

# 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  
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## Employment

Plaintiff was terminated for tardiness, excessive absenteeism and performance issues following several months of progressive discipline. Plaintiff filed an action against his former employer asserting that his termination was the result of retaliation because plaintiff had asserted his rights under the state and federal Family Medical Leave Acts (FMLA) and because plaintiff had filed a BOLI complaint. Judge Robert E. Jones granted a defense motion for summary judgment against plaintiff's common law wrongful discharge claim, claims under the Oregon and federal FMLA statutes, and O.R.S. 659 on grounds that plaintiff failed to produce evidence of a causal connection between his protected activities and his termination. The court denied a defense motion for summary judgment against a claim that the defendant interfered with plaintiff's FMLA rights by denying a leave request, noting that there was a factual dispute as to whether plaintiff had actually given his leave request to his supervisor.

The court granted summary judgment against plaintiff's retaliation claims under 42 U.S.C. § 1983, based upon the absence of any evidence to show the existence of an official policy or custom as to the county defendant. The court granted summary judgment on this claim as to the individual, supervisory defendant due to the absence of evidence that she intended to infringe plaintiff's FMLA rights. Price v. Multnomah County, CV 99-1593-JO (Opinion, Jan., 2001).

Plaintiff's Counsel:

Don Potter

Defense Counsel:

Agnes Sowle

**7** Two managers who participated in the drafting of an anonymous letter that addressed concerns regarding potential wage and hour law violations were not entitled to maintain unlawful retaliation claims under Federal or Washington wage and hour laws. Judge Ann Aiken held that the plaintiffs merely took action consistent with their management responsibilities and thus, fell beyond the purview of the acts' coverage.

The court also granted the defense motion for summary judgment against a tortious interference with contract claim against an individual defendant on grounds that all acts asserted fell within the scope of her employment. The court also rejected intentional infliction of emotional distress and defamation claims for insufficient evidence to sustain prima facie cases. Merrill v. Columbia River Mental Health Services, CV 99-1589-AA (Opinion, Feb., 2001).

Plaintiffs' Counsel:

Craig Crispin

Defense Counsel:

Maryann Yelnosky

**7** Plaintiff filed an action against his former employer alleging that he was terminated because his employer failed to reasonably accommodate him following hip replacement surgery. Defendant moved for summary judgment on grounds that plaintiff was not "disabled" or "qualified."

Judge Anna J. Brown denied the motion. On the disability issue, the court found that plaintiff's own testimony was sufficiently

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bolstered by an affidavit from a certified rehabilitation counselor who opined that plaintiff was precluded from working in 26 categories of jobs for which he would be qualified but for his physical condition. The defense argued that plaintiff was not disabled because he was in fact working in his own contracting business. Defendant also argued that the rehab counselor's affidavit was too vague and conclusory to defeat summary judgment. Judge Brown disagreed with both assertions, noting evidence that plaintiff had to turn down certain jobs that were too physically demanding and reported an inability to maintain a regular work schedule.

Judge Brown also rejected a defense claim that plaintiff was not "qualified" for his former position. The court held that a reasonable factfinder could conclude that the defendant was liable under the ADA because it failed to engage in the statute's mandated interactive process to determine if a reasonable accommodation could be reached. Vanderpool v. Sysco Food Services of Portland, Inc., CV 99-1118-BR (Opinion, April 16, 2001).

Plaintiff's Counsel:

Rick Klingbell

Defense Counsel:

Mary Merten James

## Social Security

Judge Robert E. Jones granted a motion to remand a social security claim. The court held that the ALJ improperly discredited a treating and examining physicians' disability opinions based upon a fibromyalgia diagnosis. Judge Jones noted that the ALJ's proffered reason regarding the absence of medical evidence in the record to support the diagnosis was simply wrong. However, because the evidence in the record did not compel a conclusion that the claimant was totally disabled from any work, the court remanded for further proceedings instead of directing an award of benefits. Rogers v. Commissioner, CV 00-145-JO (Opinion, March, 2001).

Plaintiff's Counsel:

Tim Wilborn

Defense Counsel:

William Youngman

## Insurance

In a diversity action, a landlord sought to establish coverage for losses sustained from a tenant's methamphetamine laboratory operation. At issue was whether a policy exclusion was valid under the point size and capitalization requirements set forth in O.R.S. 742.246(2). The statute requires that policy exclusionary language be printed in at least 8 point type and

in upper case letters. The policy language at issue was in 12 point type and a mixture of upper and lower case letters.

Judge Jelderks noted the absence of any controlling authority. The court concluded that the Oregon Supreme Court would likely hold that the statute permits the use of upper and lower case letters, so long as all of the letters are at least 8 point in size. The court also reviewed the actual policy and found that the exclusions were clearly set forth, consistent with the overall intent of the Oregon statute. Salvador v. Allstate Ins. Co., CV 00-1491-JE (Opinion, April 4, 2001).

Plaintiff's Counsel:

Robert E.L. Bonaparte

Defense Counsel:

Dianne K. Dailey

## Habeas

Judge Ann Aiken rejected a petitioner's multiple claims of ineffective assistance of counsel and attacks on sufficiency of the evidence. The court refused to entertain a claim of error based upon the trial court's refusal to permit a lesser included offense instruction to go to the jury. Holliday v. Morrow, CV 99-1004-AA (Opinion, Feb., 2001).