

9th Circuit Affirms Judgment for Teck Alaska in Title VII Shareholder Preference Suit

Court validates ANCSA shareholder preferences

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In *Conitz v. Teck Alaska*, a case involving shareholder preferences closely watched by ANCSA corporations and others, the U.S. Court of Appeals for the 9th Circuit issued a brief unpublished decision affirming the district court's judgment in favor of Teck Alaska and NANA Regional Corporation.

Background

Gregg Conitz worked for Teck Alaska at the Red Dog mine. He filed suit alleging he was passed over for promotion because Teck Alaska applied NANA's shareholder preference policy. He argued that the policy constituted impermissible race discrimination because most shareholders are Alaska Natives. The lawsuit was substantially similar to a prior suit he filed making the same claims.

The district court held that the shareholder preference was not a racial preference but instead a political preference based on shareholder status. The court observed that non-Natives could be shareholders. Furthermore, the court concluded that Conitz was not as qualified for the promotion as the person who was promoted. Conitz appealed.

Decision

The 9th Circuit affirmed in a brief unpublished decision. The court noted that the shareholder preference was only used as a tiebreaker between two equally qualified candidates, and that it did not favor Alaska Natives but instead shareholders. Therefore, the preference was not facially discriminatory and no direct discrimination could be found.

The court concluded that Conitz failed to establish a prima facie case under *McDonnell Douglas* because he did not show he was more qualified for the position being sought than the person who was promoted. As with the prior case, the court did not need to reach the question whether the shareholder preference policy constituted racial discrimination in violation of Title VII because, by failing to establish a prima facie case, Conitz failed to show how the policy adversely affected him.

Analysis

Although the 9th Circuit did not closely analyze the shareholder preference issue, most commentators believe that such preferences are permissible under Title VII, Section 1981, or other federal remedial statutory rights because shareholder status is a political

or economic (and not racial) classification. The Alaska State Commission for Human Rights (ASCHR) has also approved shareholder preferences for state claims under the Alaska Human Rights Act.

The catch, however, is ensuring that the policy is a shareholder preference policy, and that it is not applied in a manner that might give rise to any discrimination or retaliation claims. For example, an otherwise valid shareholder preference may be applied in a discriminatory manner (for example, if it could be shown that the preference was denied to non-Natives who were also shareholders). Teck Alaska was careful to avoid any such contention.

Significance of *Conitz*

The result here is significant in at least two respects.

First, it demonstrates the importance of relying on traditional defenses or arguments, e.g., arguing that an employee was not qualified for a position (to note one example). Prudent employers should not rely solely on a shareholder preference when defending against employment discrimination claims even though the preferences are otherwise entirely valid.

Second, employers should ensure that shareholder employment preferences are actually applied as a shareholder preference to preclude argument that the preference implicates protected classifications.

Future advisory

Davis Wright Tremaine's Anchorage employment law practice group will issue a brief advisory later this summer summarizing principles related to ANCSA and tribal employment preferences.

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