

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

In a follow-up to an earlier decision, Judge Ancer Haggerty granted a motion for reconsideration of a suppression order. After receiving and reviewing additional documentation from the Portland Police Bureau, the court held that an officer's decision to have a car towed was constitutionally sound because the officer lacked discretion not to have the vehicle towed. However, the court found that the officer still had unfettered discretion on the issue of whether to permit the defendant to remove personal items from the vehicle prior to the inventory search. Based upon this finding, Judge Haggerty affirmed his prior suppression order and held that the search was unconstitutional. United States v. Ernest Abbit, CR No. 98-208-HA (Opinion, Dec. 23, 1999 - 5 pages).

AUSA: Pamala Holsinger
Defense Counsel: Tom Coan

Civil Rights

A police officer who shot and killed a drive-by shooting suspect acted in an objectively reasonable manner as a matter of law and thus, was entitled to summary judgment. The facts were uncontested. The decedent was a suspect in a drive-by shooting incident and was stopped by police after attempting to elude the officers. The suspect stepped out of his car, ignored the officers' directions to get back into the car, and grabbed for his waist band and pulled out a firearm. The suspect then started to run and one of the officers at the scene fired a single shot into the suspect's back. The suspect was later discovered dead in a residential backyard with a loaded firearm on his person. It was later determined that the suspect's firearm was in fact used in the drive-by shooting incident and the suspect was positively identified by the victims as the shooter. The decedent's estate filed a civil rights action claiming that the shooting was racially motivated and that it constituted excessive force.

Judge Janice Stewart noted that the plaintiff failed to produce any evidence of racial motivation. The court further found, based upon the undisputed facts, that the officer was justified in using deadly force because he had probable cause to believe that the suspect had been involved in a crime involving the infliction of serious physical harm, because the suspect threatened police officers with a weapon and because the suspect posed a threat of harm to the community during flight. Keller v. City of Portland, CV 98-263-ST (Findings and Recommendation, November 5, 1999 - 20 pages; Adopted by Order of Judge Haggerty, Dec. 17, 1999).

Plaintiff: Pro Se
Defense Counsel:
J. Scott Moede, Mark Moline

Labor

Judge Garr King certified a collective FLSA action under § 216, but limited certification to notice and discovery. Plaintiffs are former employees who allege that

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the defendant maintained a policy of failing to pay overtime wages, encouraging employees to work off the clock and altering time records to reduce overtime obligations.

The court declined to certify a class pursuant to Fed. R. Civ. P. 23 at this time because it would be difficult to fashion an effective notice to prospective class members and because he found that it would be prudent to wait and see how many employees and/or former employees opted into the collective action. Thiebes v. Wal-Mart, Inc., CV 98-802-KI, 1999 WL 1081357 (Dec. 1, 1999).

(*Note: this opinion is only available on Westlaw; it is not available via e-mail).

Plaintiffs' Counsel:

Sean Donahue

Defense Counsel:

David Hosenpud

Education

The parents of a disabled child filed an appeal from an administrative decision under the IDEA. The sole issue on appeal was the applicable statute of limitations period. Judge Robert E. Jones noted that when Congress fails to specify a limitations period, the court must look to the most analogous state law provision and then must determine if application

of that limitations period is consistent with federal policy.

The administrative hearings officer held that the Oregon Tort Claims Act 2-year limitations period applied. On appeal, petitioners urged the court to adopt the 6-year limitations period from O.R.S. 12.080(2) for actions premised upon statutory violations.

Judge Jones noted that this was an issue of first impression in this district. The court found that the 6-year period for actions premised upon statutes was the most analogous state provision and that application of such a time frame was consistent with the federal statutory framework and policy. Accordingly, the court granted the appeal and remanded the action to the hearings administrator for further proceedings. S.V. v. Sherwood School Dist., CV 99-1109-JO (Opinion, Dec., 1999 - 19 pages).

Plaintiff's Counsel:

Mary Broadhurst,

Jerry Goodman

Defense Counsel:

Richard Cohn-Lee

Maritime

Judge Ann Aiken granted a defense motion for summary judgment in a maritime personal injury claim. The court held that where the undisputed facts showed

that the moving defendant (the local agent for the vessel's time charterer) exercised no control over any of the circumstances allegedly giving rise to the injury, there was no "duty" giving rise to negligence liability. Pendergraft v. Baja Bulk Carriers, S.A., CV 99-254-AA (Order, Jan. 5, 2000 - 4 pages).

Plaintiff's Counsel:

Jeffrey Mutnick

Defense Counsel:

Thomas McDermott

Correction

The 12/21/99 issue erroneously reported that Judge Hubel had found in Carey v. United Air Lines, CV 99-604-HU, that plaintiff failed to allege an "accident" as that term is defined by the Warsaw Convention. In fact, Judge Hubel did find that plaintiff had alleged an "accident," but held that he could not recover because he did not suffer a compensable injury. We apologize for any confusion.

Recommendation

For a good chuckle and an example of some fine judicial draftsmanship, go to <http://www.ce9.uscourts.gov> and check out Judge Kozinski's recent dissent from the denial of a petition for rehearing en banc in

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Wendt v. Host International, Inc.,
No. 96-55243 (December 28,
1999).