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COURT EXPRESSES SKEPTICISM REGARDING USE OF "DISPARATE IMPACT" STANDARD

(South Camden Citizens in Action v. NJDEP)

The U.S. Court of Appeals for the Third Circuit in Philadelphia issued two orders this week suggesting that it is skeptical of a lower-court decision in which the State of New Jersey was found to have violated federal civil rights laws even though it never intended to discriminate against any protected class of citizens. First, the Third Circuit granted a stay of the injunction issued by the district court. The appeals court then issued an order asking the lower court to clarify whether it really intended to prevent operation of a fully-constructed cement factory as a result of New Jersey's alleged infraction.

The Third Circuit's actions constituted an interim victory for the Washington Legal Foundation, which had filed a brief urging that the lower-court decision be overturned. WLF filed the brief on behalf of itself and two clients: the National Black Chamber of Commerce and the Allied Educational Foundation.

The result of the lower court decision had been to block operation of a \$50 million cement factory in Camden, New Jersey. The factory provides much needed jobs and tax revenue in an economically depressed area. As a result of the Third Circuit's orders, the factory has started operating. The Third Circuit's orders noted that New Jersey recently issued a report concluding that the plant's operation does not have any more adverse impact on blacks than on any other racial group. By asking the lower court to clarify whether the report's finding causes it to alter its finding that New Jersey violated civil rights laws, the Third Circuit appeared to be signalling its belief that no violation has occurred. The Third Circuit has retained jurisdiction in the case and will hear oral arguments in the case in September if the lower court chooses to stand behind its original ruling.

The lower court held in April 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 plaintiff, 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 a brief filed in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, WLF argued that the lower court erred in permitting Title VI plaintiffs to proceed without evidence of discriminatory intent. WLF argued that the debates surrounding adoption of the Civil Rights Act of 1964 demonstrate unequivocally that Congress did not intend to permit such suits.

"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 the Third Circuit's ruling. "The lower-court decision threatens 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 are companies seeking discharge permits from the Environmental Protection Agency. EPA has 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. Also at risk are colleges and universities that rely heavily on standardized tests (such as the SAT) in their admissions process, since test takers from some racial minority groups on average score lower on standardized tests than do test takers from other racial groups.

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.

WLF made two principal arguments in its Third Circuit brief. First, WLF argued that the EPA regulations at issue (which purport to impose a "disparate impact" standard on recipients of federal funds) are invalid because a federal agency has no authority to expand the scope of a law drawn up by Congress. Second, WLF argued that even if Congress did intend to adopt a disparate impact standard for Title VI, it did not extend a private right of action to enforce that standard; i.e., Title VI regulations can be enforced only by the federal agency that wrote the regulations, not by those allegedly injured by violation of the regulations.

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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