

COURTHOUSE NEWS

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

Plaintiffs, the parents and siblings of Fouad Kaady, filed an action for money damages under 42 U.S.C. § 1983 and Oregon law against the two law enforcement officers who shot and killed Fouad Kaady and against the City of Sandy and Clackamas County, who employed those officers. The individual officer defendants moved for summary judgment on several grounds, including qualified immunity on the claim that their use of Tasers against Kaady constituted excessive force. Judge Papak granted one officer summary judgment on that issue but denied the other officer's motion. The judge concluded that police officers had reasonable notice that they may not use a Taser against an individual suspect who does not pose an immediate threat and has merely failed to comply with commands. Once the individual posed a immediate threat of flight or harm, however, it was constitutionally permissible for an officer to use a Taser to stop the suspect. The defendant who

did not win summary judgment on this issue has filed an appeal. Plaintiffs have filed a motion to certify the appeal as frivolous.

Kaady v. City of Sandy

Civ. No. 06-1269-PK

(Opinion, 11/26/08)

Plaintiffs' Counsel: Gerry Spence,
Kent W. Spence, Michelle R.

Burrows, Tyson E. Logan

Defendants' Counsel: David C.

Lewis, Edward S. McGlone III,

Kathleen J. Hansa Rastetter, Robert

S. Wagner, Brian G. Cahill,

Christopher P. Dombrowicki, J. Ric

Gass, Kimberley Anne

Ybarra-Cole, Janet Marie Schroer

Oregon Family Leave Act

In OFLA claim tried to the court, plaintiff proved by a preponderance of the evidence that defendant refused, without reasonable cause, to reinstate her after she took family medical leave.

The court found a "failure to reinstate" claim available under OFLA. When an employer refuses to reinstate even after receiving a doctor's note clearing the employee to return to work, courts have held that action unreasonable. The

defendant's decision to terminate plaintiff after it received the doctor's advice that it was "reasonable for her to return to work in May, provided that she would handle only [92] bright paper and that there be improved ventilation in her work environment," was unreasonable under the circumstances. Defendant had already upgraded the paper it was using. The defendant in effect was seeking a return to work release from plaintiff's physician that assured it that plaintiff would not become ill again in the future from exposure to some unknown irritant that might be present in the workplace.

Plaintiff was awarded back pay, front pay, and insurance costs.

Sanders v. City of Newport,

Civ. No. 07-776-TC

(Opinion, 1/22/09)

Plaintiff's Counsel: Thomas Doyle

Defense Counsel: Karen O'Kasey

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Insurance Law

Judge King recently had to determine several difficult insurance questions in a coverage case involving two insurers, a general contractor, and a subcontractor. An employee of the subcontractor's subcontractor was injured on the job and sued his employer, the subcontractor, and the general contractor. The contracts all contained provisions concerning indemnification and CGL coverage of the higher-up contractors. The issue before this court was who had to pay for the defense in the underlying personal injury case. The decision required an analysis of the workers' compensation bar, the effect of a large self-insured retention in one policy, the provisions in ORS 30.140 for what indemnification is allowed in construction contracts, and standing to bring various breach of contract claims.

Continental Casualty Insurance Company v. Zurich American Insurance Company, Civ. No. 07-913-KI (Opinion, January 29, 2009)
Plaintiff's Counsel: David Prange, Aaron Denton
Defense Counsel: Thomas Brown, Robert Sabido, James Murphy, John Langslet,

YOUNGER ABSTENTION

Plaintiff Simmons pled guilty

and served his sentence on state charges that a Jefferson County grand jury had returned as a not true bill. When the district attorney filed new criminal charges against him, the plaintiff filed suit seeking injunctive relief and damages for various alleged civil rights violations and state torts. Defendants moved to dismiss the action on several grounds, including *Younger* abstention. Judge Papak held that *Younger* abstention applied to the claims that the plaintiff could assert in his pending state criminal trial. Judge Papak further held that the proper action was to stay the proceedings, unless the claims could be dismissed as meritless on the pleadings without reaching the constitutional issues they raise. Judge Mosman adopted the Findings and Recommendation in its entirety.

Simmons v. Deuel
CV-08-343-PK (Opinion, 12/18/08)
Plaintiff's Counsel: Kristina S. Hellman, Steven M. Richkind, Steven T. Wax, Thomas J. Flaherty
Defendants' Counsel: Leonard W. Williamson, Nena Cook, Nikola L. Jones, James P. McCurdy, Bruce L. Mowery

Motion to Remand

Plaintiffs filed a "complaint for damages for truth in lending violations, fraud, unfair business practices, conversion, conspiracy, negligence, unjust enrichment,

constructive trust and other equitable relief" in the Circuit Court of the State of Oregon for the County of Deschutes. Defendant West Coast Bank removed the action to this court. Plaintiffs filed a Motion to Remand. Judge Aiken denied plaintiff's motion to remand finding both original and supplemental jurisdiction over this matter.

Stull v. West Coast Bank et al., Civ. No. 08-6362-AA (Opinion, Jan. 27, 2009)
Plaintiff's Counsel:
Steven McCarthy
Defense Counsel:
David Markowitz

Of Interest:

Judge Aiken will speak at the Federal Bar Association's monthly lunch scheduled tomorrow, February 19, 2009. She will introduce herself to the Bar and speak about her vision for her tenure as Chief Judge.
Registration/RSVP to Ann Fallihee,
afallihee@barran.com