

# COURTHOUSE NEWS

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

Judge Malcolm F. Marsh granted a motion for a preliminary injunction filed by an employer against a former employee seeking to prohibit the employee from commencing work for a competitor. The employee had signed a 1-year non-competition agreement, but the parties disputed whether the contract was signed at the commencement of a bona fide advancement as required by ORS 653.295. The defendant presented evidence that he actually began performing his new job duties immediately after receiving and accepting the offer of advancement. The employer claimed that the advancement was not effective until all of its paperwork was complete and the defendant's pay and benefit package increased.

Judge Marsh noted that the case presented an issue of first impression relative to the timing of a job promotion. The court held that resolution depended upon several factors including the circumstances surrounding the offer and acceptance, the employer's standard practice, the increase in

job duties and the implementation of any enhanced pay or benefit package. Considering all of these factors, Judge Marsh concluded that even though the defendant signed the non-competition contract after beginning some of his new job duties, this was part of the employer's normal transitioning process and took place prior to the promotion's actual effective date. Based upon these findings, the court concluded that the employer had established a high likelihood of success on the merits. Because the contract provided that the employee would be paid for the entire year of the non-compete, Judge Marsh also found that the balance of hardships tipped in favor of the employer. Nike v. McCarthy, CV 03-1128-MA (Opinion & Order, Sept. 29, 2003).

Plaintiff's Counsel:

Amy Joseph Pedersen

Defense Counsel:

Christopher Carson (Local)

! Undocumented aliens are not entitled to maintain claims for

backpay under Title VII because they are not "available for work." Judge Anna J. Brown rejected numerous arguments raised by plaintiffs, finding that the Immigration Reform Act of 1986 and a similar Supreme Court ruling under the NLRA precluded relief. Martinez v. Metro Metals Northwest, Inc., CV 02-860-BR (Opinion, Oct. 9, 2003).

Plaintiffs' Counsel:

D. Michael Dale

Defense Counsel:

Dennis E. Westlund

! Plaintiff claimed that he was terminated after he informed his employer about his impending knee surgery; he argued that the employer was motivated by a desire to keep its health costs down and to deny him medical leave.

The employer moved for summary judgment against plaintiff's overtime claims since plaintiff relied upon his own later testimony and a self-generated document to contradict the employer's own contemporaneous records. Judge King held that a genuine issue of material fact could

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be created by the plaintiff's testimony standing alone because the jury could reject the employer's contention that its own time records were accurate.

Judge King also rejected a defense motion against plaintiff's claims for ERISA interference and FMLA violations, finding that plaintiff presented sufficient evidence of a qualifying medical condition and that the employer actually knew about the knee surgery when it made its decision to terminate plaintiff.

Plaintiff's claim for retaliation under the OFLA was dismissed because there is no cause of action available under the statute. Judge King agreed with Judge Dennis J. Hubel and rejected arguments from the BOLI Commissioner that an administrative rule could be relied upon to expand the statutory scope of the OFLA. Loumena v. Les Schwab Tire Centers of Portland, Inc., CV 02-856-KI (Opinion, Oct. 2, 2003).

Plaintiff's Counsel: Craig Crispin  
Defense Counsel: Karen O'Kasey

### Federal Tort Claims

Judge Ann Aiken held that an injured train engineer was entitled to partial summary judgment on his employer's liability given uncontroverted evidence that other employees violated a codified federal safety rule. However,

because the rule did not provide for negligence per se, the employer will be permitted to present evidence of contributory negligence. The court also denied plaintiff's motion for partial summary judgment on the issue of causation. Blanco v. The Burlington Northern & Santa Fe Railway Co., CV 02-6307-AA (Opinion, Sept. 2003).

Plaintiff's Counsel:  
David L. Jensen  
Defense Counsel:  
Daniel L. Kinerk

### Procedure

Judge Janice M. Stewart held that she lacked personal jurisdiction over a Chinese residence who entered into an exclusive marketing agreement with an Oregon corporation. Judge Stewart found that while the plaintiff alleged Oregon contacts, the record demonstrated that all business activities took place in California and China. The court noted that it might have personal jurisdiction over one claim for breach of a confidentiality agreement that called for application of Oregon law, but that because personal jurisdiction was lacking over other claims, a transfer of all claims should be made to the

Northern District of California. Voyager Medical Corp. v. Xu, CV 03-351-ST (Findings & Recommendation, June 12, 2003; Adopted by Judge Anna J. Brown, Sept. 19, 2003).

Plaintiff's Counsel:  
Barton C. Babbitt  
Defense Counsel:  
Deanna L. Wray

### Evidence

Judge Janice M. Stewart denied a defense motion to strike an exhibit submitted in connection with plaintiff's opposition to a summary judgment motion. The exhibit was a draft of a letter from defendant's Human Resources Director to the plaintiff; it was erroneously sent to plaintiff's attorney instead of defense counsel. Defendant claimed that the document should be stricken because it fell within the attorney-client privilege.

Judge Stewart held that any privilege was waived because, although the disclosure was involuntary, defendant failed to take reasonable steps to preserve the privilege. Brounstein v. Gresham Barlow School Dist., CV 00-1526 (Order, June 20, 2003).

Plaintiff's Counsel:  
Stephen L. Brischetto  
Defense Counsel:  
Peter R. Mersereau