Press Release

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WLF Urges Supreme Court to Apply Normal Causation Standards in Discrimination Cases

(*Comcast Corp. v. NAAAOM*)

> **"Proof that the defendant's conduct did in fact cause the plaintiff's injury is a standard requirement of any tort claim. The Ninth Circuit's abandonment of that requirement in the context of some federal anti-discrimination claims lacks any statutory basis. It will make it very difficult for defendants to win dismissal even of insubstantial claims."**
> **—Richard Samp, WLF Chief Counsel**

WASHINGTON, DC—Washington Legal Foundation (WLF) today urged the U.S. Supreme Court to overturn a Ninth Circuit decision that makes it nearly impossible for defendants to win pretrial dismissal of even frivolous discrimination claims. WLF's *amicus curiae* brief argued that unless Congress specifies otherwise by statute, a plaintiff seeking to prevail on a discrimination claim must establish that the defendant would not have acted as it did "but for" unlawful discrimination. The Ninth Circuit held that a plaintiff can establish liability merely by showing that unlawful discrimination was "a factor" in the defendant's decision-making, even if the defendant would have made the same decision had discrimination not been a factor.

At issue before the Court is 42 U.S.C. § 1981, a statute that prohibits racial discrimination in the making of contracts. The plaintiff, Entertainment Studios Networks (ESN), is a small, minority-owned television-program provider that has been unable to convince major cable operators to carry its programming. ESN sued Comcast and all the other large cable providers under § 1981, arguing that they discriminated against it on the basis of race. Comcast denied the claim, asserting that it denied a contract because ESN did not demonstrate adequate viewer interest in its programming. ESN's complaint included no factual allegations suggesting discriminatory motives; it merely claimed that its programming was at least as popular as the programming of non-minority companies that were offered contracts.

The Ninth Circuit reversed the trial court's dismissal of the case. It held that, to prevail on its claim, ESN need not show that discrimination was the "but for" cause of Comcast's decision; it need merely show that discrimination was "a factor." It held that ESN's we're-as-well-qualified-as-those-who-got-contracts allegation was sufficient to permit ESN to proceed past the pleading stage and to engage in pre-trial discovery. WLF's brief argued that the Ninth Circuit's adoption of a lessened causation standard violates well-established tort principles and will likely incentivize the filing of frivolous claims.

Celebrating its 42nd year as America's premier public-interest law firm and policy center, WLF's mission is to preserve and defend America's free-enterprise system by litigating, educating, and advocating for free-market principles, a limited and accountable government, individual and business civil liberties, and the rule of law.

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