UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BBF ENGINEERING SERVICES, P.C.
a Michigan Corporation, and
BELLANDRA FOSTER, an individual

PLAINTIFFS,

v.

CASE NO.: 11-CV-14853

HON. NANCY G. EDMUNDS

THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC and MARK STEUCHER

DEFENDANTS.

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PLAINTIFFS BBF ENGINEERING SERVICES, P.C. AND BELLANDRA FOSTER'S SUPPLEMENTAL BRIEF IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

On July 29, 2013, this Court issued an order requesting supplemental briefs on the issue of whether Plaintiffs BBF Engineering and Bellandra Foster ("Plaintiffs") could argue a class of one Equal Protection claim under the recent opinion of the Seventh Circuit Court of Appeals in *Swanson v City of Chetek*, ___F.3d___; 2013 WL 3018926 (See Exhibits 1 and 2). In addition, the Court also requested that the parties address whether Plaintiffs waived the argument on claim in their Response Brief.

First, some context must be offered with respect this issue. Defendants Victor Judnic, et al ("Defendants") merely argued in their motion for summary judgment that under no circumstance, either in a public or private contract context, could any person make out a class of one Equal Protection claim. This was the sole issue presented by Defendants' briefing on this subject matter and was the assertion to which Plaintiffs responded.

Second, in response to this issue, Defendants addressed Plaintiffs' principle authority *Engquist v Oregon Dept. of Agriculture*, 553 US 591; 128 S.Ct. 2146; 170 LE2d 975 (2008), and distinguished that case at pages 38-40 of its Brief in Response (See Excerpts Exhibit 3). In fact, Plaintiffs cited to *JDC Management, LLC v Reich,* 644 FSupp 2d 905, 922 (WD MI 2009), where the Court recognized that *Engquist, supra,* was inapplicable cases involving suspect classifications such

as race and sex. Plaintiffs then argued that the instance case clearly distinguishable from *Engquist, supra*, because by its very nature it turned on questions of race and sex which are suspect classifications since Ms. Foster is a black female who was discriminated against by Defendants.

Defendants' self-serving claims of waiver are specious to say the least. The only statement of waiver comes from Defendants in their Reply Brief. Nothing in Plaintiffs' Response Brief waives the claim or fails to address the claim. Most importantly, some facts are irrefutable regarding Plaintiffs' *prima facie* case. Where there is smoke, there is fire. There is enough smoke here to choke every elephant in Africa and India—let alone the circus that is MDOT contracting:

1. No other professional service contractor has won a bid award and had the bid award recalled and redistributed to other majority firms.

2. No other contractor has had a chief engineer drive out one of the contractor's employees for alleged incompetence and then have that very employee rehired by MDOT to do the same work.

3. No other contractor denied the right to bill its travel and transportation costs.

4. No other contractor denied the right to bill a principal's time and then audited and punished for allegedly not having enough revenue to justify its compensation and overhead rate.

5. No other contractor was subjected to inferior evaluations and object favoritism by its project engineers awarding work to contractors that later employed them (Judnic and HNTB).

6. No other contractor has bid 29 prime contract proposals and won none after it began working with Judnic and Steucher.

7. No other contractor was consistently denied routine in-person meetings by its Project Engineers or had to move mountains to secure one.

8. No other contractor is complaining about black males being last hired and first fired and offering to provide Detroit-based staff on Detroit projects and had the offer denied.

9. No other contractor has had its scores arbitrarily changed by a chief engineer (Steucher) to eliminate it from an award.

10. No other contractor has been subjected to an audit of records back to 1999 after it complained about discrimination to the Federal Highway Administration ("FHWA").

11. No other contractor has a report from the FHWA and MDOT finding that it had been subjected to disparate treatment by Defendants.

Defendants argued and this Court accepted that the Equal Protection Clause was only applicable through U.S.C. § 1983. *Swanson, supra,* at *3 (Emphasis added) holds that:

> The Equal Protection Clause of the Fourteenth Amendment protects individuals from governmental discrimination. The typical equal protection case involves discrimination by race, national origin or sex. However, the Clause also prohibits the singling out of a person for different treatment for no rational reason.

The examples offered above demonstrate irrational discrimination. Plaintiffs only ask – let the trier of fact decide.

ARGUMENT

A. PLAINTIFFS DID NOT WAIVE THEIR ARGUMENTS.

In *Newburgh/Six Mile Limited Partnership II, v Adlab Films USA, Inc.,* 483 Fed Apx 85, 90, (6th Cir. 2012), the Court addressed some basic issues regarding waiver where the plaintiff in that case argued that the defendants' failure to address the argument before judgment was entered constituted a waiver. In addressing this issue, the court stated as follows:

> In general arguments not raised before the district court are deemed waived on appeal to this court... Despite this general waiver rule, this court has occasionally exercised its discretion to deviate from the rule in exceptional cases or if the application of the rule would result a miscarriage of justice....

