

# 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. VIII, No. 4, Feb. 22, 2002

## Jurisdiction

Magistrate Judge Dennis J. Hubel held that fraudulent joinder of a defendant does not destroy diversity. Judge Hubel found that an individual defendant was fraudulently joined because: (1) there is no individual liability under ORS 659.410; and (2) although individuals can be liable for aiding and abetting illegal discrimination, remedies under ORS 659.121 are only available against employers.

Plaintiff's complaint met the \$75,000 amount in controversy requirement by seeking non-economic damages in an amount "not to exceed \$150,000," lost wages in the amount of \$16 per hour and attorney's fees.

Under the "first served defendant" rule, the removal statute creates a single 30-day period in which to remove an action to federal court, which begins to run when the first defendant is served. After noting that the Ninth Circuit has neither adopted or rejected this rule and that other courts and commentators are

split on the issue, Judge Hubel stated that he need not decide the issue of whether the "first served defendant" rule applied here because the facts presented would fall within the "exceptional circumstances" exception to that rule since McDonald first served the fraudulently joined non-diverse party. McDonald v. Federal Express Corp., Civil No. 01-1172-HU, (F & R, 1/15/02; Adopted by Judge Garr M. King, Feb. 6, 2002).

Plaintiff's Counsel:

Karen Thompson

Defense Counsel:

David Riewald

## ERISA

A group of former employees who utilized their employer's short term disability program than had their wages reduced so that the employer could recoup some of the disability payments. Plaintiffs claimed that their employer violated Oregon wage laws in failing to obtain written authorization before making the deductions. Defendant removed

the action based upon ERISA preemption. Plaintiffs moved to remand.

Judge Janice M. Stewart noted that the employer's ERISA plan authorized the employer to deduct disability overpayments from an employee's wages. However, plaintiffs were not seeking to recover benefits, but rather, they challenged defendant's method of collection under Oregon law. For this claim, the ERISA plan was irrelevant. Accordingly, the court found plaintiffs' claims were not preempted by ERISA and that remand was required. Albin v. Qwest Communi-cations, Corp., CV 01-1304-ST (F&R, Dec. 4, 2001; Adopted by Judge King, Jan. 24, 2001).

Plaintiffs' Counsel:

David B. Wiles

Defense Counsel:

Karen O'Kasey

## Attorney Fees

An insurance company failed to promptly investigate and adjust a claim for death benefits. Plaintiff was forced to hire an attorney and the coverage dispute was

## 2 The Courthouse News

eventually settled. The parties were unable to agree on attorney fees. Plaintiff's lawyers sought \$50,000-\$80,000 under different theories of recovery and computation.

Judge Anna J. Brown held that plaintiff was entitled to recover fees under the Olympic rule under Washington law. The court held that defendant violated fiduciary duties to the plaintiff in the handling of her claim. However, the court refused to award the amount sought and applied Washington's version of the lodestar analysis. For reasonable rates, the court started with the 1998 Oregon State Bar Economic Survey. For an attorney with 20 years of trial experience, the court found his requested hourly rate of \$180 reasonable. For an attorney with just 2 years of experience, the court allowed an hourly rate of \$160, after considering his other work experience and the fact that he was a solo practitioner.

Judge Brown rejected all requests for upward adjustments to the lodestar and denied defendant's request for fees expended in responding to the plaintiff's petition. McCrary v. Life Ins. Co. of North America, CV 01-360-BR (Feb. 14, 2002).  
Plaintiff's Counsel: Fred Cann  
Defense Counsel:  
Peter Mintzer

## Employment

A noncompetition agreement with a former employee must be executed at the commencement of the employee's employment or as part of a "bona fide advancement" under Oregon statutory law. Judge Garr M. King held that a "bona fide advancement" requires some form of promotion or progression in job duties. The fact that the contract may be supported by valuable consideration (i.e. a pay raise or benefit package) is not enough. The court held that the phrase "bona fide advancement" requires "an increase or improvement in job status or responsibilities that justifies a change in the way the employer entrusts client contacts and business related information with the employee."

The court looked to both the plain text of the statute, O.R.S. 653.295, and the legislative history which demonstrated a concern that such agreements be narrowly circumscribed. In addition, the fact that one of the former employees had signed a non-competition agreement at the outset of his employment did not act to save the later contract since the subsequent contract declared all prior agreements "null and void." Judge King found that the void provisions could be

severed and the remainder of the contracts enforced.

Judge King also held that prohibitions against client solicitation and luring other employees away constituted "noncompetition" agreements. First Allmerica Financial Life Ins. Co. v. Sumner, et al., CV 02-0034-HU (Feb. 21, 2002).

Plaintiffs' Counsel:

Christopher T. Carson

Defense Counsel:

Per A. Ramfjord

## Torts

Two restaurant workers alleging single incidents of physical harassment involving a co-worker failed to state a battery claim against their employer. Judge Brown held that the claim as stated was insufficient to show unlawful intent by the employer and thus, it was subject to the exclusive remedy provision of the Workers Compensation Act. The court denied a motion to dismiss Title VII claims as premature even though plaintiffs filed the action three days prior to receiving a right to sue letter from the EEOC. Reddick v. Hilton Hotels, Corp., CV 01-1477-BR (Feb. 14, 2002).

Plaintiff's Counsel:

Tom Steenson

Defense Counsel:

Paula A. Barran