

COURTHOUSE NEWS

A Summary of Topical Highlights from decisions of the
U.S. District Court for the District of Oregon
A Court Publication Supported by the Attorney Admissions Fund
Vol. V, No. 20, September 2, 1999

Employment

Whether a total abstinence provision of a last chance agreement constitutes a "reasonable accommodation" will have to be decided by a jury. So held Judge Marsh when he adopted Judge Hubel's Findings and Recommendation in Ward v. Esco, CV 98-1290-HU.

The plaintiff is a sawmill operator who showed up for work one day in a state of alleged visible intoxication. Plaintiff's supervisor took him to a nurse's station and she administered a urine test for drugs and a saliva test for alcohol. Plaintiff registered a .14 for alcohol, but contested the accuracy of the test and denied being intoxicated while at work. The employer responded with a Last Chance Agreement requiring that plaintiff successfully complete a treatment program and completely abstain from the use of alcohol.

Plaintiff conceded that, following his admission to a treatment program, he suffered a relapse. Plaintiff was not released from the program, nor was did the relapse (and subsequent intoxication) occur at work. The employer terminated plaintiff for failing to maintain total abstinence.

Judge Hubel noted that

terminations pursuant to Last Chance Agreements were specifically sanctioned by the Ninth Circuit. The court accepted plaintiff's claim that his challenge was not against the termination, but rather was directed against the reasonableness of the total abstinence condition itself. Plaintiff argued that this portion of the Last Chance Agreement violated the ADA's "reasonable accommodation" requirement.

Judge Marsh noted that there is also Ninth Circuit authority which permits an employer to terminate an employee for conduct which takes place outside of the work setting. However, such actions have typically occurred where the employee commits a criminal or highly egregious action-- the type of activity which would subject any employee to termination regardless of whether or not that employee suffered from an addiction problem. Judge Marsh also noted that the ADA focusses upon what an employer can do to control activity "within the workplace." The court therefore concluded that whether a total abstinence restriction constituted a "reasonable" provision fell within the Ninth Circuit's general rule that the reasonableness of accommodations present issues of fact which should be decided by

the jury. (F&R, July 16, 1999 - 16 pages; Adopted by Order, August 20, 1999 - 6 pages).

Plaintiff's Counsel: Peter Fels
Defense Counsel: Jack Schwartz

7 Judge Dennis James Hubel denied a defense motion for summary judgment in a case involving a worker who claimed that she was constructively discharged following jury service. Plaintiff had been working a 40 hour flexible schedule week for several years. Immediately following her call for jury service, plaintiff came under the direction of a new supervisor who told plaintiff that her jury service was causing problems for the company. The new supervisor refused to allow plaintiff to continue her flexible schedule. Plaintiff also alleged that when she returned from jury duty she was excluded from meetings and programs and unfairly criticized.

Judge Hubel rejected the defense argument that plaintiff's claim of common law wrongful discharge should be rejected based upon the availability of statutory remedies. The court held that the critical inquiry was whether the statute provided adequate remedies. Because Oregon law provides for

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only equitable relief and a \$500 fine, Judge Hubel found the remedy inadequate. The court further noted that the equitable remedy of reinstatement would be particularly inappropriate in a constructive discharge setting. Judge Hubel also rejected the defense claim that plaintiff failed to identify sufficient factual support for her claim that her working conditions were intolerable. The court found that the plaintiff's prior work history was a relevant basis for comparison and tended to support her claim of intolerable working conditions. Halbasch v. Med-Data, Inc., CV 98-882-HU (Opinion, Aug. 4, 1999 - 11 pages).

Plaintiff's Counsel: Victor Calzaretta

Defense Counsel: Carter Mann

7 Judge Jones granted a defense motion for summary judgment based upon the plaintiff's inability to counter the defendant's proof that it did not employ 15 or more employees for a continuous 20 week period. The court rejected plaintiff's affidavit and that of her husband regarding their general belief that defendant employed the requisite number of workers for the requisite hours and found that the employer's payroll and tax records established that the defendant did not fall within Title VII's definition of an employer. The court also dismissed plaintiff's supplemental state claims. Wallace v. Smith & Smith Construction, Inc., CV 99-446-JO (Opinion, August, 1999 - 6 pages).

Plaintiff's Counsel: Charese Rohny
Defense Counsel: Donna Sandoval

Product Liability

In January, Judge Haggerty granted a motion to dismiss on grounds that plaintiff failed to timely and properly serve process. Plaintiff, who was blinded in one eye when a cigarette lighter she used exploded, moved for reconsideration of the dismissal order.

In his original opinion, Judge Haggerty ruled that plaintiff's attempted service of the Phillip Morris defendants to the Oregon Secretary of State was a nullity. The first appropriate service of the Phillip Morris defendants was plaintiff's mailing of the Summons and Complaint to defendants' agent and principal place of business which occurred more than 60 days after plaintiff's complaint was filed, and more than two years after the date upon which it appeared that plaintiff's claims accrued. The court held that plaintiff's service failed to relate back under ORS 12.020, and thus her claims were barred by the applicable statute of limitations.

Because an action in Oregon does not accrue until the plaintiff has obtained knowledge, or reasonably should have obtained knowledge of the tort committed upon her person by defendant, however, Judge Haggerty granted reconsideration of the dismissal

order. In this case, plaintiff submitted an affidavit stating that she was confined to bed for one week after losing the sight in her right eye, but that as soon as she was able, "she began to investigate the source of the cigarette lighter." Plaintiff avers that the "source could not be determined from the fragments of the lighter remaining after the explosion."

Plaintiff provided to the attorney pieces of the exploded lighter, as well as promotional materials and similar lighters she had collected. The attorney found the words "Philip Morris Inc." in small type on the promotional material.

Judge Haggerty concluded that the defendants' possible involvement was not "inherently discoverable" at the time of plaintiff's injury. Since Oregon's "discovery rule" is designed to give plaintiffs a reasonable opportunity to become aware of their claim, plaintiff was deemed to have acted reasonably in becoming aware of the defendants' possible tortious conduct within three months of being blinded in her right eye. The subsequent service to those defendants, therefore, was found to be timely. Cook v. Djeep, CV 98-669-HA (Opinion, August 19, 1999) Plaintiff's Counsel (solely for purposes of reconsideration):

Susan Eggum
Defense Counsel: David Ernst

Insurance

Defendant, the prime contractor on the Fox Tower construction

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project, subcontracted with another company to perform work on the project. Plaintiff insurer issued a commercial general liability insurance policy to the subcontractor. After problems arose on the project, the prime contractor filed an action against the subcontractor in state court and was awarded damages and attorney fees. Judge King held that the policy did not cover the attorney fee award on its face because of the contractual liability exclusion. Application of California law, however, provided coverage for a portion of the attorney fee award because the California Civil Code considers attorney fees authorized under a contract to be costs, which were covered by the policy.

Gerling America Ins. Co. v. Wagner Construction Co., CV98-1156-KI (Opinion, Aug. 30, 1999)
Plaintiff's Counsel: Douglas Houser
Defense Counsel: Gary Abbott