Here, imposition of a waiver would constitute a miscarriage of justice.

In *Thomas v Speedway SuperAmerica, LLC,* 506 F.3d 496, 500 at fn 1 (6th Cir. 2007), the Court found that it was proper to find that an argument which was short, vague, and unsupported by legal authority and was the epitome of a perfunctory argument, did not need to be addressed and was waived. In the case at bar, Plaintiffs offered extensive argument on this new issue at pages 39-40 of their Response and cited authority contravening Defendants' position. There simply was no waiver.

In *United States v Nagi,* 947 F.2d 211, 217, (6th Cir. 1992), the court noted this following an important facet of any waiver claim:

> The cornerstone of any argument based upon waiver is that such waiver is knowing....

There was no knowing waiver of any argument in this case.

B. *SWANSON, SUPRA*, CLEARLY ESTABLISHES THAT PLAINTIFFS' CLAIMS WITHSTAND SUMMARY JUDGMENT.

First, *Swanson v City of Chetek, supra*, recognizes the existence of a class of one Equal Protection claim. This issue surfaces in this case because Defendants maintain that a class of one Equal Protection claim could never be maintained under any circumstance either in a public contracting context or a private contracting context. *Swanson, supra*, further dispels this argument, which Plaintiffs opposed in their original Response.

Swanson, supra, also establishes that where the animus is readily obvious that the plaintiff need not demonstrate a near exact one-to-one comparison to maintain his or her claim. In disavowing this approach, the *Swanson, supra,* court held as follows:

> If animus is readily obvious, it seems redundant to require that the Plaintiff show disparate treatment in a near exact, one to one comparison to another individual. See *Fenje v Feld*, 398 F.3d 620, 628 (7th Cir. 2005) ('[A]n 'orchestrated campaign of official harassment directed against[v Plaintiff] out of sheer malice,' 'vindictiveness,' or 'malignant animosity' with stated claim for relief under the equal protection clause.,') (quoting *Esmail v Macrane* 53 F.3d 176, 178-79 (7th Cir 1995)); see also *Nevel v Village of Schaumburg*, 297 F3d 673, 681 (7th Cir. 2002); *Hilton v City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000) (so called "vindictive action" equal protection cases require proof of a 'totally legitimate animus toward plaintiff by defendant"). *Id* *4.

Here, as set forth above (*supra,* pp 2 and 3*)*, there is clear evidence of animus and disparate treatment. This is a motion for summary judgment. The issue is whether there is a genuine issue of material fact for the jury. The court should recall the findings of the investigation conducted by the FHWA in its report, which was delivered to Defendants, and has never been challenged or contested, which concluded that there was evidence of disparate treatment against Plaintiffs. (Exhibit 1 to Plaintiff's Response).

C. DISPARATE TREATMENT AND DISPARATE IMPACT ARE TWO THEORIES TO PROVE DISCRIMINATION.

A plaintiff seeking to establish a claim under 42 U.S.C. § 1983 can raise at least two distinct theories of discrimination tied to disparity. *Huguley v. General Motors Corp., 52 F.3d 1364, 1370 (*6th Cir.1995*)*. Disparate treatment, "occurs when an employer treats some employees less favorably than others because of race, religion, sex, or the like," and requires proof of discriminatory motive. *Id.* (citing *International Broth. of Teamsters v. United States,* 431 U.S. 324, 335-36 n. 15; 97 S.Ct.1843; 57 L.Ed 2d 396 (1977)). Disparate impact requires no showing of discriminatory motive, because it is predicated on a theory that discrimination has "result[ed] from facially neutral employment practices that have a disproportionately negative effect on certain protected groups and which cannot be justified by business necessity." *Id.* (citing *International Broth. of Teamsters, supra.*)

1. There is a *prima facie* case of disparate treatment discrimination.

To establish a *prima facie* case of disparate treatment, the plaintiff must show: "1) she was a member of a protected class; 2) she was subject to an adverse employment action; 3) she was qualified for the job; and 4) for the same or similar conduct, she was treated differently from similarly situated non-minority employees." *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000). Plaintiffs have met all of these elements: BBF and Ms. Foster are members of a protected class, have been subjected to adverse actions, and have been qualified and treated different than the non-minority contractors (See e.g., pp 2 and 3, *supra).*

On this last prong, this Court has questioned whether Plaintiffs were treated differently from similarly situated non-minority contractors. A plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered "similarly-situated;" rather, a plaintiff and an employee with whom a plaintiff seeks to compare himself or herself must be similar in "all of the *relevant* aspects." *Pierce, supra,* at 802 (emphasis added). *Ercegovich v. Goodyear Tire & Rubber Co.,* 154 F.3d 344, 352 (6th Cir.1998); *Hanna v. E.I. du Pont de Nemours & Co., Inc.*, 65 Fed. R. Serv. 3d 142 (E.D. MI 2006); and *Swanson, supra.*

