South Camden Citizens in Action v. New Jersey Department of Environmental Protection

United States Court of Appeals

274 F.3d 771 (3rd Cir. 2001)

GREENBERG , Circuit Judge.

I.
OVERVIEW

This matter comes on before this court on appeals by defendant-appellant New Jersey Department of Environmental Protection ("NJDEP") and intervenor- appellant St. Lawrence Cement Co., L.L.C. ("St.Lawrence") from the district court's order granting preliminary injunctive relief to plaintiffs, South Camden Citizens in Action and ten residents of the Waterfront South neighborhood of Camden, New Jersey. Plaintiffs brought this action pursuant to 42 U.S.C. § 1983 , as well as on other bases, claiming NJDEP discriminated against them by issuing an air permit to St. Lawrence to operate a facility that would have an adverse disparate racial impact upon them in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7.

Our opinion focuses on whether, following the Supreme Court's recent decision in Alexander v. Sandoval , 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2000) , plaintiffs can maintain this action under section 1983 for disparate impact discrimination in violation of Title VI and its implementing regulations. For the reasons we set forth, we hold that an administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the EPA's disparate impact discrimination regulations. Because the district court predicated its order granting injunctive relief on section 1983 , we will reverse.

II.
BACKGROUND AND PROCEDURAL HISTORY

A. Background

As we ultimately decide this appeal on a legal basis and the district court's opinions stated the facts at length, we only need summarize the factual background of this case. Initially, we point out that the residents of Waterfront South are predominately minorities and the neighborhood is disadvantaged environmentally. Waterfront South contains two Superfund sites, several contaminated and abandoned industrial sites, and many currently operating facilities, including chemical companies, waste facilities, food processing companies, automotive shops, and a petroleum coke transfer station. Moreover, NJDEP has granted permits for operation of a regional sewage treatment plant, a trash-to-steam incinerator and a co-generation power plant in the neighborhood. As a result, Waterfront South, though only one of 23 Camden neighborhoods, hosts 20% of the city's contaminated sites and, on average, has more than twice

the number of facilities with permits to emit air pollution than exist in the area encompassed within a typical New Jersey zip code.

St. Lawrence supplies cement materials, primarily to the ready-mix concrete industry. One aspect of St. Lawrence's business is the processing of ground granulated blast furnace slag ("GBFS"), a sand-like by-product of the steel- making industry, used in portland cement. In 1998, St. Lawrence wanted to open a GBFS grinding facility on a site in Camden owned by the South Jersey Port Corporation (the "Port"). In furtherance of this project, in March 1999 St. Lawrence signed a lease with the Port for the site and initiated discussions with NJDEP with respect to obtaining construction and operation permits for the facility, primarily focusing on the air permit that required minimizing the emission of PM10, i.e. , particulate matter with a diameter of 10 microns or less. NJDEP required St. Lawrence to conduct an air quality impact analysis for PM10 confirming that there would not be adverse health impacts from operation of the facility and that St. Lawrence's operations complied with the National Ambient Air Quality Standards for PM10. St. Lawrence completed the analysis, and NJDEP accepted the result that the facility's emissions would satisfy the established standards applicable to its operation.

On November 1, 1999, NJDEP notified St. Lawrence that the permit process was "administratively complete." Accordingly, NJDEP permitted St. Lawrence to begin construction of the facility, which it did in late 1999. Then, on July 25, 2000, NJDEP gave notice of a public hearing to be held on August 23, 2000, addressing St. Lawrence's draft air permit. NJDEP stated, however, that it would accept written comments on the draft permit until August 31, 2000. Approximately 120 community members voiced their opinions and concerns about St. Lawrence's facility at the hearing, and several individuals provided NJDEP with written comments.

Thereafter, NJDEP issued a 33-page "Hearing Officer's Report Responses to Public Comments on the Draft Air Permit" for St. Lawrence. In the report, NJDEP addressed the concerns raised by community members, including environmental equity/environmental justice, preexisting local environmental issues, St. Lawrence's emission limits, the results of St. Lawrence's air quality impact analysis, truck emission standards and carbon monoxide air quality evaluation results, and the protection of the health and safety of Waterfront South residents. Plaintiffs, however, filed an administrative complaint with the EPA and a request for a grievance hearing with NJDEP, as they alleged that NJDEP's permit review procedures violated Title VI of the Civil Rights Act of 1964 because the procedures did not include an analysis of the allegedly racially disparate adverse impact of the facility. NJDEP did not respond to the grievance hearing request, and on October 31, 2000, issued St. Lawrence's final air permit.

