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COURT DENIES EPA'S MOTION TO DISMISS SUIT FOR MALICIOUS PROSECUTION; DISCOVERY ALLOWED TO PROCEED *(Riverdale Mills Corporation v. United States)*

In a major victory for the Washington Legal Foundation (WLF), a federal court in Massachusetts denied a motion for summary judgment filed by the Environmental Protection Agency (EPA) that sought dismissal of a civil lawsuit brought by WLF on behalf of a small business and its owner against the EPA for malicious prosecution. The court instead granted WLF's motion for discovery, ordering the EPA to produce documents, and allowing WLF to take depositions of EPA agents and officials.

WLF filed the lawsuit in late 2000 in federal court in Worcester, Massachusetts, on behalf of the Riverdale Mills Corporation (RMC) and its owner and president, James M. Knott, Sr., against the United States under the Federal Tort Claims Act for malicious prosecution of RMC and Knott for allegedly violating the Clean Water Act in late 1997. The complaint also names three EPA agents who are sued individually in a so-called "*Bivens*" action for violating RMC's and Knott's constitutional rights under the Fourth and Fifth Amendments for conducting unlawful searches and seizures, and for selectively enforcing EPA regulations.

RMC, a small business located in Northbridge, Massachusetts, is an environmental award-winning, energy efficient facility that manufactures galvanized and plastic-coated welded steel wire mesh used for lobster traps, aquaculture, erosion control, and other purposes. The complaint recounts EPA's malicious and selective criminal investigation and felony indictment against RMC and Knott for allegedly violating an EPA regulation by discharging rinsewater from RMC's facility on October 21, 1997 and November 7, 1997, with a pH level of less than 5.0 standard units, into the public sewer. The sewer eventually reaches the Town of Northbridge's publicly owned treatment works (POTW).

There were no allegations by the EPA that the POTW was damaged in any way by RMC's rinsewater (which, by volume, is less than six percent of the amount RMC is allowed by EPA to

discharge, and which accounts for less than two-tenths of one percent of the capacity of the POTW). Nor were there any allegations that RMC's rinsewater caused the POTW to violate any EPA regulations governing the POTW's discharge of rinsewater into the Blackstone River. Thus, even if there were violations of the pH levels as alleged by the EPA, they were technical infractions with no accompanying harm.

In the course of defending themselves against the unprecedented felony criminal charges for the alleged trivial infractions, Knott and RMC demanded that the government turn over the original log books of the EPA agents who took pH readings on October 21 and November 7, 1997. The log books revealed that a lawful pH reading of 7 taken during the initial raid was altered so that the 7 was made to look like a 4, and that other 7s were altered to look like 2s. The pH readings taken by the EPA during the November 7, 1997 raid on RMC all show pH readings of 5 or above in compliance with EPA regulations where the public sewer line actually connects to RMC's discharge pipe.

U.S. District Court Judge Nathaniel M. Gorton suppressed the evidence of pH readings of rinsewater taken on October 21, 1997, because EPA agents had violated RMC's and Knott's Fourth Amendment rights against unreasonable searches and seizures when it took tests and readings without any RMC employee present to witness the testing, as expressly required by Knott as a condition for the consensual search. A week before the scheduled trial in May 1999, all charges against RMC and Knott were dropped.

On July 27, 2000, the court granted RMC's and Knott's subsequent motion filed under the Hyde Amendment for reimbursement of attorneys' fees for defending what the court found to be a "vexatious" criminal prosecution; one that was harassing in nature and without probable cause. Judge Gorton described the November 7, 1997 raid on RMC as "*a virtual `SWAT team' consisting of twenty-one EPA law enforcement officers and agents, many of whom were armed, [who] stormed the RMC facility to conduct pH samplings. They vigorously interrogated and videotaped employees causing them great distress and discomfort.*" EPA and the U.S. Attorney's Office had also issued a press release falsely branding Knott and RMC as a water polluter, and boasting that Knott was facing six years in prison and \$1.5 million in fines. Unfortunately, the attorneys' fee award was reversed by the First Circuit on appeal by the government.

"EPA has never filed felony criminal charges for such trivial infractions," commented Paul D. Kamenar, WLF's Senior Executive Counsel. "Even in cases of serious pollution involving hazardous, carcinogenic, and toxic pollution, administrative or civil remedies are routinely sought. Now that the court has permitted discovery to go forward, we intend to put the EPA on trial to expose its abuse of power," Kamenar added. WLF is working with local counsel Warren G. Miller of Boston who represented Knott and RMC in the original criminal proceedings.

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