

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

In an ADA case in which the jury awarded plaintiff approximately \$193,000 in compensatory and punitive damages, Judge Hubel denied defendant's post-trial motions for judgment as a matter of law and new trial. Judge Hubel rejected defendant's arguments that there was insufficient evidence to sustain the verdict on plaintiff's "regarded as" disabled claim. Judge Hubel noted that the case was tried on alternative theories of disability, each of which had factual disputes and that certain facts, applicable to both theories, could be construed differently in support of one theory or another. Although the jury had found in defendant's favor on the actual disability claim, when the evidence was viewed in a light most favorable to the "regarded as" claim, the verdict was supported by substantial evidence. Judge Hubel also rejected a due process challenge to the amount of punitive damages and awarded plaintiff's costs, other litigation expenses, and attorney's fees based on hourly rates of \$125-\$150. Clark v. Peco, CV 97-737-HU (Opinion, April, 1999 - 30 pages).

Plaintiff's Counsel: Eric Fjelstad
Defense Counsel: Edward McGlone

ADA

An autistic high school student won the right to play softball in competitive games following the entry of a preliminary injunction. Plaintiff is a member of a junior varsity softball team who has only been allowed to participate in practice drills based upon the school district's concern for her safety and that of other players. Plaintiff's doctor testified that plaintiff was capable of playing in games and posed no threat of harm. Defendant claimed that plaintiff had difficulties with focus, yet agreed that her skills were "average" and comparable to that of several other players.

Judge Garr King found that plaintiff was likely to prevail on her claim that the district's actions violated the Americans with Disabilities Act (ADA) since the district failed to demonstrate a reasonable probability that allowing plaintiff to participate would result in substantial injury. The court ordered the district to allow plaintiff to participate in intrasquad games and precluded the defendant from excluding her from participation in competitive games based upon her autism. Inskip v. Astoria School Dist. II, CV 99-515-KI (Order, April 26, 1999 - 5 pages).

Plaintiff's Counsel: Charles Levin
Defense Counsel: Nancy
Hungerford

Tort Liability

Plaintiff's son was killed when a soft drink vending machine fell on him. Judge King denied The Coca-Cola Company's motion for summary judgment on January 12, 1999, after concluding that the company might be liable under the Restatement (Second) of Torts § 400 for "putting out" the vending machine as its own product.

Because of the lack of Oregon law on the issue, Judge King invited the company to renew its motion after further research. Recently, Judge King dismissed The Coca-Cola Company based on its renewed motion. Further research revealed that § 400, which had been replaced with § 14 in the third edition of the Restatement, was generally only applied to entities that sold the allegedly defective product, and not to companies who put a trademark on the product and were involved in minor ways to preserve the value of the trademark. Ellis v. Dixie-Narco, CV97-1619-KI, (Opinion April 19, 1999).

Plaintiff's Counsel: Michael Shinn
Defense Counsel: Phillip Chadsey

Fraud

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A plaintiff with a \$10.9 million uncollectable judgment filed an action against corporations that had engaged in commercial transactions with the debtor just prior to the debtor's inability to pay the plaintiff's bills. Plaintiff argued that the debtor was a Thailand corporation that was unable to pay the debt due to the Asian financial crisis. The defendant had sold the debtor several pieces of equipment for over \$6 million but the equipment was never delivered and remained in a U.S. warehouse. Thereafter, the defendant re-purchased the same equipment for \$700,000.

Plaintiff moved for summary judgment on its fraudulent transfer claim. Judge Ann Aiken noted that to establish such a claim, plaintiff must prove that the debtor was insolvent at the time of the transfer and that the equipment was sold for less than fair value. The court found no factual rebuttal to the plaintiff's claim of insolvency due to a presumption arising from the fact that the debtor had debts of over \$190 million. However, the court found genuine factual issues regarding the proper valuation of the equipment and the appropriate valuation method and denied summary judgment on this element. Fullman Int'l v. KLA-Tencor Corp., CV 98-961-AA (Opinion, April, 1999 - 8 pages).

Plaintiff's Counsel: Art Tarlow
Defense Counsel: Michael Halligan

Procedure

A defendant who files an answer prior to raising an objection to service of process has waived the objection under Fed. R. Civ. P. 12(h). Judge James Redden also held that a plaintiff's claims were tolled under O.R.S. 12.150 and were not barred by a statute of limitations even though filed and served beyond the limitations period where the defendants resided out of state. Herndon v. Uberti (U.S.A.), Inc., CV 98-1018-RE (Opinion, April 5, 1999 - 5 pages).

Plaintiff's Counsel:
Nikolaus Albrecht
Defense Counsel: Jonathan Hoffman

Costs

Judge Garr King held that all costs normally associated with the taking of a deposition are recoverable under 28 U.S.C. § 1920, including costs for shipping and ASCII disks. The court also noted that depositions need not be indispensable but need only be reasonably necessary as viewed at the time they are taken for costs to be recoverable. The court reduced a photocopy fee by half, finding that a bate stamp charge of \$.06/page and copying charges of \$.16-.21/page were excessive. Durham v. City of Portland, CV 98-138-KI (Opinion, April 7, 1999 - 5 pages).

Plaintiff's Counsel: Thane Tienson
Defense Counsel: Jennifer Johnston

Attorney Fees

Get out your editing pencils. Federal judges have long touted the virtues of brevity and now one has rewarded it monetarily. A defendant objected to plaintiffs' request for 10.9 hours for preparing a complaint and requests for admission and production as "excessive" given the brevity of the documents. Judge Donald Ashmanskas rejected the argument explaining, "The fact that Plaintiffs' counsel took the time to pare the documents down to the essential allegations and relevant facts is appreciated immensely by the court. This judge spends a vast amount of time reading hastily prepared pleadings in which attorneys have included every possible argument and every known fact rather than spend the time needed to determine what arguments are truly valid and what facts are truly relevant. 'Less is more.'" Ijas v. City of Portland, CV 98-1382-AS (Findings and Recommendation, March 22, 1999 - 2 pages; Adopted by Judge Marsh, April 28, 1999 - 2 pages).

Plaintiffs' Counsel: Donald Dartt
Defense Counsel: Bill Manlove, III

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