Further, the question of whether Defendants' disparate treatment of Plaintiffs stemmed from race or sex, is more properly resolved at trial. *Perry v.*

McGinnis 209 F.3d 597, 602 (6th Cir. 2000). Trials exist to resolve such issues of fact, and summary judgment is to be used only when there is no question as to such issues of fact. Here, there are obvious questions of fact that must be resolved at trial. *Perry, supra* at 602. It is for a jury to decide whether to draw an inference of race discrimination from a comparison non-minorities and minorities. *Hanna v. E.I. du Pont de Nemours & Co., Inc., supra.*

2. There is a *prima facie* case of disparate impact discrimination.

To establish a *prima facie* case of disparate impact discrimination under a Civil Rights Act, a plaintiff must show that she was a member of a protected class and that a facially neutral employment practice burdened a protected class of persons more harshly than others. *Meagher v. Wayne State Univ,* 222 Mich.App 700, 709; 565 NW2d 401 (1997).

The use of statistics may be relevant in establishing a prima facie case of discrimination or in showing that the proffered reasons for a defendant's conduct are pretextual. *Dixon v. W W Grainger, Inc,* 168 Mich.App 107, 118; 423 NW2d 580 (1988). Appropriate statistical data showing an employer's pattern of conduct toward a protected class can, if unrebutted, create an inference that a defendant discriminated against individual members of a class. *Barnes v. Gencorp, Inc,* 896 F.2d 1457, 1466 (6th Cir. 1990). Statistical proof alone cannot determine the more likely cause of the disparate effect. *Id.* To meet a burden of demonstrating that the

statistical disparity is more likely than not due to the defendant's bias, a plaintiff must present significant statistics coupled with independent circumstantial evidence of discrimination. *Hopson v. DaimlerChrysler,* 306 F.3d 427, 437-438 (6th Cir. 2002).

Thus, when proceeding under a disparate impact theory of discrimination, a plaintiff essentially attempts to show that "'some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.' " *Hartsel v. Keys,* 87 F.3d 795, 801-02 n. 4 (6th Cir.1996) (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 987; 108 S.Ct. 2777; 101 L.Ed 2d 827 (1988).

Plaintiffs' evidence prevails on this issue as well. Plaintiffs, BBF and Bellandra Foster were the only minority contractors subjected to a laundry list of suspect treatment. (See e.g., pp 2 and 3, *supra.*)

D. THIS COURT SHOULD DENY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE IS A *PRIMA FACIE* CASE OF DISCRIMINATION HERE.

This Court posed a question at the June 26, 2013 hearing: "is there nothing here that goes to the possibility that there was animus based on race or gender?" (Exhibit 4: June 26, 2013 transcript, page 11.) The answer is yes. The courts have substantiated that the consideration of an impermissible factor in one context may support the inference that the impermissible factor entered into the decision-

making process in another context. *Ercegovich v. Goodyear Tire & Rubber Co., supra.* The "evidence of a corporate state-of-mind or a discriminatory atmosphere is not rendered irrelevant by its failure to coincide precisely with the particular actors or timeframe involved in the specific events that generated a claim of discriminatory treatment." *Ercegovich, supra,* at 357. Plaintiffs have established a history of animus, which unfortunately has led to the Defendants subsequent discriminatory actions and Plaintiff's demise.

CONCLUSION

Trial is trial. This is a summary judgment motion. There is enough smoke here to shroud any argument that there is no genuine issue of material fact. Where there is smoke, there is fire and Defendant's motion should be denied simply on the density of the plume in this case.

Respectfully Submitted,

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Dated: August 2, 2013

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, I electronically filed the above document with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record.

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INDEX OF EXHIBITS

EXHIBIT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Bellandra Foster, et al.,

Plaintiffs,

v.

Victor Judnic, et al.,

Defendants.
_____/

Case No. 11-14853

Honorable Nancy G. Edmunds

OPINION REQUIRING SUPPLEMENTAL BRIEFING

Upon reviewing the parties' briefs, considering the oral arguments, and conducting its own independent research, the Court finds that it requires supplemental briefing to render its decision on the motion for summary judgment [dkt. 50]. The Court therefore ORDERS the parties to address the Seventh Circuit's recent opinion, in *Swanson v. City of Chetek*, ---F.3d---, 2013 WL 3018926 (7th Cir. June 19, 2013), regarding class-of-one claims. The parties must submit the briefing by **Friday, August 2, 2013, by 12 p.m.** Briefs should be no longer than 10 pages.

