

Alerts and Updates

DISCRIMINATION SUIT OF GOVERNMENT CONTRACTOR'S EMPLOYEE CAN PROCEED, DESPITE DENIAL OF SECURITY CLEARANCE

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The Ninth Circuit recently allowed a federal government contractor's employee to proceed with a discrimination lawsuit after he was denied a security clearance and then fired. In *Zeinali v. Raytheon Company*,¹ the plaintiff was an engineer of Iranian descent. The engineer position into which he was hired required a "secret" level security clearance by the U.S. Department of Defense ("DOD"). This requirement was well-documented in the job description and other company documents.

After being hired, Zeinali was denied the requested clearance. He requested and was denied "interim" clearance while his appeal of the denial was pending. However, Raytheon continued to employ him while he appealed the DOD's adverse decision, utilizing him on tasks for which he was not required to review classified information. Zeinali had been employed by Raytheon for four years when the DOD finally informed him that his appeal had been denied and that he could not reapply for a security clearance for at least a year. Shortly thereafter, Raytheon terminated his employment, based on Zeinali's inability to obtain the DOD security clearance required by the job.

Zeinali sued, maintaining that he was discriminated against on the basis of race and national origin. He offered evidence of other engineers at Raytheon who were not of Iranian descent who had failed to obtain security clearance—and who remained employed. Among those retained were individuals who had their previously granted security clearances revoked. Zeinali contended that Raytheon's stated reason for his termination—his inability to obtain DOD security clearance—was pretextual and that the real reason he was fired was his race and national origin.

The court noted that Zeinali was not challenging the merits of the DOD's refusal to grant him a security clearance. Rather, he challenged Raytheon's contention that having a "secret" level security clearance was a bona fide job requirement for all engineers at Raytheon and contended that the retention of other engineers who lacked security clearance (or who had it revoked) showed that the security clearance "requirement" was not uniformly enforced. The Ninth Circuit agreed that Zeinali presented sufficient evidence to allow his case to proceed. The court noted that he had met his preliminary burden of establishing a prima facie case of discrimination.

What This Means for Employers

It is apparent that government contractors who have positions requiring DOD security clearance should thoroughly review the job descriptions and, more significantly, the actual practice. In the *Zeinali* case, it was undisputed that the Raytheon job descriptions identified DOD clearance as a job requirement. However, in practice, the company employed several engineers who did not have the "required" clearance. Indeed, the company found engineering work for Zeinali that did not require him to review classified information, and managed to utilize him for four years. While this may seem like an illustration of the adage, "No good deed goes unpunished," it highlights the need for all employers—not just government contractors—to ensure that stated job requirements are in fact truly required in order to perform the job and that the company's practices support such a conclusion.

Employers, regardless of whether they are government contractors, should ensure that requirements contained in job descriptions and recruiting communications list as "requirements" only those qualifications that are truly necessary. Employers may want to double-check to ensure that they do not have persons in those jobs who do not have the "required" qualifications. Finally, before discharging an existing employee on the basis that he or she lacks a "required" credential, it would be prudent to review all of the circumstances. The longer that an employer permits an employee without the required qualifications to remain in a job, the more likely that the duration of employment will be

used against the employer and potentially diminish the credibility of the employer's explanation.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

Note

1. *Zeinali v. Raytheon Co.*, 2011 U.S. App. LEXIS 6792 (9th Cir. Cal. Apr. 4, 2011).

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