

Floodgates open to equal protection claims

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The Equal Protection Clause of the 14th Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Most lawyers associate this constitutional prohibition with discrimination based on membership in a suspect class, such as race or gender. Indeed, case law supports the principle that some type of class-based discrimination must be alleged in order to state an equal protection claim under 42 U.S.C. § 1983. See *Herro v. City of Milwaukee*, 44 F.3d 550, 552 (7th Cir. 1995); *Albright v. Oliver*, 975 F.2d 343, 348 (7th Cir. 1992); *New Burnham Prairie Homes v. Village of Burnham*, 910 F.2d 1474, 1481 (7th Cir. 1990).

However, an emerging body of case law starting with *Esmail v. Macrane*, 53 F.3d 176 (7th Cir. 1995), and reaffirmed recently in *Olech v. Village of Willowbrook*, No. 98-2235, Slip Op. (7th Cir. 11/12/98), recognizing an admittedly uncommon and unusual kind of equal protection claim when disparate treatment is based upon sheer vindictiveness, maliciousness, animosity or spite toward a single entity or individual unrelated to any legitimate state interest. Under these circumstances, a "class of one" may bring a section 1983 equal protection claim.

In *Esmail*, a Naperville liquor dealer alleged that the mayor had revoked his license and denied a second license while approving licenses for similarly situated dealers. The dealer alleged that he was being persecuted by the mayor based on "deep-seated animosity toward him." Part of the alleged animosity stemmed from the dealer's success in getting a prior license revocation changed to a suspension through state procedures; in part on the dealer's advertising campaign against the sale of liquor to minors which painted the city as soft on that issue; and, in part on the dealer's withdrawal of political and financial support for the mayor. The mayor had also allegedly instructed the Naperville police to conduct constant surveillance upon the dealer and his employees, to stop his car repeatedly to perform sobriety tests, and to file false criminal charges against him.

In an opinion written by Judge Posner, the *Esmail* court began its analysis acknowledging that the liquor dealer's claim did not fit the usual mold of a cognizable equal protection claim. The dealer had not been singled out for unequal treatment because of his membership in a particular class or group, nor had he challenged a law or policy which made irrational distinctions. 53 F.3d at 178. Instead, he essentially alleged that he had been picked on out of sheer vindictiveness. Although acknowledging that this type of selective prosecution alone was not actionable, the court stated that "[t]he distinctive feature here . . . is that the unequal treatment is alleged to have been the result solely of a vindictive campaign by the mayor." *Id.* at 179. "If the power of government is brought to bear on a harmless individual merely because a powerful state or local official harbors a malignant animosity toward him, the individual ought to have a remedy in federal court." *Id.* Although this kind of abuse "is remote from the primary concern of the framers of the equal protection clause * * * neither in terms nor in interpretation is the clause limited to protecting members of identifiable groups." *Id.* at 180.

Following *Esmail's* lead, the court in *Olech* (again Judge Posner) similarly recognized an equal

protection claim based on individual, rather than class-based discrimination. In *Olech*, a homeowner and her husband (now deceased) sued the village of Willowbrook and several of its officials under section 1983 alleging that they were denied equal protection of the laws when the village refused to allow them to connect to the municipal water system. As a condition to allowing the hookup, the village had demanded that the Olechs grant a 33-foot easement to allow the village to widen the road in front of their house, rather than a standard 15-foot utility easement. The Olechs refused to grant the oversized easement. In their complaint, the Olechs alleged that the village's demand for the easement was motivated by a prior lawsuit filed by the Olechs in which they were awarded damages for flood damage due to the village's negligent installation and enlargement of culverts near the Olechs' property. The Olechs believed that the prior litigation had generated "substantial ill will" causing the village to depart from its normal policy of demanding only a 15-foot easement. After three months of demanding the easement, the village finally backed down and took the smaller easement and allowed the water hookup. However, the Olechs had been without water for three months and claimed resultant damages.