The Court instructs the parties to focus on whether Plaintiffs have asserted a class-of-one claim and whether Plaintiffs, if they have asserted such a claim, waived the claim in their response brief. (Pls.' Resp. at 40.) The Court further instructs the parties to address whether *Swanson* could apply to this case in any other way.

So ordered.

s/Nancy G. Edmunds
Nancy G. Edmunds
United States District Judge

Dated: July 29, 2013

I hereby certify that a copy of the foregoing document was served upon counsel of record on July 29, 2013, by electronic and/or ordinary mail.

s/Johnetta M. Curry-Williams
Case Manager
Acting In the Absence of Carol A. Hemeyer

EXHIBIT 2

2013 WL 3018926
Only the Westlaw citation is currently available.
United States Court of Appeals,
Seventh Circuit.

Karl SWANSON and Kathy Wietharn, Plaintiffs–Appellants,
v.
CITY OF CHETEK, a municipal corporation, and Jerry Whitworth, in his individual and official capacities, Defendants–Appellees.

No. 10–1658. | Argued Sept. 7, 2012. | Decided June 19, 2013.

Synopsis

Background: Neighbor of city's mayor and the woman with whom he lived brought action against mayor for class-of-one discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. The mayor moved for summary judgment which the United States District Court for the Western District of Wisconsin, 09–cv–0097–slc—, 695 F.Supp.2d 896, Stephen L. Crocker, United States Magistrate Judge, granted. Neighbor appealed.

Holdings: The Court of Appeals, Cudahy, Circuit Judge, held that:

[1] woman who lived with neighbor lacked standing, and

[2] mayor's actions sufficiently demonstrated animus towards neighbors.

Affirmed in part, reversed in part, and remanded.

West Headnotes (10)

[1] **Federal Civil Procedure**
In general; injury or interest
Federal Civil Procedure
Causation; redressability

To satisfy Article III standing: (1) a plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized, and actual and imminent; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

[2] **Federal Civil Procedure**
Rights of third parties or public

A party generally must assert his own legal rights and interests in order to have Article III standing, and cannot rest his claim to relief on the legal rights or interests of third parties. U.S.C.A. Const. Art. 3, § 1 et seq.

[3] **Constitutional Law**
Equal Protection

Female individual, who lived with male homeowner, lacked standing to bring class-of-one discrimination claim under the Equal Protection Clause of the Fourteenth Amendment against mayor of city who lived next door to homeowner and allegedly used his mayoral powers to harass homeowner for his building a fence along the property line and remodeling his home; individual had no property interest in the home, and the city only cited and sued homeowner for alleged violations, precluding a finding that individual suffered an injury in fact. U.S.C.A. Const. Art. 3, § 1 et seq.; U.S.C.A. Const.Amend. 14.

[4] **Federal Civil Procedure**
In general; injury or interest

For Article III standing, the injury in fact test requires more than an injury to a cognizable interest; it requires that the party seeking review be herself among the injured. U.S.C.A. Const. Art. 3, § 1 et seq.

[5] **Constitutional Law**
Applicability to Governmental or Private Action; State Action

The Equal Protection Clause of the Fourteenth Amendment protects individuals from governmental discrimination. U.S.C.A. Const.Amend. 14.

[6] **Constitutional Law**

Rational Basis Standard; Reasonableness

The Equal Protection Clause of the Fourteenth Amendment prohibits the singling out of a person for different treatment for no rational reason. U.S.C.A. Const.Amend. 14.

[7] **Constitutional Law**

"Class of one" claims

To state a class-of-one equal protection claim under the Equal Protection Clause of the Fourteenth Amendment, an individual must allege that he was intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. U.S.C.A. Const.Amend. 14.

[8] **Constitutional Law**

"Class of one" claims

Under the analysis of a claim for class-of-one discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, if there was no rational basis for the treatment of the plaintiff, then the motives must be irrational and improper. U.S.C.A. Const.Amend. 14.

[9] **Constitutional Law**

"Class of one" claims

To achieve clarity of analysis in a class-of-one discrimination claim under the Equal Protection Clause of the Fourteenth Amendment, courts look to the treatment of similarly situated individuals; if all principal characteristics of the two individuals are the same, and one received more favorable treatment, this may show there was no proper motivation for the disparate treatment. U.S.C.A. Const.Amend. 14.

[10] **Constitutional Law**

Other particular issues and applications

Municipal Corporations

Duties and liabilities

Mayor's actions of causing an investigation of his neighbors, interrupting neighbors' meeting with building inspectors, angrily telling inspectors that permits to build a fence should not be issued, and making allegedly defamatory statements about neighbors were sufficient to demonstrate animus against neighbors required for their class-of-one discrimination action against mayor under the Equal Protection Clause of the Fourteenth Amendment, even though there was allegedly no similarly situated individual with which to make a comparison, where overt animus on the part of the mayor obviated the need for presenting a similarly situated individual who was treated differently. U.S.C.A. Const.Amend. 14.

