decision not only precludes class-of-one claims in employment cases, but may also lead to the rejection of class-of-one claims in other types of cases.

Background
The United States Supreme Court formally recognized the “class-of-one” Equal Protection claim in Village of Willowbrook v. Olech, 528 U.S. 562 (2000). In this case, to receive water service, a property owner was required to grant a municipality a 33-foot easement even though a 15-foot easement was required from every other property owner. Id. at 563. The Supreme Court allowed the owner’s equal protection claim to survive a motion to dismiss because the allegations were sufficient to state a claim; the municipality’s demand was alleged to be “irrational and wholly arbitrary.” Id. at 565. Although the owner did not allege individual, class-based discrimination, such as race or sex-based discrimination, the Supreme Court explained 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.” Id. at 564 (citing cases).

In a concurring opinion, Justice Breyer noted concerns that the decision would transform “run-of-the-mill” zoning cases into “cases of constitutional right.” Olech, 528 U.S., at 555–56 (Breyer, J., concurring). Justice Breyer concluded that this particular case posed no such danger because the owner also alleged “vindictive action,” “illegitimate animus,” or “ill will” by the municipality. Id. at 566.

Analysis in Engquist may persuade courts to reject claims in a host of government-related cases.
Following Olech, the plaintiffs in Engquist asserted class-of-one equal protection claims in a wide variety of contexts. See, e.g., Engquist v. Oregon Dep’t of Agriculture, 478 F.3d 983, 993–94 (9th Cir. 2007) (citing cases from First, Second, Third, Fifth, Seventh and Tenth Circuits where courts recognized class-of-one claims in employment cases, yet held that class-of-one theory does not apply to employment cases), aff’d, 128 S. Ct. 2146 (2008); Griffin Industries, Inc. v. Irvin, 496 F.3d 1189, 1199–1210 (11th Cir. 2007) (asserting class-of-one Equal Protection claim challenging allegedly more vigorous enforcement of environmental regulations than competitor), cert. denied, 128 S. Ct. 2055 (2008); Club Italia Soccer & Sports Organization, Inc. v. Charter Township of Shelby, Mich., 470 F.3d 286, 298–99 (6th Cir. 2006) (asserting class-of-one claim challenging rejection of bid and bidding procedures); Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202 (10th Cir. 2006) (asserting class-of-one claim in challenge to tax assessment); Valley Outdoor, Inc. v. City of Riverside, 446 F.3d 948 (9th Cir. 2006) (asserting class-of-one claim in challenge to enforcement of sign ordinance); McDonald v. Village of Winnetka, 371 F.3d 992, 1001–09 (7th Cir. 2004) (bringing class-of-one claim arising out of dispute concerning investigation of house fire); Purze v. Village of Winthrop Harbor, 286 F.3d 452, 454–56 (7th Cir. 2002) (asserting class-of-one claim to reject developers’ preliminary plats of subdivision plan).

Nevertheless, courts applied the class-of-one theory with some unease. For example, in Jicarilla, the Tenth Circuit observed as follows:

Most circuits, including this one, have proceeded cautiously in applying the [class-of-one] theory, sensitive to Justice Breyer’s warning against turning even quotidian exercises of government discretion into constitutional causes. [citation omitted]. An approach that reads Olech too broadly could transform the federal courts into “general-purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking; a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system.” [citation omitted]. Such a pervasive threat of federal litigation could straightjacket local governments that have neither the capacity to document the reasoning behind every decision nor the means to withstand an onslaught of lawsuits.

In spite of such concerns about applying the theory, courts did not question class-of-one equal protection claims as a viable theory of recovery. Instead, courts limited the scope of class-of-one equal protection claims in other ways. For example, some courts, relying on Justice Breyer’s concurrence in Olech, held that a plaintiff asserting a class-of-one equal protection claim must allege and show that the decisionmaker not only acted arbitrarily and irrationally, but also acted with animus or malice toward the plaintiff. Jennings v. City of Stillwater, 383 F.3d 1199, 1211 (10th Cir. 2004) (collecting cases). Other decisions held that a plaintiff cannot prevail on a class-of-one equal protection claim unless he or she can identify a comparator that is “very similar indeed.” Griffin, 496 F.3d at 1205; McDonald, 371 F.3d at 1002.