The district court in *Olech* dismissed the complaint because there were no allegations demonstrating an orchestrated campaign official harassment motivated by sheer malice as seemingly required under *Esmail*. Slip Op. at *2. However, the Seventh Circuit reversed, holding that *Esmail* did not require an orchestrated campaign of harassment nor did it draw a distinction between "sheer malice" and "substantial ill will." *Id.* While these labels were important in *Esmail*, the court in *Olech* stated that they were not prerequisites to stating an equal protection claim. *Id.* Rather, the refusal of the village to allow connection to the municipal water system motivated solely on baseless hatred was enough to state a cause of action. *Id.*

In this author's opinion, *Esmail* and *Olech* have the potential for opening the floodgates in federal court to section 1983 claims which the court had traditionally and routinely rejected on the pleadings. In order to state an equal protection violation, a disgruntled citizen need only claim that he or she was personally disliked by some village official or employee. Even Judge Posner cautioned that the vindictiveness-type of equal protection claim could be misused by litigants. He commented in *Esmail* that such a claim was "no doubt subject to abuse by persons whose real complaint is [nonactionable] selective prosecution . . ." 53 F.3d at 179. Similarly, in *Olech*, he was "troubled . . . by the prospect of turning every squabble over municipal services, of which there must be tens or even hundreds of thousands every year, into a federal constitutional case." Slip Op. at *3. *See, also, Indiana Teachers v. School Comm'rs of Indianapolis*, 101 F.3d 1179, 1181 (7th Cir. 1996) ("[t]he concept of equal protection is trivialized when it is used to subject every decision made by state or local government to constitutional review by federal courts").

In addition, even though litigants operate under notice pleading rules in federal court, "there still must be sufficient facts pleaded to allow the court and the defendants to understand the gravamen of the plaintiff's complaint." *Doherty v. City of Chicago*, 75 F.3d 318, 325 (7th Cir. 1996). *See Brazdo v. Illinois Dept. of Professional Regulation*, No. 94 C 134, 1997 WL 403500 (N.D. Ill. July 15, 1997) (dismissing *Esmail* claim because plaintiff merely interspersed the words "vindictive" "malicious" and "capricious" throughout complaint, but alleged no substantive supporting allegations).

For example, in *Sarris v. Village of Frankfort*, No. 97 C 5635, Slip Op. (N.D. Ill. 8/10/98), a

plaintiff/developer alleged that the village administrator thwarted his land development by issuing building code citations, changing storm water runoff grades, issuing stop work orders, requiring certain water and sewer mains, and placing liens on the property. The plaintiff concluded that these actions took place solely as a result of a vindictive campaign of harassment "to get him" and that the village administrator acted out of "spite, malice and personal dislike." In dismissing the complaint, Judge Zagel held that the plaintiff failed to plead enough to allow the case to move forward under *Esmail*. Slip Op. at *2. The plaintiff had merely alleged a conclusory statement of maliciousness and failed to explain in his complaint the reason for the alleged campaign of harassment. *Id.* Judge Zagel described the plaintiff's theory as circular: "[The village administrator] does not like me and acts out of malice and I know he does not like me and acts out of malice because of the unfair actions that he has taken against me." *Id.* The court concluded that an *Esmail* claim required more. *Id.*

In *Becker v. City of Wilmington*, No. 98 C 2587, Slip Op. (N.D. Ill. 9/16/98), Judge Kocoras likewise dismissed an *Esmail*-type equal protection claim based on the conclusory nature of the plaintiff's complaint. In *Becker*, a group of developers alleged that the city of Wilmington had refused to issue them building permits while issuing permits to at least five other builders. Plaintiffs essentially alleged that Wilmington's actions were personal to them and therefore violated their equal protection rights under *Esmail*. Judge Kocoras dismissed the complaint because the plaintiffs had failed to sufficiently allege that Wilmington's denial of the permits were based upon sheer vindictiveness or spite. Slip op. at *5. Plaintiffs had alleged that the lack of any justification for denying the permits supported their conclusion that Wilmington's actions were motivated only by vindictiveness or spite. The court rejected this theory, holding that "conclusory allegations and arguments of vindictiveness by default do not sufficiently set forth the essential elements of a 'class of one' equal protection claim and are not sufficient to withstand Wilmington's motion to dismiss." *Id.*

Whether or not the Seventh Circuit upholds the pleading requirements employed in *Sarris* and *Becker* remains to be seen. The Seventh Circuit in *Olech* was careful not to restrict the effect of *Esmail* to its own peculiar facts. Yet, at the very least, even *Esmail* and *Olech* require some factual allegation supporting the vindictiveness, spite or dislike behind the government action. In *Esmail*, a number of reasons were alleged, including political retaliation. In *Olech*, the ill will was motivated by a prior, successful lawsuit against the municipality. In contrast, the *Sarris* and *Becker* plaintiffs provided no explanation as to why the respective governments harbored bad feelings toward the plaintiffs. In any event, I expect we will see increased filings of equal protection claims and more decisions further refining the scope of these types of claims.