Attorneys and Law Firms

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Joel L. Aberg (argued), Attorney, Weld, Riley, Prenn & Ricci, S.C., Eau Claire, WI, for Defendants–Appellees.

Before CUDAHY, ROVNER, and TINDER, Circuit Judges.

Opinion

CUDAHY, Circuit Judge.

*1 This is a case about a class-of-one equal protection claim in which the plaintiff has demonstrated hostility, but may have failed to identify a similarly situated individual who received more favorable conduct. The magistrate judge granted summary judgment for defendants because, though there was evidence of animus, there was no similarly situated individual. Because animus is the very basis of a class-of-one claim, we reverse.

Karl Swanson purchased a lakeside home in Chetek, Wisconsin. He and Kathy Wietharn live together, but Wietharn holds no ownership interest in the Chetek home.

They moved in next door to Jerry Whitworth, the elected mayor of Chetek. Swanson decided to remodel the home. He obtained a building permit for "remodel—repair" and began work. Swanson also decided to put in a three-feet high fence between his property and Whitworth's and along the street. Whitworth did not like this situation and used his position to harass Swanson.

Whitworth's harassment of Swanson included: repeatedly telling building inspector Bill Koepp that he should not have issued the remodeling permit; repeatedly entering the Swanson home without permission; using his influence to cause building inspector Joe Atwood to block (or at least delay) the grant of a fence permit; [1] telling the fence building team that Swanson and Wietharn were drug dealers and unlikely to pay for the work provided; and causing the City's prosecution of Swanson in municipal court for the construction of the fence in violation of a five-foot setback requirement.

This case against Swanson was without legal basis. The ordinance at issue applied only to fences four feet or higher. Further, the judge determined that Swanson's fence work did not require a separate permit and the repair permit validly authorized such work. The City did not appeal the decision.

During this period of harassment, Michele Eberle, a neighbor of Swanson, erected a fence that straddled part of Swanson's property. This fence was constructed without a permit and allowed to be closer to the property line than Swanson's litigated fence. Building inspector Atwood confirmed that the fence encroached on Swanson's property. After the completion of the fence, Atwood filled out a building permit application form for Eberle and later issued the permit authorizing the movement of the fence to "the property line." This occurred during the same period that the City cited Swanson for placement of a boundary fence within several feet of Whitworth's property line.

Swanson and Wietharn filed a class-of-one equal protection suit, as well as defamation and slander claims under Wisconsin law. The magistrate judge granted summary judgment for Whitworth as to the Fourteenth Amendment claim, finding that though "[t]he facts found for the purpose of deciding summary judgment suggest that the Mayor of Chetek employed his city's bureaucracy to wage a personal vendetta against [Swanson and Wietharn]" the equal protection claim must fail because Swanson and Wietharn did not show a similarly situated individual who received more favorable treatment. The magistrate judge felt that Eberle's situation was not very similar to Swanson's for two main reasons: first, Swanson did not provide enough information regarding the height and character of Eberle's fence; and second, Eberle's fence was only a boundary fence while Swanson's fencing involved a front fence and a boundary fence. The magistrate judge declined to exercise supplemental jurisdiction over Swanson's and Wietharn's state law claims and they were dismissed without prejudice.

*2 Swanson and Wietharn appeal. This court has jurisdiction under 28 U.S.C. § 1291. This court reviews a motion for summary judgment *de novo*, drawing all inferences in the non-moving party's favor. *See Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1014 (7th Cir.1996); *Wolf v. Buss Am. Inc.*, 77 F.3d 914, 918 (7th Cir.1996). We begin our analysis by noting that Wietharn lacks standing to bring an equal protection claim arising from the mistreatment of Swanson and the abuse of permits regarding Swanson's home. However, we feel that a clear showing of animus, absent a robust comparison to a similarly situated individual, may sustain a class-of-one equal protection claim and so we reverse.

I.

[1] [2] The doctrine of standing instructs the court to determine if a litigant is entitled to a federal resolution of his grievance. To satisfy standing, (1) a plaintiff must have suffered an "injury in fact:" an invasion of a legally protected interest which is concrete and particularized, and actual and imminent; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be likely that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). "A party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)).