In addition, the government defendant only needed to show that the contested decision was rationally related to a legitimate government purpose—which is a relatively easy standard to meet. See, e.g., Club Italia, 470 F.3d at 298 (6th Cir. 2006) (“government action amounts to a constitutional violation only if it ‘is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the government’s actions were irrational’”); RJB Properties, Inc. v. Bd. of Ed. of the City of Chicago, 468 F.3d 1005, 1010 (7th Cir. 2006) (under rational basis review, “[t]he government may defend the rationality of its actions on any ground it can muster, not just the one articulated at the time of decision”).

Because of court limitations, plaintiffs bringing class-of-one employment claims rarely prevailed. Lauth v. McCollum, 424 F.3d 631, 633–34 (7th Cir. 2005) (collecting cases). The Supreme Court, however, had opportunity to revisit the class-of-one theory it first recognized in Olech after an employee challenging her termination and other related employment decisions prevailed on a class-of-one claim in Engquist.

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

In Engquist, the plaintiff alleged that her employer denied her a vacant managerial post and made other decisions that led to the termination of her employment because of her race, sex and national origin. The plaintiff also alleged that she was terminated for “arbitrary, vindictive, and malicious reasons.” Engquist, 128 S. Ct. at 2149. The district court allowed the plaintiff’s class-of-one claim and other discrimination claims to proceed to trial. At trial, the jury rejected the plaintiff’s race, sex and national origin discrimination claims under Title VII and 42 U.S.C. §§1981 and 1983. Id. The jury did, however, return a verdict in favor of the plaintiff on the class-of-one claim. Id. Specifically, the jury found that the employer “intentionally treat[ed]” [the plaintiff] differently than others similarly situated” respecting employment decisions “without any rational basis and solely for arbitrary, vindictive or malicious reasons.” Id. at 2149–50. The jury awarded the plaintiff $175,000 in compensatory damages and $250,000 in punitive damages. Id. at 2150.

On appeal, the Ninth Circuit acknowledged that other circuits had recognized class-of-one equal protection claims in employment cases. Nevertheless, the Ninth Circuit declined to recognize class-of-one equal protection claims in employment cases. Instead, the Ninth Circuit vacated the district court’s judgment in favor of the plaintiff on the class-of-one claim. Engquist, 478 F.3d at 994–96.

The Supreme Court affirmed the Ninth Circuit’s ruling in a 6–3 opinion authored by Chief Justice Roberts. In concluding that class-of-one theory does not apply to public employees, the Supreme Court distinguished employment cases from the Olech context. The Supreme Court explained that Olech involved the government’s regulation of property and that the cases relied upon in Olech concerned property assessments and taxation schemes. Engquist, 128 S. Ct. at 2153. The Supreme Court observed:

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. 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
government was entitled to more leeway when acting as an employer than as regulator or sovereign, and that the free speech rights of employees must be balanced against the interests of government employers. *Id.* at 2151–52 (citing *Pickering v. Board of Ed. of Township High School Dist.,* 205, Will Cty., 391 U.S. 563 (1968) and *Connick v. Myers,* 461 U.S. 138 (1983)). The Supreme Court also stated that its prior decisions had recognized that government was entitled to more leeway in its dealings with employees in the context of the Fourth Amendment. *Id.* at 2151 (citing *O’Connor v. Ortega,* 480 U.S. 709 (1987) (plurality opinion) (holding that Fourth Amendment does not require public employers to obtain warrants before conducting search of employee’s office).

In addition, the Supreme Court concluded that allowing class-of-one claims in employment cases would undermine the employment-at-will doctrine. *Engquist,* 128 S. Ct. at 2156. The Court added, “The Constitution does not require repudiating that familiar doctrine.” *Id.*

Finally, the Supreme Court noted that, if a plaintiff were allowed to establish a constitutional claim simply by arguing “only that they were treated by their employee worse than other employees similarly situated, any personnel action in which a wronged employee can conjure up a claim of different treatment will suddenly become the basis for a federal constitutional claim.” *Engquist,* 128 S. Ct. at 2156. While acknowledging that plaintiffs often would have difficulty prevailing on a class-of-one employment claim, the Supreme Court brushed off this consideration as being “beside the point.” *Id.* at 2157. The problem with allowing class-of-one employment claims to proceed, the Supreme Court explained, “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.*

**Impact of Engquist on Employment Cases and Other Class-Of-One Claims**

As a consequence of *Engquist,* employment discrimination claims based on a class-of-one theory are no longer viable and are ripe for dismissal. Although, as noted above, class-of-one employment claims generally were unsuccessful, government defendants were able to defeat these claims only after extensive discovery and gathering evidence showing rational grounds for the contested employment decision and/or the absence of a similarly situated employee. The *Engquist* decision will enable government employers and managers to dispose of class-of-one employment claims much more quickly and inexpensively. The *Engquist* decision, however, will have no impact on the more common employment discrimination claims based on race, sex and other protected classes.

