

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

A liver transplant surgeon and former director of a liver transplant program filed an action against his employer claiming that he was removed as the program director in retaliation for public comments he made concerning patient care at the defendant's institution. Plaintiff asserted claims under Oregon's Whistleblower Act and the federal Civil Rights Act, 42 U.S.C. § 1983. The case proceeded to trial and the jury returned a \$500,000 verdict in favor of the plaintiff on the state claim and in favor of the defendant on the federal claim. Following the jury trial, Judge Owen M. Panner heard additional evidence and arguments on plaintiff's equitable claim for reinstatement.

The court noted that state law and analogous federal case law have recognized a preference for reinstatement to make the plaintiff whole. However, utilizing an 8-factor test set forth by an Iowa federal district court judge, Judge Panner concluded that reinstatement to his former position as a Director would be inappropriate given the

administration's stated lack of confidence in plaintiff's leadership abilities and a concern that the two other surgeons in the department would resign, leaving the program seriously understaffed.

Judge Panner also denied a defense motion for remittitur to the \$200,000 cap set forth in the Oregon Tort Claims Act. The court followed Judge Janice Stewart's decision in Draper v. Astoria School Dist., 995 F. Supp. 1122 (D. Or. 1998) holding that the OTCA cap does not apply to Oregon Whistleblower Act claims. Rabkin v. OHSU, CV No. 01-943-PA (Opinion, Nov. 2001).
Plaintiff's Counsel: Jeff Edelson
Defense Counsel: Mark Wagner

Credit

Plaintiffs attempted to open a coffee and tobacco shop. After securing a construction loan from the defendant, with additional funding from the Portland Development Commission, plaintiffs then lacked sufficient operating capital to open for business. They filed an action

against their lender claiming that the defendant refused to provide them with a line of credit because of their race in violation of the Federal Equal Credit Opportunity Act (ECOA). Plaintiffs also asserted claims for breach of contract and misrepresentation. On cross-motions for summary judgment, Judge Janice M. Stewart granted the defendant's motion in part and denied the plaintiffs' motion. The court rejected plaintiffs' assertion that the defendant violated the ECOA by requesting a guarantor on the construction loan and by seeking information about that guarantor's financial solvency. The court found no evidence that the defendant refused to extend credit based upon the plaintiffs' race and thus, dismissed all of the federal claims.

Because trial was set just two months away, Judge Stewart exercised her discretion to retain jurisdiction over the state claims. The court dismissed the breach of the implied covenant of good faith and fair dealing under the Oregon Supreme Court's Uptown Heights decision. Taylor v. Albina

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Community Bank, CV 00-1089-ST (Opinion, Nov. 23, 2001).

Plaintiffs' Counsel:

Terrance Slominski

Defense Counsel: James Finn

Procedure

A professional corporation filed an action against an Internet Service provider in Multnomah County Circuit Court. The defendant substituted its Delaware parent corporation as a named party and removed the action to Federal Court based upon diversity jurisdiction. Plaintiff moved to remand.

Defendant had been an Oregon corporation up until November 1999 when it merged with a Delaware corporation, later merging again with a Tennessee corporation operated as a wholly owned subsidiary of the Delaware corporation. At the time the complaint was filed, defendant was a Delaware corporation with its principal place of business in Atlanta, Georgia. Judge Janice M. Stewart rejected the plaintiff's argument that defendant should be considered an Oregon corporation because it had previously existed as an Oregon corporation and because it continued to operate in the same manner as it had before the merger.

Judge Stewart also rejected the plaintiff's attempt to revise its

prayer for damages to something less than \$75,000. The court noted that any such amendment would not affect the court's jurisdiction since diversity jurisdiction is determined based upon the facts that exist as of the time the complaint was filed. Glazer & Assoc., P.C. v. Teleport, Inc., CV 01-1080-ST (F& R, Sept. 13, 2001; Adopted by Order of Judge Garr M. King, Oct. 15, 2001).

Plaintiff's Counsel:

Gordon Evans

Defense Counsel:

Robert E.L. Bonaparte

Attorney's Fees

In a case brought by a marina against Multnomah County, some of the plaintiff's section 1983 claims survived summary judgment and then were settled shortly before trial. Unable to resolve the attorney's fee issue, however, the parties agreed to leave that issue for the court with the plaintiff filing a fee petition under 42 U.S.C. § 1988. In a lengthy opinion, Judge Hubel granted in part and denied in part plaintiff's requested fees. He addressed several attorney's fees issues including (1) "block billing," (the failure to segregate time for each task performed), and the problems this creates for the court in both assessing what a reasonable fee is, and in

segregating fees where not all tasks are compensable, (2) charging for secretarial tasks performed by paralegals, (3) poor documentation of costs, and (4) setting a reasonable hourly rate. Frevach v. Multnomah County, et al., CV 99-1295-HU (Opinion, Dec. 18, 2001).

Plaintiff's Counsel: Kelly Clark

Defense Counsel: Sandra Duffy

Federal Fines

Defendant moved the court to dismiss a forest service citation; she had been cited for failure to pay the required fee for use of the Oregon Dunes National Recreation Area. Judge Thomas M. Coffin ruled that although the manner in which the forest service enforced their fee collection activities was appropriate and the forest service was not required to prove that defendant had used the area for "recreational" purposes, defendant was nonetheless entitled to dismissal because the forest service had exceeded its authority by charging and collecting fees at more than the statutorily authorized 100 recreational sites. USA v. Siart, (Opinion, Dec. 6, 2001).

Plaintiff's Counsel:

William Fitzgerald

Defense Counsel: Lauren Regan