

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
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Employment

Plaintiff and a male co-worker who were hired at the same time engaged in sexual banter during a training session. Plaintiff complained of sexual harassment to a supervisor and, after conducting an investigation, both plaintiff and the co-worker were terminated for inappropriate conduct. Plaintiff then filed an action alleging that she was terminated in retaliation for complaining about sexual harassment. Judge Janice M. Stewart found that while plaintiff had established a prima facie case, summary judgment for the employer was warranted because plaintiff failed to offer any proof that the employer's proffered reason for her discharge was pretextual. The court noted the absence of any evidence that the employer conducted its investigation in bad faith; instead, the employer was confronted with two brand new employees who both claimed that the other had engaged in a sexually charged discussion during a training session.

In a subsequent order, Judge Stewart denied defendant's motion for costs because of the economic

hardship posed to the plaintiff and the court's concern that a cost award in this circumstance might chill access to the courts. Weiler v. Petsmart, Inc., CV 02-401-ST (Opinion, March 19, 2003; Order on Costs, April 16, 2003).

Plaintiff's Counsel:

Martin C. Dolan

Defense Counsel:

Clay D. Creps

Civil Rights

Plaintiff filed a Fourth Amendment excessive force claim against several police officers arising out of injuries he sustained during an arrest. He also asserted a civil conspiracy claim against the officers for the same conduct and a Monell claim against the city with supplemental claims of battery and negligence. Judge Hubel denied the individual defendants' motion for partial summary judgment on the civil conspiracy claim. Even though the officers submitted affidavits stating that they did not form a plan regarding the use of unlawful force during plaintiff's

arrest, Judge Hubel determined that the fact that the officers had two pre-arrest meetings was sufficient circumstantial evidence to create a material issue of fact regarding the scope of the officers' agreement and thus, summary judgment for the defendants was unwarranted. Pfau v. Portland Police Bureau, et al., CV 01-1060-HU (Opinion, May 13, 2003).

Plaintiff's Counsel:

Randall Vogt

Defense Counsel:

Mary T. Danford

Insurance

Judge Janice M. Stewart held that one insurance company owed a duty to defend claims filed against its corporate insured. An employee of the insured had been accused of sexual misconduct with two minors during the course and scope of his employment. The court held that claims of negligent hiring and supervision constituted an "occurrence" during the relevant time period sufficient to trigger a duty to defend. Thus, the defendant insurance company was liable for contribution claims to

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legal defense costs incurred by the plaintiff insurance company. The court held that the allocation of defense costs should be in the same ratio as the allocation of contribution and indemnity for the underlying action using a “time on the risk” method. TIG Ins. Co. v. Travelers Ins. Co., CV 00-1780-ST (Opinion, March 24, 2003; Supplemental Order, April 28, 2003).

Plaintiff’s Counsel:

Diane L. Polsker

Defense Counsel:

Darsee Staley

Contracts

Judge Anna J. Brown granted a plaintiff’s motion for partial summary judgment against an affirmative defense of mutual mistake under a lease agreement. The court held that the defense was unavailable because the unambiguous terms of the lease allocated the risk of any mistake regarding defendant’s ability to operate its business on the leased property to the defendant. Thus, defendant’s mistake about its ability to comply with local noise ordinances did not provide a basis for rescission. Griffin Oaks Business Park LLC v. Hertz Equipment Rental Corp., CV 02-369-BR (Opinion, Mary 13, 2003).

Plaintiff’s Counsel:

Gregory J. Miner
Defense Counsel:
Edwin C. Perry

Environment

Judge Redden found that NOAA Fisheries (fka NMFS) conclusion, based on a reasonable and prudent alternative (RPA) in a December 2000 biological opinion, that continuing dam operations under the Federal Columbia River Power Systems (FCRPS) would not jeopardize the existence, or adversely modify the habitat of 12 threatened or endangered salmon species, was arbitrary and capricious under the Endangered Species Act (ESA). The court found that the RPA improperly relied on future federal mitigation actions that had not undergone consultation required by section 7 of the ESA, and non-federal regional, state, tribal and private mitigation actions that were not reasonably certain to occur. The court also found that NOAA Fisheries definition of action area in the biological opinion for purposes of determining the geographic scope of the mitigation actions necessary to avoid jeopardy to the salmon species was too narrow, and was therefore, also arbitrary and capricious. The

court remanded the biological opinion to NOAA Fisheries for a period of one year to provide an opportunity for NOAA Fisheries either to correct the deficiencies in the biological opinion or to recommend other strategies to avoid jeopardy to the salmon species. National Wildlife Federation v. National Marine Fisheries Service, CV 01-640-RE (Opinion, May 7, 2003).

Plaintiffs' Counsel: Todd True
Defense Counsel:

Fred Disheroon

Attorney Fees

Judge Janice M. Stewart granted a defense motion for attorney fees incurred in responding to a discovery motion. However, the court discounted the request for block billing and excessive hours. Judge Stewart concluded that 15 hours to draft a 4 page response on a “simple” legal issue was unreasonable. The court noted that San Francisco defense counsels’ usual hourly rates of \$300 and \$250 were properly discounted for the Portland market to \$200 and \$175. Revels v. UPRR, CV 01-157-ST (Order, Feb. 11, 2003).

Plaintiff’s Counsel:

Craig Crispin

Defense Counsel:

Austin W. Crowe, Jr.