D.C. Circuit Considers Anti-SLAPP Case

Digital Media and Data Privacy Law Blog

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Posted in Anti-SLAPP StatutesUntil now, we have not yet waded into the legal and political morass that is *Shirley Sherrod v. Andrew Breitbart and Larry O'Connor*. In case you have not picked up a newspaper in the past three years, this is a complaint brought by a former official with the U.S. Department of Agriculture against Andrew Breitbart and one of his employees. The Washington Post described the case as follows:

Sherrod was ousted from her job as an Agriculture Department rural-development official in 2010 after Breitbart posted an edited video of Sherrod, who is black, supposedly making racist remarks. She sued Breitbart, his employee Larry O'Connor and an unnamed defendant for defamation and emotional distress after USDA officials asked her to resign and the video ignited a racial firestorm. . . . The video on Breitbart's Web site turned out to be edited, and when Sherrod's full speech to an NAACP group earlier that year came to light, it became clear that her remarks about an initial reluctance to help a white farmer decades ago were not racist but rather an attempt at telling a story of racial reconciliation. Sherrod received public apologies from the administration — including one from President Obama — and an offer to return to her job, which she declined.

Sherrod brought suit in the District of Columbia. The defendants removed the case to federal court, and then filed a motion to dismiss pursuant to D.C.'s relatively new anti-SLAPP act, which had been passed just a year before and had gone into effect at the end of March 2011. We first wrote about anti-SLAPP statutes in 2009. In February 2012, the district court denied the motion to dismiss on a number of grounds, including: (1) the complaint had been filed before the effective date of D.C.'s anti-SLAPP law and could not be applied retroactively; (2) even if it could be applied retroactively, the law would then be considered procedural and therefore could not be applied by a federal court sitting in diversity; and (3) even if it could be applied in federal court, by seeking several extensions of their deadline to respond to the complaint, the defendants had missed the statutory deadline in which to file a motion under D.C.'s law (45 days). The defendants appealed that decision to the United States Court of Appeals for the District of Columbia Circuit, arguing, among other things, that denial of an anti-SLAPP motion to dismiss is immediately appealable. Oral argument in that appeal took place on March 15, 2013, and a decision is likely to be issued sometime this summer. If the D.C. Circuit agrees that it has jurisdiction to hear this interlocutory appeal—meaning an appeal that comes before the final resolution of the case at the trial court level —and according to reports of oral argument that is no sure thing, the court will answer several critical questions of first impression about D.C.'s anti-SLAPP law. Of primary importance to media defendants is whether a state (or District of Columbia) anti-SLAPP statute can be applied in federal court. The general rule is that statutes or rules that are procedural (i.e., they govern how an

action proceeds through the court system) are not applied by federal courts, but statutes or rules that are substantive (i.e., they govern the merits of the cause of action) are to be applied by federal courts. This question is crucial, because if plaintiffs could avoid the effect of an anti-SLAPP statute by bringing their case in federal court (by either adding a federal cause of action or creating diversity among defendants), many might choose to do so. A coalition of media organizations filed an amicus curiae brief in the D.C. Circuit urging the court to align itself with the First, Fifth, and Ninth Circuits, which have all held that anti-SLAPP statutes are substantive, and therefore should be applied by a federal court sitting in diversity. Indeed, the amici asserted that every Circuit Court to examine the question has agreed that such statutes are substantive. In the coming days, we will have another post about one of the other important questions raised by the Sherrod case—whether the defendants' motion to dismiss was untimely.

Of course, we will keep you posted when the court issues its decision.