[3] [4] In the case before us, although Whitworth may have defamed Wietharn or otherwise behaved in a boorish manner, Wietharn has not sustained an invasion of a legally protected interest in connection with the unequal treatment of Swanson's fence work. First, the property in Chetek is owned solely by Swanson. Wietharn's status as a person

who lives with Swanson is not enough to provide her with a constitutional cause of action under the Equal Protection Clause. Second, the City cited and sued Swanson for the violation of ordinances. Even though Wietharn was acting as an agent for Swanson when dealing with Atwood, and it seems clear that she may have felt frustrated by the bureaucratic run-around she encountered, the legally protected interests at issue belonged to Swanson. "[T]he 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be [her]self among the injured." *Sierra Club v. Morton,* 405 U.S. 727, 734–35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). Because Wietharn was not the subject of any municipal citation, and was not the object of any government action, Wietharn has not suffered an "injury in fact," and has not satisfied the first element of standing. Wietharn is therefore not a proper plaintiff to the class-of-one equal protection claim.

Of course, this does not mean that Wietharn has no legal recourse for the possible torts committed against her. Swanson and Wietharm asserted state common law claims for defamation and slander against Whitworth, for telling the fence building team that they were drug dealers who were unlikely to pay for the work provided. However, the magistrate judge dismissed Swanson's and Wietharn's class-of-one claims, and consequently, declined to exercise supplemental jurisdiction over their state law claims. Wietharn's state law claims may allow her possible redress for injuries to her reputation.

II.

*3 [5] [6] [7] The Equal Protection Clause of the Fourteenth Amendment protects individuals from governmental discrimination. The typical equal protection case involves discrimination by race, national origin or sex. However, the Clause also prohibits the singling out of a person for different treatment for no rational reason. To state a class-of-one equal protection claim, an individual must allege that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Vill. of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000).

[8] [9] The classic class-of-one claim is illustrated when a public official, "with no conceivable basis for his action other than spite or some other improper motive ... comes down hard on a hapless private citizen." *Lauth v. McCollum,* 424 F.3d 631, 633 (7th Cir.2005). This improper motive is usually covert, so courts first look to eliminate all proper motives. If there was no rational basis for the treatment of the plaintiff, then the motives must be irrational and improper. *See Vill. of Willowbrook,* 528 U.S. at 564–65, 120 S.Ct. 1073. To achieve clarity, courts look to the treatment of similarly situated individuals: if all principal characteristics of the two individuals are the same, and one received more favorable treatment, this may show there was no proper motivation for the disparate treatment. *See Geinosky v. City of Chicago,* 675 F.3d 743, 748 (7th Cir.2012) ("When the parties raise a serious question whether differences in treatment stem from a discriminatory purpose or from a relevant factual difference, the key evidence is often what was done in the investigation or prosecution of others in similar circumstances."). It is this difficulty in showing animus that has motivated a large number of splits, including a tied en banc in this court in *Del Marcelle v. Brown County Corp.,* 680 F.3d 887 (7th Cir.2012) (en banc), over whether animus must be alleged or whether a showing of different treatment with no rational basis is enough.[2]

[10] Thankfully, for the present issue we need not wade into the question of what to do in the absence of alleged animus. In most class-of-one cases, the comparison of similarly situated individuals will be used to infer animus. However, this case presents the opposite circumstance: animus is easily demonstrated but similarly situated individuals are difficult to find. Below, the magistrate judge found animus due to the overt actions of Whitworth: Whitworth bore Swanson ill will, caused an investigation against him, interrupted meetings of the plaintiffs and building inspectors and angrily informed building inspectors that no permit should be granted. The magistrate judge concluded at the summary judgment stage that the facts supported the notion that Whitworth abused his powers as mayor in order to pursue his vendetta against plaintiffs. However, the magistrate judge held that because the proffered similarly situated individual, Eberle, was sufficiently different from plaintiffs, their claim must fail. The magistrate judge erred in this conclusion of law.

*4 If animus is readily obvious, it seems redundant to require that the plaintiff show disparate treatment in a near exact, one-to-one comparison to another individual. *See Fenje v. Feld,* 398 F.3d 620, 628 (7th Cir.2005) ("[A]n 'orchestrated campaign of official harassment directed against [the plaintiff] out of sheer malice,' 'vindictiveness,' or 'malignant animosity' would state a claim for relief under

the Equal Protection Clause.") (quoting *Esmail v. Macrane*, 53 F.3d 176, 178–79 (7th Cir.1995)); *see also Nevel v. Vill. of Schaumburg*, 297 F.3d 673, 681 (7th Cir.2002); *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir.2000) (so-called "vindictive action" equal protection cases require proof of "a totally illegitimate animus toward the plaintiff by the defendant").

This case is similar to *Geinosky v. City of Chicago*, in which Geinosky received twenty-four bogus parking tickets within a year, all written by officers of Unit 253 of the Chicago Police Department. 675 F.3d 743, 745 (7th Cir.2012). Geinosky brought a class-of-one discrimination claim. However, because Geinosky failed to identify a similarly situated individual, the district court granted judgment for the City. *Id.* at 749. We reversed, explaining that

> requiring Geinosky to name a similarly situated person who did not receive twenty-four bogus parking tickets in 2007 and 2008 would not help distinguish between ordinary wrongful acts and deliberately discriminatory denials of equal protection.... On these unusual facts—many baseless tickets that were highly unlikely to have been a product of random mistakes—Geinosky's general assertion that other persons were not similarly abused does not require names or descriptions in support.

