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FEDERAL COURT WATCH

BY GARRY STURGESS

New Judges Get No Rehearsals

Karen LeCraft Henderson was still a government lawyer in South Carolina when the first ruling in *Ann Hopkins v. Price Waterhouse* was issued in 1985. Last week, in her first appearance on a panel of the U.S. Court of Appeals for the D.C. Circuit, Judge Henderson was in the thick of the long-running sex-discrimination case, already the subject of a 1989 Supreme Court ruling.

Henderson led her two senior colleagues, Abner Mikva and Harry Edwards, into the courtroom as the new term got under way Sept. 10. The first words from presiding Judge Mikva were a welcome to Henderson.

Fifty minutes later, Henderson came through with her first question as a D.C. Circuit panelist. She asked Hopkins' lawyer about the suitability for partnership of a person found to have misrepresented a meeting with her senior partner.

Price Waterhouse is asking the D.C. Circuit panel to overturn District Judge Gerhard Gesell, who in May ordered the giant accounting firm to make Hopkins a partner and to give her some \$350,000 in back pay as a remedy for its past sex discrimination against her.

"You agree a partnership should be based on trust," Henderson posited.

"Yes," replied James Heller of D.C.'s Kator, Scott & Heller, who has represented Hopkins throughout the seven-year saga. "All employment should rely on trust."

But Judge Gesell had taken the incident referred to into account when making his decision, Heller said. "He is the chancellor on this unless he has made a clearly erroneous decision," Heller argued.

Price Waterhouse, represented at the D.C. Circuit by Theodore Olsen of the D.C. office of Los Angeles' Gibson, Dunn & Crutcher, has been relentless in fighting Hopkins' claims. Gesell ruled against the firm in 1985, but denied any damages to Hopkins. The D.C. Circuit upheld Gesell on the broad finding of sex discrimination and then remanded the case so Gesell could determine damages. But Price Waterhouse appealed to the Supreme Court, which in a split decision in May 1989 generally upheld the D.C. Circuit. That put the matter back before Gesell, who issued his groundbreaking decision last May.

Although the D.C. Circuit stayed Gesell's order that Hopkins be made partner, the appeals court also agreed to hear the case on an expedited basis; that put it first on the list for the new term.

Judge Edwards, who sat on the panel that heard the case back in 1987, grilled Olsen on the function of the appeals court. "You're asking us to assess the record as if we were triers of fact. We can't do that."

Olsen, however, contended that there was clear error. He compared Gesell's approach to looking for two bad apples in a barrel and ignoring the rest.

Edwards and Mikva appeared unimpressed with the argument. The onus was on Price Waterhouse to show that prejudice didn't govern their decision to withhold a partnership from Hopkins. They were given the chance by Gesell to back up their claim, but opted against another full-blown trial.

"To use your apple analogy, how hard is it to hold up an apple and say, 'This is a good apple,'" Mikva said, referring to Price Waterhouse's decision not to present new evidence to Gesell.

Ironically, the panel that considered the case had a makeup that will be increasingly rare as the court, for the first time since January 1988, operates with a full complement of 12 judges. The *Hopkins* panel was composed of two Democratic appointees and Henderson, who was nominated by President George Bush, but the overall court lineup of eight Republican and four Democratic appointees means that panels dominated by Democrats will be exceptions.

The other new judge will be on a more typical panel

when he hears his first case. Judge Raymond Randolph will sit Sept. 14 with two other Republican appointees, Judges James Buckley and Douglas Ginsburg.

Although the cases Randolph will hear are not as famous as the *Hopkins* saga, two criminal appeals raise key constitutional issues that are being closely watched.

The government is challenging district court rulings in two similar drug cases, *United States v. Lewis*, and *United States v. Cothran*. Both Stanley Sporkin, in *Lewis*, and Gesell, in *Cothran*, suppressed evidence gathered by police who boarded interstate buses stopped temporarily at Union Station.

The case will immediately test the D.C. Circuit's newest judge on his views of Fourth Amendment prohibitions against unreasonable search and seizure.

The immediate and sometimes critical impact new judges can have on an appellate court will be shown later this month on a key First Amendment case that pits the American Library Association against Attorney General Richard Thornburgh.

Randolph and Clarence Thomas, who joined the bench last spring, will sit with Chief Judge Patricia Wald on a challenge to a section of the Child Protection and Obscenity Enforcement Act of 1988. Passed with the goal of protecting minors against child pornography, the law was found unconstitutional last year by U.S. District Judge George Revercomb. The Library Association contends that the law removes "constitutionally



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protected visual depictions of the nude human form and sexual conduct from the public domain.”

Wald, with 11 years of appellate experience, could find herself outvoted by two novices.

Small World

A gathering of international judges here this week will offer a chance to review the extraordinary and unexpected explosions that have been set off by the American constitutional experiment in nations around the globe.

More than 150 veteran appellate judges from 75 nations will gather Sept. 11 to Sept. 14 at the Mayflower Hotel for the fifth International Appellate Judges Conference. The meeting is being hosted by the Judicial Conference of the United States, which is also holding a meeting of its own in mid-week.

Among those attending the international forum will be a judge from India, where an activist judiciary has expanded its constitution's due-process cause. Article 21 reads: "No person shall be deprived of his life and personal liberty except according to procedure established by law."

But the Indian Supreme Court in 1978 pronounced that the procedure established by law must be "fair, just, and reasonable, and not arbitrary, fanciful, or oppressive." This expanding right soon came to encompass the right to bail, to speedy trial, to dignified treatment in custody, to privacy, and to legal aid.

And in the 1980s, Indian Supreme Court judges developed the laws of *locus standi* into an epistolary jurisdiction. Ordinary citizens can activate the processes of the court by a simple letter written personally or on their behalf. The court, which has its own staff of investigators, can launch a probe.

Every year more than 60,000 cases pend for hearing before India's top court.

The international gathering in the District will focus on the protection of the principles of each nation's constitutional system through judicial review of executive and legislative actions. The meeting will be the first held in the United States, which has the oldest constitutional court in the world.

HALLWAY TALK . . . Former D.C. Circuit Judge **Robert Bork** still gets calls at the courthouse, says his long-time assistant **Judy Carper**. Carper, who moved with Bork to the American Enterprise Institute, knows what's happening in the old chambers because she's back at her same desk as secretary to Judge **Raymond Randolph**, a friend of Bork's.

"Federal Court Watch" appears alternately in this space with "Superior Court Watch."