

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 05-3459

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DANIELLE STANGL;  
YVETTE KOERNER

v.

PORT AUTHORITY OF ALLEGHENY COUNTY;  
WILLIAM MCARDLE

Port Authority of Allegheny County,  
Appellant

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA  
(D.C. Civil No. 02-cv-01184)  
District Judge: The Honorable David S. Cercone

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Argued: May 11, 2006

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Before: BARRY, SMITH and TASHIMA,\* Circuit Judges

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(Opinion Filed: May 22, 2006)

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\* The Honorable A. Wallace Tashima, Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

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OPINION

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BARRY, Circuit Judge

In 2002, Danielle Stangl and Yvette Koerner initiated a lawsuit against the Port Authority of Allegheny County and the Port Authority Police Chief, William McArdle,

alleging gender discrimination and retaliation. In May 2005, shortly before the case was scheduled to go to trial, the Port Authority filed a motion for summary judgment claiming that it was entitled to Eleventh Amendment immunity. The District Court denied the motion, finding that “the Port Authority is not an alter ego of the Commonwealth, and is not entitled to immunity under the Eleventh Amendment.”<sup>1</sup> (App. at 13.) The Port Authority appealed. We have jurisdiction under 28 U.S.C. § 1291,<sup>2</sup> and will affirm.

The Eleventh Amendment provides: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Subjects of any Foreign State.” U.S. Const. amend. XI. Eleventh Amendment immunity is available to states, as well as to any entity that is considered an “arm of the state.” *See Edelman v. Jordan*, 415

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<sup>1</sup> The District Court held, in the alternative, that even if the Port Authority is entitled to Eleventh Amendment immunity, “then such immunity must be abrogated in this instance to remedy the alleged unconstitutional conduct that discriminates based upon gender.” (App. at 15.) Because we agree that the Port Authority is not entitled to Eleventh Amendment immunity, we do not reach the abrogation issue.

<sup>2</sup> “Ordinarily we do not have appellate jurisdiction to review district court orders denying motions to dismiss or for summary judgment because there is no final order within the meaning of 28 U.S.C. § 1291.” *Acierno v. Cloutier*, 40 F.3d 597, 606 (3d Cir. 1994). We have jurisdiction over an order denying Eleventh Amendment immunity, however, because “the denial of a defense of sovereign immunity is immediately appealable under the collateral order doctrine.” *Bell Atlantic-Pennsylvania, Inc. v. Pa. Pub. Util. Comm’n*, 273 F.3d 337, 343 (3d Cir. 2001) (citing *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993)). As we have explained, “an order denying a defense of immunity is reviewable before trial because entitlement to ‘immunity from federal claims encompasses not only immunity from liability, but also immunity from suit.’” *Acierno*, 40 F.3d at 606 (quoting *Brown v. Grabowski*, 922 F.2d 1097, 1105 (3d Cir. 1990)).

U.S. 651 (1974). In *Fitchik v. New Jersey Transit Rail Operations*, 873 F.2d 655 (3d Cir. 1989), we synthesized the factors to be considered when determining whether an entity is an arm of the state for Eleventh Amendment purposes. We articulated a three prong analysis, and directed district courts to consider the following questions:

- (1) Whether the money that would pay the judgment would come from the state (this includes three of the *Urbano* [*v. Board of Managers*, 415 F.2d 247 (3d Cir. 1969)] factors -- whether payment will come from the state's treasury, whether the agency has the money to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts);
- (2) The status of the agency under state law (this includes four factors -- how state law treats the agency generally, whether the entity is separately incorporated, whether the agency can sue or be sued in its own right, and whether it is immune from state taxation); and
- (3) What degree of autonomy the agency has.

*Id.* at 659.<sup>3</sup>

Here, the District Court found that the first and third factors weighed against immunity, while the second factor weighed slightly in favor of it. We need not reprise those findings. Suffice it to say that substantially for the reasons set forth in the District

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<sup>3</sup> For many years, we considered the first consideration to be “the most significant factor.” *Id.* (quoting *Urbano*, 415 F.2d at 251). Recently, however, we held that we can “no longer ascribe primacy to this factor.” *Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 239 (3d Cir. 2005). Accordingly, “[w]e now accord equal consideration to all three prongs of the analysis—payment from the state treasury, status under state law, and autonomy.” See *Febres v. Camden Bd. of Educ.*, No. 05-1178, 2006 U.S. App. LEXIS 9687, at \*5 (3d Cir. April 18, 2006). In close cases, however, where “indicators of immunity point in different directions,” *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994), the Supreme Court dictates that “the principal rationale behind the Eleventh Amendment— protection of the sovereignty of states through ‘the prevention of federal-court judgments that must be paid out of a State’s treasury,’—should ‘remain our prime guide.’” *Febres*, 2006 U.S. App. LEXIS 9687, at \*5.

Court's well-reasoned opinion, we will affirm. *See Febres v. Camden Bd. of Educ.*, No. 05-1178, 2006 U.S. App. LEXIS 9687 (3d Cir. April 18, 2006).