

9th Circuit Holds That Employers' Decisions Based on Security Clearances Are Subject to Court Review in Certain Circumstances

Opinion carves out exception to the Egan/Brazil rule and spotlights need for consistency

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In 1988, the U. S. Supreme Court held in *Department of the Navy v. Egan* that the administrative agency responsible for adjudicating civil service disputes lacked jurisdiction to review employment grievances based on the executive branch's security clearance decisions. In 1995, the U.S. Court of Appeals for the 9th Circuit expanded *Egan* to prohibit judicial review of Title VII related claims in *Brazil v. Department of the Navy*.

The “*Egan/Brazil* rule” was generally understood to preclude claims implicating security clearance issues. However, in *Zeinali v. Raytheon Company*, an opinion filed April 4, 2011, the 9th Circuit carved out an exception to the *Egan/Brazil* rule, holding that courts could review such claims if the claim did not challenge the merits of the security clearance decision but instead the process by which the employer relied on it.

Key facts

Raytheon Company hired Hossein Zeinali (of Iranian descent) in November 2002 for a position requiring a security clearance. Zeinali's initial request was denied, but Raytheon retained him through the appeal process. In September 2006, the Department of Defense notified Zeinali that his request had been denied. Raytheon terminated Zeinali shortly afterwards. Although there were several factors supporting the decision to terminate Zeinali, Raytheon primarily relied on the fact that Zeinali's job required a security clearance and he had failed to obtain one.

Zeinali filed suit under state and federal law, alleging that his termination was based on his race and national origin. He did not contest the security clearance decision. Instead, he noted that two other similarly situated employees who were not Iranian had also failed to obtain a security clearance yet they were not terminated. Raytheon moved for summary judgment relying on *Egan/Brazil*. The district court granted summary judgment because it concluded that Zeinali's claims were “premised on the denial of his security clearance,” and therefore barred.

The opinion

The 9th Circuit reversed. The court concluded that it did have jurisdiction to review employment decisions that did not implicate the merits of the decision to deny a security clearance. Such issues might include, among others, “whether in fact [a] clearance was denied ... , whether transfer to a nonsensitive position may be feasible ... , [and] whether the security clearance was a requirement for the job and thus its denial was an appropriate cause for dismissal.”

Here, the fundamental issue addressed the fact that two other employees who were not of Iranian origin had also been denied a security clearance, yet they had not been terminated. Zeinali did not challenge the decision to deny a security clearance. Instead, he alleged that the security clearance requirement was not a bona fide job requirement and that Raytheon used the security clearance decision in an impermissibly discriminatory manner. The fact that other employees had not been terminated raised a genuine issue of material fact concerning both of these issues. The court therefore concluded that Zeinali's claim should be allowed to proceed.

Significance

The court's opinion offers employers several important lessons:

- Consistency is important. Employers should carefully screen decisions to ensure that similarly situated employees are treated in a similar manner.

- Process is critical. Employment decisions should not rest on single issues. If there are legitimate, nondiscriminatory reasons for a decision, all such reasons should be documented and relied upon at the outset.
- Employers relying on defenses (such as bona fide occupational qualification) should ask counsel to analyze whether, in fact, the avowed justification meets governing legal standards.
- Human resources representatives and management should confer with counsel where decisions will likely lead to litigation (such as employment termination).

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