

COURTHOUSE NEWS

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

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ADA

Plaintiff filed a class action on behalf of all disabled persons who received medical services from the Oregon Health Sciences University. On cross-motions for summary judgment, Judge Stewart held that OHSU complied with ADA notice requirements regarding patient rights. The court rejected plaintiff's claim that the notice given was inadequate because it failed to specifically advise patients of their rights of "reasonable accommodation" and failed to specifically mention the ADA or the Rehabilitation Act. The court noted the absence of any case law or administrative regulations regarding how a public entity must satisfy the ADA's notice requirement and found that the general regulations conferred broad discretion on the entity to determine notice contents and the methods of distribution.

The court further found that OHSU had a grievance procedure in place that patients could invoke, however, the patient procedure failed to provide sufficient due process because it failed to include a hearing before a neutral decision-maker. The court held that such a hearing must be part of the grievance process and thus, defendant could not simply rely upon separate federal administrative

remedies. Harris v. Oregon Health Sciences University, CV 98-1-ST (Opinion, Jan. 19, 1999 - 12 pages).

Plaintiffs' Counsel: Spencer Neal
Defense Counsel: Mark Wagner

Product Liability

The housekeeper for a motel attempted to purchase a soda from a vending machine located on the motel's premises. When the machine failed to produce the soda, he shook it until it fell over and crushed him to death. His estate then filed an action against the soda distributor and the national soda company claiming negligence in the design and placement of the machine. The national soda company sought summary judgment on grounds that it neither manufactured nor designed the machine.

Noting the absence of any Oregon authority on point, Judge King denied summary judgment relying upon the Restatement of Torts. The court found that evidence that the national soda company had design and performance criteria for vending machines and required that all machines go through an authorization process was sufficient to expose the company to liability. The court rejected the defense claim

that its reliance upon UL safety standards relative to the design of the machine (as opposed to product quality specifications) should shield it from liability. Ellis v. Dixie-Narco, CV 97-1619-KI (Opinion, Jan. 12, 1999 - 6 pages).

Plaintiff's Counsel: Michael Shinn
Defense Counsel: Phillip Chadsey;
Christopher Angius; Barry Mount

Procedure

Judge Panner denied a defense motion to transfer an action to the District of Maine. The court noted that while many of the witnesses and most of the documents were located in Maine, plaintiffs were willing to travel to Maine for depositions and document review. Further, the court found that Maine law would apply to eight of the claims but Oregon law would apply to three claims. The court accorded deference to plaintiff's choice of forum and noted that a transfer would delay trial. Columbia Housing SLP Corp. V. Glickman, CV 98-259-PA (Order, July 30, 1998).

Plaintiff's Counsel: Michael Kelly
Defense Counsel: Steven Blackhurst

Criminal Law

A defendant convicted of violations of the Arms Export

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Control Act filed a motion for a new trial on grounds he had been denied an adequate interpreter. The defendant was born and raised in Taiwan but had lived in the U.S. since 1982. A Mandarin Chinese interpreter was present throughout most of the trial, but no interpreter was present during voir dire and one morning of trial.

The court found that the defendant was fluent in English and thus, the absence of an interpreter for the entire proceedings did not violate the Court Interpreters Act. The court further found that the defendant was also fluent in Mandarin Chinese such that he could understand the interpreters provided for him at trial. The court noted that the defendant raised no objection to the interpreters provided at trial until after his conviction. The court further found that the defendant agreed to continue the trial during the two brief periods in which no interpreter was present. The court also rejected the opinion of a psychiatrist who opined that defendant was unable to understand the proceedings, noting that the psychiatrist was not a linguist and had spoken with the defendant for only an hour. United States v. Cheng, CR 97-412-MA (Opinion, Jan. 22, 1999 - 12 pages).

AUSA: Charles Gorder, Jr.
Defense: David McDonald

Employment

A disabled employee whose condition was exacerbated by a supervisor's allegedly "aggressive"

management style failed to state a claim for failure to accommodate when her employer refused to reassign her to another permanent position. The court also rejected plaintiff's request that her supervisor undergo counseling to alter her style so as to avoid causing plaintiff stress. The court followed a number of other jurisdictions in holding that a change in supervisors is not a reasonable accommodation because it impermissibly interferes with the employer's personnel decision-making authority.

However, the court denied the employer's motion to dismiss plaintiff's disparate treatment claim. The employer argued that its transfer of the plaintiff to a temporary position with no change in pay or benefits necessarily meant that plaintiff could not show that she suffered any adverse employment action, a necessary element of a prima facie disparate treatment case. Judge Marsh found that a transfer could in fact constitute an adverse action if it constituted an effective demotion. Because this inquiry is fact specific, the court held that dismissal was inappropriate.

Plaintiff's claim of a hostile work environment was also dismissed because she failed to allege any actual harassment. The court noted that while no Ninth Circuit decision had indicated if a hostile environment claim was possible under the ADA, several other courts had assumed that such a claim would be viable. However, plaintiff claimed only that on two occasions she had told her

supervisor about her disability and her supervisor indicated that plaintiff's disability was her own problem and not that of the company. While such evidence may be relevant to plaintiff's disparate treatment claim, these two isolated instances failed to state a claim for hostile environment. Myers v. PGE, CV 98-1203-MA (Opinion, Jan. 26, 1999 - 12 pages)

Plaintiff's Counsel: Loren Collins
Defense Counsel: Peter Koehler, Jr.

ERISA

An employer who failed to give notice to an employee of her rights to continue health coverage following her severance was assessed approximately \$6,000 in statutory penalties. The court noted that the absence of any bad faith mitigated the damage demand of \$54,000, and further found that plaintiffs should not recover actual medical expenses since the premiums they would have paid had they continued coverage exceeded their actual expenses. Weighing several equitable factors, Judge Jones held that some penalty was necessary to punish the plan administrator for "sloppy record-keeping." The court awarded the plaintiff husband and wife \$20/day for the period between severance and the date the husband was eligible for coverage in his new job; the court awarded \$5/day following service of the complaint and \$50/day through the remaining 18 month period for defendant's failure to give notice even after service of

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the complaint. Al-Sabt v. Equity Group Investments, Inc., CV 97-1540-JO (Opinion, Jan. 25, 1999 - 10 pages).

Plaintiffs' Counsel: Elissa Ryan
Defense Counsel: Carter Mann

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