Id. at 748–49.

If anything, Swanson presents a stronger argument for animus than in *Geinosky*. In *Geinosky*, there was no apparent motive for the ticketing officers and animus could be inferred from the sheer absurdity of the number of illegitimate tickets. Swanson, on the other hand, has identified his specific harasser, provided a plausible motive and detailed a series of alleged actions by Whitworth that appear illegitimate on their face. Taken together, Whitworth's alleged statements and behaviors demonstrate overt hostility. It would be oddly formalistic to then demand a near identical, one-to-one comparison to prove the readily-apparent hostility.

In the present case, where the direct showing of animus was very strong, Swanson's pointing to Michele Eberle as a similarly situated individual was helpful in indicating the norm governing the regulation of fences in Chetek. Whitworth's actions against Swanson resulted in a drastic deviation from that norm, and Whitworth's previous statements made clear that his personal hatred caused this unwarranted difference in treatment. Hypothetically, if the direct evidence of animus were less strong but still significant, Eberle's circumstance could be invoked as additional support for a direct showing of animus. Here, however, all Swanson needs to show is that harassment, yelling, arbitrary denials and frivolous litigation do not normally follow requests for fence permits.

***5** AFFIRMED in part, REVERSED in part, and REMANDED.

Footnotes

1 Swanson was given contradictory information regarding where the fence could be placed, and whether it could be built without a permit. Wietharn's first meeting with Atwood was interrupted when Whitworth entered the room and began shouting that no permit would be issued. At that meeting, Atwood refused to provide Wietharn a fence permit application. In a later meeting, Atwood informed Wietharn that the fence was a "structure" and thus had to be set back more than 20 feet. Wietharn believed this information was incorrect and so did not fill out a structure permit application.

2 The Seventh Circuit's case law on this subject is contradictory. *See Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 683–84 (7th Cir.2005) (discussing two, and possibly three, lines of cases). However, this case does not present the court with a "merely unexplained difference in ... treatment," which was contemplated in *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir.2000), but instead concerns overt hostility.

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EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BBF ENGINEERING SERVICES, P.C.
a Michigan Corporation, and
BELLANDRA FOSTER, an individual

PLAINTIFFS,

v.

CASE NO.: 11-CV-14853

HON. NANCY G. EDMUNDS

THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC and MARK STEUCHER

DEFENDANTS.

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PLAINTIFFS BBF ENGINEERING SERVICES, P.C. AND BELLANDRA FOSTER'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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responsible for the construction, maintenance and operation of nearly 10,000 miles of state highways and more than 4,000 state highway bridges. (Exhibit 9: MDOT webpage). Both, Governor Snyder and Director Steudle are "connected to and have responsibility for" MDOT and its consulting contracts, as elaborated in *Floyd, supra,* and therefore are liable for violations. Furthermore, it is Steudle who writes that he is aware of the problems in selecting consultants and that corrective measures need to be taken.

V. This Court Should Properly Deny Defendants' Motion for Summary Judgment, the "Class of One" Claim.

Defendants argue that Plaintiffs assert a class of one which is a prohibited claim according to Defendants under *Engquist v Oregon Dept. of Agriculture*, 553 US 591; 128 S. Ct. 2146; 170 L. ED2d 975 (2008). However, *Engquist, supra,* was first and only applied in the context of employment termination decisions. The Supreme Court in *Engquist, supra,* stated as follows:

> In concluding that the class-of-one theory of equal protection has no application of public employment context and that is all we decide--we are guided, as in the past, by the common sense realization that government offices cannot function if every employment decision became a constitutional matter. *Id* at p. 607.

Defendants also argue that this rationale of *Engquist, supra,* has been extended to decisions regarding public contracting as well as in the context of termination of public contracts. citing *Douglas Asphalt Co. v Qore, Inc.*, 541 F.3d 1269 (11th Cir, 2008). Again *Douglas*, dealt with situations where the constitutional claims that turned on a claim involving free speech. It was not fundamental constitutional right that was at issue.

What the United States Supreme Court subsequently addressed in the *Board of County Com'rs Wabaunsee County, Kan. v Umbehr* 518 US 668, 677, 678; 116 S. Ct. 2342; 135 L.Ed.2d 843 (1996) was the balancing test that was required in this context:

> Each of these arguments for and against the imposition of liability has some force. But all of them can be accommodated by applying our existing framework for government employee cases to independent contractors. *Mt. Healthy* assures the government's ability to terminate contracts so long as it does not do so in retaliation for protected First Amendment activity. *Pickering* requires a fact-sensitive and deferential weighing of the government's legitimate interests. The dangers of burdensome litigation and the *de facto* imposition of rigid contracting rules necessitate attentive application of the *Mt. Healthy* requirement of proof of causation and substantial deference, as mandated by *Pickering, Connick,* and *Waters,* to the government's reasonable view of its legitimate interests, but not a *per se* denial of liability.

