

# 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. IX, No. 12, June 10, 2003

## REMINDER

RSVPs are due **THIS FRIDAY** (June 13<sup>th</sup>) for the FBA/Oregon District Court Historical Society Summer Associate Program taking place Wednesday, June 18, 2003. Contact: Seth.Row@bullivant.com

**Also: All attorneys are invited to the 9<sup>th</sup> Floor of the Mark O. Hatfield U.S. District Courthouse for a Bench & Bar Social at 4:30 p.m. on Wednesday, June 18, 2003.**

## Clarification

In an article published in the June 3, 2003 issue (Vol. IX, #11) of this newsletter about a sanctions ruling in *Hill v. Union Pacific*, Mr. John P. Ashworth and Stephen F. English were retained as counsel for Union Pacific after Judge Stewart's April 22 opinion. Neither Mr. Ashworth, nor Mr. English were the subject of any inquiry involving sanctions in that case.

## Procedure

After Judge Ann Aiken granted

a plaintiff's motion to disqualify defense counsel from further representation in a case, defendant moved to certify for interlocutory appeal and stay further district court proceedings. Judge Aiken denied the defendant's motion, finding no "exceptional circumstances" to justify relief under 28 U.S.C. § 1292(b). The court also noted the absence of any irreparable harm to the defendant from having to obtain different counsel. Swanson v. City of Eugene, CV 02-6323-AA (Opinion, May, 2003).

Plaintiff's Counsel:

Gregory E. Skillman

Defense Counsel:

Jens Schmidt

## Insurance

A life insurer filed an interpleader action to resolve disputed claims to death benefits. The decedent's husband was named as the primary beneficiary and her children from a prior marriage were named as contingent beneficiaries. The husband filed

a claim to the funds and the children filed a cross-claim arguing that the husband was not entitled to the proceeds under O.R.S. 112.515 because he caused the death of their mother. The husband moved for summary judgment against the cross-claim arguing that it was time-barred by Oregon's 3-year wrongful death statute of limitations and by laches.

Judge Janice Stewart held that the wrongful death limitations period did not apply because the cross-claim was not a wrongful death action. The court noted that if any limitations period applied, it would be the 10-year residual period and the children's cross-claim would be timely.

The court also rejected laches, noting that the husband's claim to the proceeds was just as timely (or untimely) as that of the children. Denying the husband's summary judgment motion, Judge Stewart explained that whether the husband would ultimately be barred from recovering the insurance proceeds would be determined by the court under a preponderance standard. Amerus Life Ins. Co. v. Schlosser, CV 01-

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1763-ST (Opinion, April 10, 2003).

Counsel: James Callahan  
Lynne B. Morgan  
Margaret M. Fiorino

## Employment

A part-time employee filed an action claiming that she was denied a promotion in violation of state and federal Disability Act laws because of her epilepsy. The employer moved to stay the action and compel arbitration based upon provisions within a collective bargaining agreement (CBA).

Judge Janice M. Stewart denied the defense motion because there was no evidence that the plaintiff ever agreed or accepted the terms of the CBA. The court also criticized the arbitration provision, noting several one-sided characteristics that were particularly disadvantageous to the employee. The court was particularly concerned with the limitations on remedies and deficient procedural protections. Knutson v. Winco Foods, Inc., CV 02-1145-ST (Opinion, May 7, 2003).

Plaintiff's Counsel:

T. Ann Gregory

Defense Counsel: Bruce Rubin

## Discovery

The plaintiff in a civil rights action took notes during an interview of a percipient non-party witness immediately following the incident that formed the basis for his complaint. The interview took place prior to plaintiff's retention of counsel.

Three years after the incident, defendants deposed what turned out to be the only percipient non-party witness and several of his statements appeared inconsistent with other reports. Defendants moved to compel plaintiff to produce his interview notes; plaintiff resisted under the work product doctrine, Fed. R. Civ. P. 26(b)(3).

Judge Janice M. Stewart held that plaintiff's notes, taken in anticipation of litigation, constituted ordinary work product discoverable upon a showing of substantial need and the absence of alternative sources. The court granted defendants' motion to compel, holding that defendants had met their burden because the witness was "crucial to the search for truth," the witness' credibility and his ability to actually observe the events was in question and there were no available alternatives. Marsall

v. City of Portland, CV 01-1014-ST (Opinion, May 27, 2003).

Plaintiff's Counsel:

Joseph A. Grube

Defense Counsel:

Mary T. Danford

## Verdict

It was an all defense verdict in an ADA and FMLA discrimination and retaliation jury trial last week presided over by Judge Malcolm F. Marsh. The plaintiff was a former heavy equipment operator who claimed that he was singled out for disparate treatment following a medical leave of absence and return to work under medical work restrictions. Plaintiff was ultimately terminated after his loader became submerged in the mud. The defendant-employer claimed that it terminated plaintiff solely because of the loader incident; plaintiff claimed that many employees had experienced similar accidents and were not terminated. Judge Marsh held that the case presented a single-motive/pretext issue and he instructed the jury accordingly; plaintiff preserved an objection to the court's failure to give a mixed motive instruction. Head v. NW Glacier, Inc., CV 02-373-MA. Plaintiff's Counsel: Scott Hunt  
Defense Counsel:

William Grimm (WA)