THE NATIONAL LAW JOURNAL

IN FOCUS

MONDAY, OCTOBER 20, 2003

FEDERAL CIRCUIT REVIEW

3D CIRCUIT

Earning a reputation for pragmatism

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SPECIAL TO THE NATIONAL LAW JOURNAL

LITIGANTS OFTEN ASK lawyers how the court will react to their case. At least for the 3d U.S. Circuit Court of Appeals, a simple two-word answer usually applies: "It depends." The active judges of the 3d Circuit are equally split between Republican and Democratic appointees, and their decisions as a whole reflect a pragmatic, nondoctrinaire approach to judicial philosophy. There is one judge awaiting confirmation and one vacant seat on the 3d Circuit; Republican appointees will outnumber Democratic appointees among active judges when President Bush fills the vacancy. That one-judge Republican advantage, however, should not upset the overall balance.

Perhaps the best representative of the 3d Circuit's nondoctrinaire judicial style is former Chief Judge Edward Becker, a Reagan appointee who took senior status this past year. He was replaced as chief judge by Anthony Scirica, another Reagan appointee with a reputation as a fair-minded pragmatist. It is too early to predict the judicial philosophy of the newest member of the 3d Circuit, Judge Michael Chertoff, who joined the court in 2003 after serving as assistant U.S. attorney general, where he directed the national prosecution effort against terrorism.

The pragmatic approach of the 3d Circuit as a whole is typified by its decision this past July in *Freethought Society of Greater Philadelphia v. Chester County*, 334 F.3d 247 (3d Cir. 2003), which upheld the constitutionality of a Ten Commandments plaque on a county courthouse because the plaque had historic significance. The plaintiffs argued that the placement of the plaque violated the establishment clause of the First Amendment because the plaque was donated by a religious group and conveyed an endorsement of religion to a reasonable observer. The county said that the plaque had been on display for 83 years without any action by the county to bring attention to it; a reasonable observer would not see the plaque as endorsing religion.

The court held that, given the plaque's age and its placement on a historic building, a reasonable observer would not believe that the plaque constituted an endorsement of religion; the plaque had an independent secular purpose because of the significant influence of the Ten Commandments on the development of the American legal system. The 3d Circuit rejected decisions from the 6th and 7th circuits that held that display of the Ten Commandments on public property violated the establishment clause. The 3d Circuit's *Freethought* decision also conflicts with the subsequent decision of the 11th Circuit in *Glassroth v. Moore*, 335 F.3d 1182 (11th Cir. 2003) (holding that the chief justice of the Alabama Supreme Court violated the establishment clause by placing a Ten Commandments display in the courthouse rotunda).

Another important and pragmatic decision of the 3d Circuit this past year was in the area of antitrust law. In March, the circuit rendered its en banc decision in *LePage's Inc. v. 3M (Minnesota Mining and Manufacturing Co.)*, 324 F.3d 141 (3d Cir. 2003). LePage's Inc., one of 3M's competitors, brought the antitrust action alleging that 3M wrongfully used its monopoly in its Scotch brand tape to exclude competitors' lower-priced products. Specifically, LePage's Inc. contended that 3M violated Section 2 of the Sherman Act by using a multitiered "bundled rebate" structure across product lines that included monopoly and nonmonopoly products and by offering large lump-sum cash payments and other incentives to customers to enter into exclusive dealing arrangements with 3M. A jury sitting in the Eastern District of Pennsylvania returned a $68 million verdict (after trebling) for LePage's Inc.

A 3d Circuit panel subsequently reversed, but this decision was vacated by the en banc 3d Circuit, rejecting 3M's argument that a plaintiff cannot succeed in a Section 2 monopolization case unless it shows that that the monopolist sold its product below cost. The 3d Circuit held that a monopolist's exclusionary conduct, such as exclusive dealing and bundled rebates, can violate the Sherman Act under traditional monopolization law principles. 3M's Supreme Court certiorari petition is pending.