B. Procedural History

On February 13, 2001, plaintiffs filed a complaint against NJDEP and NJDEP Commissioner Robert C. Shinn, Jr., alleging that they violated Title VI by intentionally discriminating against them in violation of section 601, 42 U.S.C. § 2000d , by issuing the air quality permit and further asserting that the facility in operation under the air permit would have an adverse disparate impact on them in violation of section 602, 42 U.S.C. § 2000d-1. ***

III.
DISCUSSION

As we have indicated, plaintiffs in their amended complaint sought an injunction under section 1983 preventing operation of St. Lawrence's GBFS grinding facility. *** The district court found that plaintiffs stated a claim under section 1983 against NJDEP for violating section 602 and its implementing regulations by failing to consider the potentially adverse discriminatory impact of permitting operation of the facility, and therefore enjoined its operation until NJDEP made such a determination. ***

IV.
CONCLUSION

We sum up our conclusions as follows. The Supreme Court's primary concern in considering enforceability of federal claims under section 1983 has been to ensure that Congress intended to create the federal right being advanced. See Suter , 503 U.S. at 357, 112 S.Ct. at 1367; Wright , 479 U.S. at 431, 107 S.Ct. at 774. Accordingly, we hold that a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute. Similarly, we reject the argument that enforceable rights may be found in any valid administrative implementation of a statute that in itself creates some enforceable right. Applying these rules here, it is clear that, particularly in light of Sandoval , Congress did not intend by adoption of Title VI to create a federal right to be free from disparate impact discrimination and that while the EPA's regulations on the point may be valid, they nevertheless do not create rights enforceable under section 1983 . The district court erred as a matter of law in concluding otherwise and therefore also erred in finding that plaintiffs are likely to succeed on the merits of their claim. Consequently, we will reverse the district court's order of May 10, 2001, granting preliminary injunctive relief and will remand the case to the district court for further proceedings consistent with this opinion.

McKEE , Circuit Judge, dissenting:

Plaintiffs seek to enforce regulations promulgated under § 602 of Title VI of the Civil Rights Act of 1963, 42 U.S.C. § 2000-1. The validity of those regulations is not in dispute here. The regulations are set forth at 40 C.F.R. § 7.10 et seq . and require the defendants to consider the potentially adverse disparate impact of air permits that St. Lawrence needs to operate the proposed facility.

The majority's decision to reverse the district court's grant of preliminary injunctive relief is based upon my colleagues' conclusion that the district court erred "as a matter of law ... in finding that plaintiffs are likely to succeed on the merits of their claim." Maj. Op. at 790. However, our review here ought to be limited to determining if plaintiffs have established " a reasonable probability of succeeding on the merits...." ACLU v. Reno , 217 F.3d 162, 173 (3d Cir.2000) (emphasis added). We need look no further than our recent decision in Powell v. Ridge , 189 F.3d 387 (3d Cir.) cert. denied , 528 U.S. 1046, 120 S.Ct. 579, 145 L.Ed.2d 482 (1999) to find the answer to that question. The majority correctly notes that the Supreme Court's subsequent decision in Alexander v. Sandoval , 531 U.S. 1049, 121 S.Ct. 652, 148 L.Ed.2d 556

(2000) , overruled part of our holding in Powell . However, Powell was not overruled in its entirety until today. Ironically, the majority overrules Powell by engaging in an analysis that overreads Sandoval while cautioning that " Powell , ... should not be overread." Maj. Op. at 784. Accordingly, I respectfully dissent from the decision of my colleagues.

***

The majority seizes upon the "language of Sandoval ," to answer the very different inquiry posed by the district court's injunction here. The majority does so even while noting that the Court in Sandoval cautioned that "this Court is 'bound by holdings, not language.' " Maj. Op. at 790 n. 12 (quoting Sandoval , 121 Sup.Ct. at 1517). The language of Sandoval , however, can not read an issue into that case that was not raised by the parties and not decided by the Court.

The issue here, simply stated, is whether § 1983 provides an independent avenue to enforce disparate impact regulations promulgated under § 602 of Title VI. That is the same question that was posed in Powell . We answered it in the affirmative in Powell , and the answer was not overturned by the subsequent holding in Sandoval.***

Of course, whether or not the plaintiffs would ultimately prevail on the merits is not the issue before us today. However, given controlling precedent in Powell I frankly fail to see how we can conclude that their chances of prevailing are anything less than reasonable. Moreover, their position has been adopted by our sister Court of Appeals for the Sixth Circuit. See Loschiavo v. City of Dearborn , 33 F.3d 548 (6th Cir.1994) , (holding that regulations promulgated under the Cable Communications Policy Act of 1984 created a right which plaintiff could enforce under 42 U.S.C. § 1983 , and relying upon Wilder , 496 U.S. at 520, 110 S.Ct. 2510 and Wright , 479 U.S. at 432, 107 S.Ct. 766). The reasonableness of the plaintiffs' position is further underscored by the four dissenting justices in Sandoval. They noted:

> the majority declines to accord precedential value to Guardians because the five justices in the majority were arguably divided over the mechanism for which private parties might seek such injunctive relief.
> 121 S.Ct. at 1527.

Conclusion

Accordingly, for the reasons set forth herein, I respectfully dissent from the decision of the majority.