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COURT REJECTS DISPARATE IMPACT SUITS IN "ENVIRONMENTAL JUSTICE" CASES

(South Camden Citizens in Action v. NJDEP)

The U.S. Court of Appeals for the Third Circuit this week overturned a decision which found that the State of New Jersey had violated federal civil rights laws even though it never intended to discriminate against any protected class of citizens. The appeals court's ruling may be the death knell of the so-called "environmental justice" movement.

The decision was a major victory for the Washington Legal Foundation ("WLF"), which filed a brief in the case urging reversal. WLF filed on behalf two clients: the National Black Chamber of Commerce and the Allied Educational Foundation.

The result of the lower court decision was to block operation of a newly-constructed \$50 million cement factory in Camden, New Jersey. Thanks to the appeals court decision, the factory is now operating and providing much needed jobs and tax revenue in an economically depressed area. The plaintiffs' theory was that civil rights laws require "environmental justice." Environmental justice (or "EJ") is the rallying cry of those who argue that companies ought to be prohibited from locating polluting facilities in a minority community if that community already has more than its "fair share" of polluting facilities. The appeals court declined to decide whether federal regulations require "environmental justice"; the court held that even if such a requirement exists, private litigants are not permitted to file suit to enforce the requirement. Rather, the court held, only federal agencies may seek enforcement.

The lower court had held that a plaintiff can make out a violation of Title VI of the Civil Rights Act of 1964 (which prohibits discrimination on the basis of race, color, or national origin by recipients of federal funding) merely by showing that the defendant's policy has a more severe impact on a protected class than on the general population -- even if the defendant did not intend to discriminate against anyone. The plaintiffs, led by an activist environmental group, convinced the trial judge that allowing a cement factory to operate in Camden instead of in a predominantly white suburb constituted racial discrimination against Camden's largely minority population.

In its decision in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the Third Circuit agreed with WLF that the lower court erred in permitting Title VI plaintiffs to proceed without evidence of discriminatory intent.

"The appeals court's decision affirms that our civil rights laws were enacted to prevent intentional discrimination against minority groups, not to ensure equal outcomes," said WLF

Chief Counsel Richard Samp after reviewing the court's decision. "The lower-court decision threatened a broad range of business and educational practices that have stood the test of time but which could be shown not to affect all racial and ethnic groups equally," Samp said.

Among those placed at risk by the lower-court decision were companies seeking discharge permits from the Environmental Protection Agency. EPA recently announced an "environmental justice" policy under which permits may be denied for locations with nearby minority populations, if local residents can demonstrate that discharges from the permit applicant's facility would have a disparate impact on their community. In the Camden case, the cement factory operator was found to be in compliance with the Clean Air Act and thus received all necessary operating permits from New Jersey environmental officials. The trial judge ruled that those officials violated the civil rights laws by issuing the permits without first determining whether Camden already had more than its "fair share" of industrial facilities.

In finding that Congress did not intend to permit private enforcement of EPA's "EJ" policy, the appeals court adopted an argument set forth in WLF's brief and not in the brief of any other party. The court ruled that when Congress adopted 42 U.S.C. § 1983 (which permits individuals to sue for government violation of their rights under federal law), Congress intended to permit enforcement of statutes only, not of regulations issued by federal agencies.

WLF also filed a brief last year in the Supreme Court in *Alexander v. Sandoval*, urging the Supreme Court to rule that private parties could not sue to enforce Title VI disparate impact regulations (such as EPA's "EJ" regulations). WLF won a tremendous victory in that case in April, when the Court ruled 5-4 that Title VI itself does not grant private litigants the right to sue for alleged violations of those regulations. But the New Jersey plaintiffs argued (and the trial court held) that even if Title VI itself did not provide individuals with a right to sue to enforce federal regulations, 42 U.S.C. § 1983 did provide such a right. The appeals court agreed with WLF that the § 1983 argument was precluded by *Sandoval*.

WLF is a public interest law and policy center with supporters in all 50 states. WLF devotes a significant portion of its resources to combatting unwarranted expansion of federal civil rights laws.

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