Employment developments

In the area of employment law, the 3d Circuit in 2003 rendered decisions favorable both to plaintiffs and defendants. In February, in a decision favorable to the defense, the court decided what constitutes notice for purposes of the starting of the limitations period under Title VII of the Civil Rights Act of 1964. In *Ebbert v. DaimlerChrysler*, 319 F.3d 103 (3d Cir. 2003), the plaintiff appealed the district court's dismissal of her disability discrimination claim on statute of limitations grounds. The court held that oral notice of a right to sue can start the running of the 90-day limitations period. The court rejected the Equal Employment Opportunity Commission's request that the court find that the limitations period does not begin to run until the plaintiff actually receives a right-to-sue letter from the EEOC.

In April, the 3d Circuit rendered a sexual harassment decision favorable to plaintiffs. In *Suders v. Easton*, 325 F.3d 432 (3d Cir. 2003), the court held that constructive discharge constitutes a tangible employment action under the Supreme Court decisions in *Faragher v. Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998). Further, if an employee proves that the constructive discharge was caused by a supervisor's sexually harassing behavior, the employer cannot escape liability by claiming that the employee failed to avail herself of the internal procedures for reporting harassment. In other words, in *Suders* the circuit expanded employer liability by preventing employers from asserting an affirmative defense in constructive-discharge sexual harassment cases when a supervisor makes the working environment so bad that it compels an employee to quit.

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In June, the 3d Circuit revisited the area of employment law and this time issued a ruling favorable to the defense related to the enforceability of releases. In *Wastak v. Lehigh Valley Health Network*, 342 F.3d 281 (3d Cir. 2003), the court reviewed the validity of a release that a plaintiff employee and the EEOC, as amicus curie, claimed was void because it contained an unenforceable EEOC- charge filing ban and misstated the employee's rights in violation of the Older Workers Benefit Protection Act (See 29 U.S.C. 626 (f)(2)(A)). The court rejected these arguments and held that an employee's release not to sue his former employer is enforceable notwithstanding the presence of an unenforceable provision against bringing an EEOC charge.

Bankruptcy, due process

In the area of bankruptcy law, the 3d Circuit in May rendered its en banc decision in *In re Cybergenics*, 330 F.3d 548 (3d Cir. 2003), which held that a bankruptcy court may use its equitable powers to authorize creditor's committees to bring derivative avoidance actions whenever the debtor-in-possession unreasonably refuses to pursue such claims. The court noted that Congress intended for creditor committees to play a robust and flexible role in representing estates and there was no contrary intent to suggest that committees should not be permitted to bring derivative actions on behalf of estates.

In 2003, the 3d Circuit also handed down two important decisions relating to the due process clause of the U.S. Constitution. In *Toys "R" Us v. Step Two S.A.*, 318 F.3d 446 (3d Cir. 2003), the court considered whether a Spanish company's operation of an active Web site was sufficient to confer jurisdiction over the company in New Jersey. The court held that "the mere operation of a commercially active web site should not subject the operator to jurisdiction anywhere in the world." The court noted, however, that a plaintiff should be given the opportunity to conduct limited jurisdictional discovery on the nature and quality of a Web site operator's Internet and non-Internet activities to determine if the operator purposefully availed itself of the benefits and protections of the forum state.

In *Brown v. Commonwealth of Pennsylvania*, 318 F.3d 473 (3d Cir. 2003), the 3d Circuit considered whether the due process clause requires a state to provide adequate and competent rescue services to its citizens. In answering this question in the negative, the court held that the due process clause neither requires states to provide citizens with rescue services, nor requires that citizens receive adequate and competent rescue services when such services are undertaken by states. Because EMT rescue services are rendered in high-pressure situations, the failure to provide adequate rescue services could only violate the Constitution if the services were rendered in a manner that was so ill-conceived and malicious as to "shock the conscience." *Brown*, 318 F.3d at 480.