Perhaps the best analysis of the *Engquist, supra,* factors is found in *JDC Management, LLC v Reich,* 644 F. Supp 2d 905, 922 (2009), where the Court effectively recognized the importance of applying *Engquist, supra,* to suspect classifications such as race and sex which are at issue here:

> Therefore, the most natural reading of *Engquist* is this: (1) if the plaintiff is a government employee challenging a decision made by a government in its role as employer, the class-of-one theory is automatically not available, and (2) if the plaintiff instead challenges a decision made by government in some other role (such as sovereign, enforcer of criminal or traffic laws, or regulator), the trial court must determine whether the circumstances fit *Engquist's* rationale. To comport with *Engquist's* rationale, the class-of-one theory will not be available if the challenged decision was necessarily subjective and based on an assessment of the plaintiff's personal characteristics (other than per se suspect classifications like race and sex).

Plaintiffs premise all of their claims on *per se* suspect classifications, both race and sex. This takes them out of the context of *Engquist* and this claim should be denied as well.

VI. This Court Should Properly Deny Defendants' Motion for Summary Judgment as Plaintiff's Damages Are an Issue of Material Fact Properly Reserved for Trial.

Plaintiffs have provided a computation of damages for Defendants. (Exhibit 33: Damage Report). Defendants may not appreciate this Nine Million Dollar calculation in lost profit opportunities, resulting from 29 contracts which were not awarded to Plaintiffs.

EXHIBIT 4

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BBF ENGINEERING SERVICES, P.C., and BELLANDRA FOSTER,

Plaintiffs,

v.

Hon. Nancy G. Edmunds
Case No. 11-CV-14853

THE HONORABLE RICK SNYDER, in his capacity as GOVERNOR OF THE STATE OF MICHIGAN, KIRK T. STEUDLE, in his capacity as DIRECTOR of the MICHIGAN DEPARTMENT of TRANSPORTATION, VICTOR JUDNIC, and MARK STEUCHER,

Defendants.
_____/

MOTION FOR SUMMARY JUDGMENT

Detroit, Michigan - Wednesday, June 26, 2013

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- - -

Suzanne Jacques, Official Court Reporter
email: jacques@transcriptorders.com

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

I N D E X

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you know, all of that kind of informs what happens later, so I mean, if you look at it, you're right, it's not directly actionable, I've already ruled that, but it's part of the res gestae that you look at to look at the action that was taken later.

MR. DITTENBER: But to proceed to trial, plaintiffs have to identify a timely act that occurred within the statute of limitations that was motivated by race or gender, and none of the timely decisions that they've identified are materially adverse. They usually have to do with meetings or with using the FOIA process. The only one that's even close is an evaluation, but the Sixth Circuit has ruled that mediocre evaluations are not actionable, and the evaluation must affect your future earnings or advancement, and there's no evidence that this one evaluation, that if they would have gotten one point higher on these categories, that they got sevens and should have been higher, that that would have --

THE COURT: What about, I mean, the problem that I have with a lot of -- with this case, I've looked at it a lot, is that it's hard to point to one thing. It's not like she was demoted or denied or -- but if you look at the accumulation of things over the years, the Love Charles incident, the fact that her contract was reduced, her 2008 contract was reduced from two years to one until she complained about it, and then it was reinstated, the whole thing about the 2010 RFP requiring her to

have five leased vehicles where she was not allowed -- then the other incident in which she was not allowed to bill as a principal.

I mean, there are a lot of little things that accumulated with the relationship between her and MDOT, and specifically involving Mr. Judnic, and what I'm trying to do is look at this as the Sixth Circuit might look at it, and say is this really amenable to summary judgment here? Is there nothing here that goes to the possibility that there was animus based on race or gender?

MR. DITTENBER: In response to that, Your Honor, I don't believe that you can aggregate claims. It's not a hostile work environment type claim. It's a disparate treatment claim, and there has to be a specific act within the statute of limitations that would satisfy the McDonnell Douglas burden shifting test, and even if we forget a minute about whether it's materially adverse, there's been no indication that Mr. Judnic was treating others differently. They identified no companies that he was holding these meetings with that he was giving better evaluations to when there is the same documented performance deficiencies.

And what the RFP, that was, that was an advertisement for proposals to all companies. Every company that wanted to submit a proposal for that project had to, would have had to comply with it, and there are affidavits from both