Although *Engquist* only held that the class-of-one theory is not viable in employment cases, its reasoning could conceivably be extended to limit other types of class-of-one claims that courts previously have allowed to proceed. One post-*Engquist* decision, for example, rejected a class-of-one claim attempting to challenge the denial of parole. *Siao-Pao v. Connolly,* 564 F. Supp. 2d 232, 245 (S.D.N.Y. 2008). In rejecting the petitioner’s habeas corpus petition, the court cited *Engquist* and emphasized the fact that the parole decision is a discretionary decision based on numerous factors. *Id.*

Courts previously have considered on the merits class-of-one claims brought by students and/or their parents claiming that a school disciplined them more severely than other similarly situated students. See, e.g., *Cohn v. New Paltz Central School District,* 171 Fed. Appx. 877 (2d Cir. 2006); *Simonian v. Fowler Unified School District,* 2008 WL 495737 (E.D. Cal. Feb. 21, 2008); *Lyon v. Estrella Foothills High School,* 2007 WL 707124 (D. Ariz.). The rationale provided in *Engquist* for not allowing class-of-one employment claims arguably could apply to school discipline cases as well.

For example, many school disciplinary decisions invariably involve subjective, individualized assessments and an exercise of discretion based on a variety of circumstances including the details of the student’s misconduct, individual personalities and the student’s behavioral history. See *Engquist,* 128 S. Ct. at 2154–55. As is the case with public employees, the Supreme Court has limited the constitutional rights of students as compared to ordinary citizens. See *New Jersey v. TLO,* 469 U.S. 325, 341–42 (1985) (holding that
the Fourth Amendment allows searches of students in schools under circumstances that are less restrictive than probable cause standard that applies to ordinary citizens); *Goss v. Lopez*, 419 U.S. 565, 582 (1975) (limiting procedural due process protections for students because “[j]udicial interposition in operation of the public school system… raises problems requiring care and restraint”). In addition, courts could be receptive to an argument similar to the one embraced by *Engquist* that applying the class-of-one theory to student discipline could generate a flood of new cases requiring the federal courts to decide whether public school students were subjected to a broad range of disciplinary actions for an arbitrary reason or a rational one.

Courts also previously have considered on the merits class-of-one claims brought by frustrated bidders who were denied a government contract. See, e.g., Club Italia, 470 F.3d at 298–99; RJB Properties, 468 F.3d at 1009–11. Procurement decisions, like employment decisions, arguably are discretionary decisions involving subjective, individualized assessments based on numerous factors, including the details of the respective bids, the reputation of the respective bidders and cost.

The Eleventh Circuit very recently accepted a similar argument in rejecting a class of one claim brought by a frustrated bidder. In *Douglas Asphalt Co v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008), the Eleventh Circuit relied extensively on *Engquist* to reject the bidder’s claim. The Eleventh Circuit explained that, “[j]ust as in the employee context, and in the absence of a restricting contract or statute, decisions involving government contractors require broad discretion that may rest ‘on a wide array of factors that are difficult to articulate and quantify.’” Id. at *4 (quoting *Engquist*, 128 S. Ct. at 2154).

Since *Olech* involved the regulation of property, courts may be less inclined to question the viability of class-of-one claims in zoning and land use cases. However, the analysis set forth in *Engquist* provides some support for an argument that class-of-one claims, even in zoning and land use cases, should be limited to situations where the government has departed from a clear standard. *Engquist*, 128 S. Ct. at 2153–54.

**Conclusion**

As a result of the *Engquist* decision, class-of-one employment claims are no longer viable. The analysis set forth in *Engquist* may persuade courts to reject class-of-one claims in cases challenging the denial of parole, the rejection of a bid for a government contract, school disciplinary decisions and other types of cases. A practitioner defending a governmental defendant against a class-of-one claim should carefully consider filing an early dispositive motion, especially if the contested governmental action does not appear to be a departure from a clear standard, but rather appears to be an exercise of discretion based on subjective and individualized determinations taking numerous factors into account.