

# COURTHOUSE NEWS

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

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## Contracts

Former shareholders filed an action against the purchaser of their stock claiming breach of express and implied covenants. Following the stock transfer, plaintiffs were entitled to additional revenues based upon the number of participants enrolled in HMOs covered by the stockholders' former company. Defendant transferred its interest in one of the HMOs to an affiliate who then transferred the HMO to another, unrelated company. Plaintiffs argued that the transfer violated their rights under the contract because it materially impaired their anticipated revenue under the agreement.

Judge King held that the "Transferability" provision relied upon by the plaintiffs was a standard, general prohibition on the assignment of rights and obligations under the agreement and thus, it did not prohibit the HMO transfer in issue. The court further rejected plaintiffs' claims of an implied contractual duty or unjust enrichment. Gregg v. NYLCARE Health Plans, Inc., CV 99-995-KI (Opinion, Nov. 12, 1999 - 12 pages).

Plaintiffs' Counsel: Steven Wilker  
Defense Counsel: Douglas Houser

## Sanctions

A bankruptcy court judge imposed over \$105,000 in sanctions against a debtor and its attorney for frivolously filing and pursuing a Chapter 11 petition. The sanctions were awarded to a bank that was adversely affected by the filing. The dollar figure represented the bank's attorney fees expended in the bankruptcy proceeding.

The debtor and his attorney appealed the sanction order and the debtor appealed the bankruptcy court's failure to include the attorney's law firm in the sanction order for purposes of establishing joint and several liability.

Judge Robert E. Jones upheld that bankruptcy court's decision in all respects. The court rejected the attorney's argument that sanctions could not be imposed because the bank failed to serve a summons along with the sanction motion on grounds that the attorney failed to preserve the error and on the merits. The court also rejected appellants' arguments that the safe harbor provision of the bankruptcy rules precluded sanctions. Finally, the court affirmed the bankruptcy court's refusal to extend sanction liability to the attorney's law firm on grounds that it was only a two person firm, the attorneys practiced independently and in different areas,

such that there was no supervision or deterrent effect necessary with respect to the other partner or the firm. Toth-Fejel v. Kramer & Toth-Fejel Law Firm, CV 99-343-JO (Opinion, Nov., 1999 - 16 pages).

Appellants' Counsel:  
Christine Coers-Mitchell  
Appellee's Counsel: Dana Vidas

## Employment

A former bank investigator filed an action under the ADA and analogous Oregon statutory provisions alleging a hostile environment based upon his HIV status and constructive discharge. Plaintiff admitted that, at present, he could not return to work due to his illness but claimed that he initially was unable to work due to stress brought about by a hostile work environment. As such, plaintiff sought damages only for that limited time period in which he was unable to work due to job related stress.

Judge Janice Stewart granted a defense motion for summary judgment. The court assumed that an ADA plaintiff could pursue a hostile environment claim, but found that plaintiff failed to establish that any harassment he suffered from co-workers was due to his HIV status as opposed to his sexual orientation. The court further held that the challenged

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conduct was not sufficiently severe or pervasive to sustain a hostile environment or constructive discharge claim. Leland v. U.S. Bank National Ass'n, CV 98-454-ST (Opinion, Sept. 22, 1999 - 23 pages).

Plaintiff's Counsel: Erik Wangen  
Defense Counsel: Tom Sand

¶ A city bus driver filed an action against his former employer alleging retaliatory discharge due to his union activities. Following a 3-day jury trial, a verdict was entered in favor of the defendants on all claims. Plaintiff filed a motion for new trial arguing that the verdict was against the clear weight of the evidence, defense counsel improperly "vouched" for one of the defense witnesses and the court erred in excluding some of plaintiff's evidence.

The court rejected all of plaintiff's arguments, finding that the case presented a classic issue of credibility and that there was sufficient evidence to support the jury's verdict. As to the improper vouching claim, the court noted that neither party cited nor was it able to find any authority for the proposition that the rule should apply in the civil context. The court expressed doubts that the "no vouching" rule had any application beyond a prosecutor's comments during a criminal trial, but nevertheless held that even if the rule were to apply, plaintiff failed to show that his rights were substantially affected by defense counsel's closing remarks. Finally, the court re-affirmed its holding excluding plaintiff's proffered pre-hire evidence under Fed. R. Evid. 401-403.

Schmitz v. City of Wilsonville, CV 96-1306-ST (Opinion, Sept. 15, 1999).

Plaintiff's Counsel: Janice Jackson  
Defense Counsel: James Martin

## Trade Secrets

Two parties who entered into negotiations to construct a fibre-optic cable line signed a confidentiality agreement. Negotiations over the cable construction failed and defendant selected an alternate route. Plaintiff then filed an action alleging violations of the confidentiality agreement, claim and delivery and unfair trade competition.

Judge Ann Aiken denied a defense motion to dismiss the breach of contract and claim and delivery claims, but granted the motion to dismiss the unfair trade competition claim. The court held that this latter claim was superseded by Oregon's Uniform Trade Secrets Act (UTSA), O.R.S. 646.461. Plaintiff was granted leave to amend. All-Phase Utility Corp. v. Williams Communications, Inc., CV 99-921-AA (Opinion, Nov., 1999 - 8 pages).

## Discrimination

A disabled Tri-Met passenger filed an action under Title II of the ADA claiming that Tri-Met failed to adequately train drivers in the use of wheel chair lifts, failed to adequately maintain the lifts (particularly during cold weather) and failed to operate paratransit cabs. Plaintiff sought injunctive relief and damages.

Judge Jones granted a defense

motion for summary judgment. The court found that, subsequent to the filing of the action, defendant implemented a comprehensive set of policies and procedures that largely rendered plaintiff's request for injunctive relief moot. The court found that recent, sporadic lift problems were sufficient to confer standing on the plaintiff, but were insufficient to establish the type of future threat of irreparable harm necessary to justify a court injunction. The court also rejected any claim for compensatory damages, finding no evidence of discriminatory intent or reckless indifference. The court did, however, caution defendant that it would not entertain any prevailing party cost bills on grounds that plaintiff's filing of this action was at least partially responsible for significant changes in defendant's policies and procedures. Midgett v. Tri-County Metropolitan Transport Dist., CV 98-140-JO (Opinion, Nov., 1999 - 25 pages).

Plaintiff's Counsel: Craig Crispin  
Defense Counsel: Bradley Tellam

## Copies

Electronic copies of referenced opinions may be obtained from:  
kelly\_zusman@ord.uscourts.gov

Hard Copies: call 326-8008.