



ALITO: TILTING THE SCALES IN FAVOR OF CORPORATE INTERESTS AND AGAINST WORKERS, THE ENVIRONMENT, AND THE RIGHTS OF ORDINARY AMERICANS

In an important story this past Saturday, the *New York Times* explained that Judge Samuel Alito has “reliably favored big-business litigants as he has pushed the federal appeals court in Philadelphia in a conservative direction.” His record, according to the *Times*, shows a “jurist deeply skeptical of claims against large corporations.” Business interests agree with this assessment, with Robin Conrad, senior vice president of the National Chamber Litigation Center, the legal arm of the United States Chamber of Commerce, stating that Alito “has come down on a host of issues in a way that the business community would prefer.” A preliminary review of Judge Alito’s judicial record supports this claim. In his fifteen years on the bench Judge Alito has ruled for and against corporations in many cases, but, in close cases where the judges on his circuit have split, Judge Alito tends to side with corporate interests. The following, non-exhaustive, list of positions taken by Judge Alito in divided cases explains why corporations are eager to have Judge Alito on the Supreme Court.

- **Tried to Shield Anti-Competitive Practices By Large Corporations** - *LePage v. 3M Corporation*, 324 F.3d 141 (3d Cir. 2003) (en banc): In *LaPage*, a jury ruled that 3M Corporation used exclusionary tactics to eliminate small competitors and entrench its monopoly over the transparent tape market in violation of § 2 of the Sherman Act and returned a \$68 million verdict against 3M. Seven judges on the Third Circuit voted to uphold this jury verdict. Judge Alito joined a three judge dissent that would have wiped this verdict off the books.
- **Overtured Emergency Order that Forced Polluter to Address Threat to Drinking Water** - *W.R. Grace & Co. v. U.S. EPA*, 261 F.3d 330 (3d Cir. 2001): The Safe Drinking Water Act has emergency powers that allow the EPA to protect the public water source from imminent threats to public health and safety, including terrorist attacks. In *W.R. Grace* a polluter challenged an emergency order issued by the EPA to protect the public health from a large ammonia plume that threatened the drinking water of Lansing, Michigan. Judge Alito joined a 2-1 opinion which overturned this emergency order and imposed a stiff

burden on the EPA to prove that a remedial measure was “the only way” to protect public health.

- **Prevented Age Discrimination Trial Despite Employer’s Smoking Gun Assertion That Employee Was “Too Old”** - *Keller v. ORIX Credit Alliance*, 130 F.3d 1101 (3d Cir. 1997) (en banc): Judge Alito ruled for the defendant corporation in a discrimination case prohibiting the plaintiff his day in court. Even though the plaintiff presented evidence that the president of the company said he might be “too old for the job” and that “maybe [he] should go hire one or two young bankers” before firing him, Judge Alito ruled that this evidence was insufficient to enable the plaintiff even to present his case to a jury.
- **Reversed \$2.6 Million Fine Against Polluter, Shut Courthouse Doors on Neighboring Landowners** - *Public Interest Research Group v. Magnesium Electron*, 123 F.3d 111 (3d Cir. 1997): Judge Alito sided with the corporate polluter in a 2-1 ruling that wiped a \$2.625 million fine off the books and restricted access to the court by requiring evidence that the Constitution does not require. The plaintiffs proved that the defendant corporation had violated the Clean Water Act 150 times, discharging pollutants into a stream used by the plaintiffs for fishing and swimming. Despite a prior ruling by the Circuit finding standing, Judge Alito tried to erect new obstacles for environmental plaintiffs to bring their case in court. Three years later, in *Friends of the Earth v. Laidlaw* (2000), the Supreme Court rejected the burden on environmental plaintiffs imposed by Judge Alito, with only Justices Scalia and Thomas dissenting.
- **Questioned Giving Workers at Coal Processing Plant Protections of Mine Safety and Health Laws** - *RNS Services Inc. v. Secretary of Labor, Mine Safety and Health Administration*, 115 F.3d 182 (3d Cir. 1997): The Mine Safety and Health Administration (MSHA) cited an employer engaged in coal processing for violations of mine safety laws. The employer’s jurisdictional challenges to the citations were rejected by the Mine Safety and Health Review Commission (MSHRC) and the Third Circuit majority. In dissent, Judge Alito questioned whether MSHA had jurisdiction over the facility, and argued for a narrower interpretation of the agency’s authority – an interpretation that would deprive many workers of MSHA’s protections. Similarly, in *Reich v. Gateway Press*, 13

F.3d 685 (3d Cir. 1994), Judge Alito dissented, arguing against Fair Labor Standards Act protection for reporters working for small newspapers that are part of larger newspaper chains.

- **Tried to “Eviscerate” Law Preventing Racial Discrimination - *Bray v. Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997):** Bray, a hotel employee, claimed that her employer discriminated against her because of her race. Judge Alito’s dissent would have given a pass to the employer because it asserted that it hired the “most qualified” applicant, ignoring the possibility that racial bias tainted the employer’s judgment. Judge Alito’s colleagues sharply criticized his dissent, asserting that the law protecting employees from discrimination would be “eviscerated” if Judge Alito’s dissent were followed.
- **Was the Lone Dissenter in a 10 – 1 Ruling that Allowed a Trial in a Sex Discrimination Claim - *Sheridan v. E.I. DuPont de Nemours*, 100 F.3d 1061 (3d Cir. 1996) (en banc):** Judge Alito was the sole dissenter in an *en banc* gender discrimination case. Judge Alito would have ruled against an employee who had served her employer for more than a decade, receiving many commendations and promotions, until she was demoted for complaining of sexual harassment. Judge Alito’s analysis, that all ten of his colleagues found flawed, erected evidentiary burdens that he used to severely limit a victim’s ability to have her day in court.
- **Would Have Prevented Trial In Wrongful Death Claim Brought by Parents of a College Student - *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993):** Drew Kleinknecht died of cardiac arrest while practicing lacrosse at a Gettysburg College playing field. The majority ruled that the case should go to trial, noting evidence indicating that emergency workers were very slow to respond and that the College did not have an adequate emergency plan in place to protect the school’s athletes against a risk of serious injury. Judge Alito dissented in this wrongful death action against Gettysburg College. Judge Alito dissented on the grounds that Drew’s parents had not alleged sufficient facts to establish that the College owed a duty to the student athletes.
- **Imposed Burden that “Few if Any” Disabled Students Could Meet in Proving Disability Discrimination - *Nathanson v. Medical***



College of Pennsylvania, 926 F.2d 1368 (3d Cir. 1991): Nathanson, a disabled medical student brought a claim against her school under the Rehabilitation Act, a federal law prohibiting federal fund recipients from discriminating against the disabled, saying that the school failed to accommodate her disability. Judge Alito, in dissent, would have refused to let a jury decide whether the medical school's actions violated the law. The majority criticized Alito's analysis saying, "few if any Rehabilitation Act cases would survive summary judgment if such an analysis were applied."



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