

# COURTHOUSE NEWS

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

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## Criminal Law

Judge Haggerty denied a motion to suppress involving a confrontation between three police officers and a patron at a private social club in Portland. Defendant's arrest arose from events occurring on 10 December 1998. At approximately 9:30 p.m. on that date, three Portland Police Officers responded to an incomplete "911" telephone call originating from a private social club called "Cleo and Lillian's." Upon arriving at the club, the officers spoke with the club's manager. The manager acknowledged that he had placed the 911 call earlier that evening because two patrons had been fighting. Although the manager testified that he ended this call because the situation had been resolved, the 911 dispatcher and the officers who were subsequently contacted had no way of knowing this. When the three police officers arrived at the club pursuant to the emergency call, the manager did not send them away. Instead, he directed the officers to defendant and his companion, and agreed that the men should be removed from the premises.

The officers proceeded to confront defendant and his companion, who were sitting together toward the back of the club. A stereo speaker was amplifying

loud music behind defendant. As the three officers approached the men, Officer Besner noticed that the table at which they were sitting blocked a view of the men's hands. Officer Besner requested that the men place their hands on top of the table. Defendant's companion complied with the request immediately. Defendant failed to comply until the request had been repeated several times. Officer Besner testified that he was required to shout at defendant because of the loud music behind him. The testimony elicited at the hearing indicates that the officers effectively surrounded defendant. The men were then asked to produce identification. Defendant explained that he had left his identification at home, and asked why the officers were bothering them. Defendant again placed his hands under the table, and appeared to be moving his hands under the table. Officer Besner repeated his request for defendant to leave his hands palm-down on the table, and seized defendant's left arm to pull his hand from under the table. Because the loud music from the speaker behind defendant made communicating with defendant difficult, the officers asked defendant to stand up and step over to a nearby bar. As defendant stood up, Officer Besner saw defendant's left hand drop below the

table again. Officer Besner seized defendant's right arm, and saw that defendant held a plastic bag in his left hand near his waist. The officers found crack cocaine in the bag defendant held, and in several bags underneath defendant's chair. Defendant was arrested and subsequently charged with one count of possession with intent to distribute a cocaine base.

Defendant sought to suppress the seizure of the cocaine base and his statements subsequent to his arrest, arguing that his detention at the club should constitute an unreasonable seizure in violation of the Fourth Amendment of the United States Constitution, since it was unsupported by a reasonable and articulable suspicion that he was engaging in, or about to engage in, criminal activity.

The only officer to testify at the suppression hearing was Officer Besner. Although this officer testified that he was responding to an emergency 911 telephone call, and that the manager at the club had admitted making the call and had asked him to remove defendant from the premises, Officer Besner also testified that he had no reasonable suspicion that criminal activity had occurred or was occurring when he approached defendant and his companion. He described the two men as "sitting casually" at their

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table when he saw them.

Judge Haggerty denied the motion to suppress notwithstanding this testimony. He held that regardless of whether an officer subjectively entertains a specific and articulable suspicion, a basis for suspicion could exist under a standard of objective reasonableness, and an objective assessment of an officer's actions in light of the facts and circumstances confronting him or her at the time.

Under the facts as presented by the parties, there is no dispute that defendant was detained and temporarily "seized." The officers' conduct was justified, however, because under an objective analysis of the totality of circumstances at the time of the confrontation with defendant, there was a basis for an articulable, reasonable suspicion to justify a brief detention of - as well as inquiries made to - defendant. Moreover, an officer attempting to make an investigatory detention may properly display some force when it becomes apparent that an individual will not otherwise comply with his or her requests. Officers may momentarily restrict a person's freedom of movement to maintain the status quo while making an initial inquiry, provided the force displayed is not excessive under the circumstances. Defendant's motion to suppress was denied. United States v. Allen, CR 99-105-HA (Opinion, 20 May 1999 - 10 pages).

Plaintiff's Counsel: John F. Deits  
Defense Counsel: Ruben Iniguez

## Employment

After a six-day trial, the jury returned a defense verdict in Byer v. Oregonian Publishing Company, CV97-1170-KI. Plaintiff, a former assistant of photography who was terminated by The Oregonian, alleged a claim of disparate treatment sex discrimination under Title VII and ORS Ch. 659. Judge King also entered judgment for defendant on the state claim, which is tried to the court. He had previously granted summary judgment against her fraud, wrongful discharge, and statutory retaliation claims.

7 A warehouseman filed an action against his former employer under ORS 654.062 alleging that he was constructively discharged in retaliation for complaints regarding defendant's failure to enforce a no-smoking policy in the workplace. Judge Janice Stewart held that plaintiff was not required to administratively exhaust remedies with BOLI prior to filing a court action, noting that the statute provide alternative private remedies. However, the court held that the 30-day deadline applicable to the filing of a BOLI complaint also applied to the filing of a court action. The court rejected the plaintiff's argument that ORS 12.110(1) or ORS 659 provided the applicable limitations period. Because plaintiff filed his complaint more than 30 days following the challenged action, his complaint was dismissed as time barred. Cristofolo v. Unisource Worldwide, Inc., CV 98-

1627-ST (Opinion, May, 1999 - 8 pages).

Plaintiff's Counsel: William Later  
Defense Counsel: Victor Kisch

## Commercial Law

Judge Garr M. King held that a warehouse limitation of liability clause was enforceable under Oregon law and thus, limited its liability to \$.50/pound for items stored. However, the liability limitation did not insulate the warehouse from liability for consequential damages due to the delivery of the wrong product. Int'l Nickel, Inc. v. Rudie Wilhelm Warehouse Co., CV 98-1319-KI (Opinion, May 26, 1999 - 6 pages).

Plaintiff's counsel: Barnes Ellis  
Defense Counsel: David Hosenpud

### Poetic Justice?

From a recent "unpublished" Ninth Circuit disposition, "The district court did not abuse its discretion when it denied [plaintiff's] motion to amend his complaint. The proposed spoliation of evidence claims were nothing more than chimeras formed from the vapors of counsel's impressions about a few stray wisps of fact." [Do you suppose that the author of such a complaint actually understood this?]

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