Finally, in the area of immigration and national security, the 3d Circuit continues to hand down decisions that are deferential to the government, as typified by its decision in late 2002 in *North Jersey Media Group Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2003), which held that the denial of public access to deportation hearings is constitutionally permissible, and, more recently, by the court's split decision in *Yeboah v. U.S. Department of Justice*, No. 02-2921, 2003 WL 22245560 (3d Cir. 2003), which held that the district directors of the Department of Homeland Security can make decisions traditionally made by state child welfare authorities about the best interests of the child in determining whether juvenile immigrants claiming abuse, neglect or abandonment should be permitted to remain in the United States under the special immigrant juvenile provisions of the Immigration and Nationalization Act. (See 8 U.S.C. 1101, et seq.).

Although certain judges on the 3d Circuit have established judicial philosophies that can be characterized as conservative or liberal, decisions in 2003 confirm that the court as a whole defies labels. Except in areas like national security and immigration, where the court is predictably supportive of the government, the outcome of any case before it will depend on the facts and the law, and to a lesser extent the philosophies of individual judges, but, so far, the 3d Circuit as a whole remains centrist. NLJ

THE 3D CIRCUIT

STRETCHING FROM Pennsylvania, New Jersey and Delaware to the U.S. Virgin Islands, the 3d U.S. Circuit Court of Appeals handled 3,643 appeals last year.

Although approved for 14 judgeships, only 12 of the seats on the 3d Circuit bench are filled. Former Pennsylvania Attorney General D. Michael Fisher, nominated by President George W. Bush, is awaiting confirmation; the other seat is open.

Judges presently on the court are:

- Chief Judge Anthony J. Scirica, nominated by President Ronald Reagan, confirmed on Aug. 5, 1987.
- Delores Kerman Sloviter, nominated by President Jimmy Carter, confirmed on June 19, 1979.
- Richard L. Nygaard, nominated by Reagan, confirmed on Oct. 14, 1988.
- Samuel A. Alito Jr., nominated by President George H.W. Bush, confirmed on April 27, 1990.
- Jane R. Roth, nominated by George H.W. Bush, confirmed on June 27, 1991.
- Theodore A. McKee, nominated by President Bill Clinton, confirmed on June 8, 1994.
- Marjorie O. Rendell, nominated by Clinton, confirmed on Sept. 26, 1997.
- Maryanne Trump Barry, nominated by Clinton, confirmed on Sept. 13, 1999.
- Thomas L. Ambro, nominated by Clinton, confirmed on Feb. 10, 2000.
- Julio M. Fuentes, nominated by Clinton, confirmed on March 7, 2000.
- D. Brooks Smith, nominated by President George W. Bush, confirmed on July 31, 2002.
- Michael Chertoff, nominated by George W. Bush, confirmed on June 9, 2003.

Senior judges include Ruggero J. Aldisert (President Lyndon B. Johnson, July 29, 1968); Max Rosenn (President Richard M. Nixon, Oct. 6, 1970); Joseph F. Weis Jr. (Nixon, March 14, 1973); Leonard I. Garth (Nixon, Aug. 3, 1973); Edward R. Becker (Reagan, Dec. 3, 1981); Walter K. Stapleton (Reagan, April 3. 1985); Morton I. Greenberg (Reagan, March 20, 1987); Robert E. Cowen (Reagan, Nov. 6, 1987).

Trivia

Fifty-eight judges have served on the Philadelphia-based court since its creation in 1891, perhaps none with less distinction than Robert Wodrow Archbald, who was impeached and convicted after only two years on the bench.

At the other end of the spectrum, another short-timer was Francis Biddle. Nominated to the bench by Franklin D. Roosevelt in February 1939, he left in January 1940 to become FDR's solicitor general, then in 1941 to become his attorney general and finally, in 1945, the U.S. representative to the panel of Allied judges at the Nuremberg Trials.

No 3d Circuit jurist has ever ascended to the U.S. Supreme Court.

—ANDREW HARRIS

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