

COURT DECISIONS

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2009

COURT OF APPEALS RULES THAT STRIKING NURSE DID NOT PERFORM WORK AND THEREFORE WAS NOT ENTITLED TO CREDIT FROM PERS FOR THE MONTH THE NURSE WAS ON STRIKE

Bailey v. Public Employees Retirement Board, 228 Or App 300 (2009) arose because the nurse that was on strike at OSHU claimed that she was entitled to credit for the month that she was on strike due to a PERS remedy that was given, which ordered that the striking nurses were paid an amount that the non striking workers were paid because of the special bonuses that OSU paid to the non striking nurses. That decision can be found on the *Oregon Nurses Association v. Oregon Health and Science University*, 19 PECBR 692 (2002).

The Court of Appeals first noted that the payment was a penalty for OSU's conduct and it was not paid to all of the striking nurses only those that returned to work at OSHU. Secondly, the Court of Appeals interpreted the statutory scheme for PERS namely ORS 238.005 (5)(a) where salary is defined as a payment out of the funds of public employer "in return for services to the employer." The Court noted that the nurse did not work during the strike and therefore it was not payment for return for services.

Editorial Comment: This case has little applicability to our clients, but what about association presidents or other officers who are on leave to run a labor organization and the labor organization reimburses the employer for the wages of the employee, because the employer carries the employee on the payroll? Might someone challenge the fact that the employee was not being paid "in return for services to the employer" since the employee was absent doing union business? Years ago this issue was raised and a legislative change was sought but abandoned. Those affected potentially by this case should reconsider getting a legislative change in this area.

FIRST AMENDMENT DOES NOT PROTECT SERGEANTS WHO CALL THEIR SUPERVISOR A BULLY

San Bernadino Police Department Sergeants Desrochers and Lowes filed grievances criticizing their Lieutenant and requesting that he be reassigned, trained on interpersonal relations, and his conduct monitored. They alleged that the Lieutenant was an "autocratic, controlling and critical supervisor. Everyone that works for him has felt the stress that he brings into every situation . . . He often uses the phrase 'hammer-nail' to illustrate that he is the hammer and everyone else is the nail." In short, they called him a bully. (*Sound familiar?*)

After filing these grievances, Descrochers was transferred from Homicide to Robbery (he considered this a demotion) and Lowes was suspended for 2 weeks following an IA investigation into unrelated conduct. They filed suit in federal court alleging that these actions were retaliation for protected First Amendment speech criticizing their Lieutenant.

The Ninth Circuit stated that there is a five part test for such First Amendment claims brought by public employees:

- (1) whether the plaintiff spoke on a matter of public concern;
- (2) whether the plaintiff spoke as a private citizen or public employee;
- (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;
- (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and
- (5) whether the state would have taken the adverse employment action even absent the protected speech.

The Ninth Circuit concluded that calling one's supervisor a bully is not a matter of public concern and affirmed the dismissal of the sergeants' First Amendment claim. To address a matter of public concern, the speech must involve issues about which information is needed or appropriate to enable members of society to make informed decisions about their government. Speech that relates to internal power struggles in a government agency is not a matter of public concern.

The Ninth Circuit rejected the sergeants' argument that their speech was protected because their grievances raised issues such as competency, efficiency and morale. The Court asserted that the reality that poor interpersonal relationships might hamper the work of a government office does not *automatically* transform speech on such issues into speech on a matter of public concern. The Court emphasized that there was no evidence of failed law enforcement efforts, "botched investigations", etc. There was no allegation that anyone failed to do his job, or even did his job poorly. The Court concluded that the public would not be interested that two sergeants thought their supervisor was a "micro-manager", "autocratic" or "controlling." The fact that the grievances were filed internally, and not made in a public forum such as a City Council meeting supported the Court's conclusion.

Desrochers et al. v. City of San Bernadino, No. 07-56773 (9th Cir. July 13, 2009)

Editorial Comment: This case illustrates the fact that although public employees have First Amendment rights, those rights are limited. Internal complaints about supervisors are unlikely to be protected-even if cloaked in concerns about efficiency or morale (evidence of inefficiency might change the result as this court suggested). On the other hand, speech made by an Association President in a public forum about an issue of genuine concern to the public is more likely to be protected (by the Constitution, the PECBA and Whistleblower statutes).

COURT OF APPEALS DELINEATES WHAT ALLEGATIONS ARE NECESSARY TO SUSTAIN A WHISTLE BLOWER COMPLAINT

The case of *Hall v. Douglas County*, 226 Or App 276 (2009) turned in part on when a complaint of misconduct was sufficient to qualify as a Whistle Blower complaint under Oregon law. The Oregon Court of Appeals had previously looked at the Whistle Blower statute and concluded that the statute along with the relevant legislative history did have some limitations on what constituted a Whistle Blower complaint. The Court stated that the following did not constitute a Whistle Blower complaint:

“Routine complaints about policies that employees must implement or practices that employees do not like.... The Legislature intended mismanagement to refer to serious agency misconduct having the effect of actually potentially undermining the agency’s ability to fulfill its public mission.”

In this case, the plaintiff alleged that he had been subject to a year of physical abuse, which included sexual harassment, and when he complained about it to a supervisor, he was disciplined for bringing forth his complaint.

The Court noted that physical abuse could actually include criminal conduct, and that retaliating for reporting sexual harassment would certainly be included under the Whistle Blower Statute.

Editorial Comment: A caveat in this case, is that it was the court’s ruling on the fact that Douglas County had been granted Summary Judgment as a matter of law, and the court merely held that plaintiff’s complaint as stated did constitute a claim for Whistle Blower violation. The trial on the merits of this issue has not yet occurred.

SUPREME COURT RULES THAT THE STATE OF OREGON IS LIABLE FOR POST JUDGMENT INTEREST Young v. State of Oregon

On July 16, 2009 the Supreme Court again reversed the Court of Appeals. In this case, the Court ruled that 1,700 plus plaintiffs who received inadequate overtime compensation in 2001-2002 were entitled to interest from the dates of their first compensation to the date of their second compensation for overtime at the corrected amount in 2006-2007. The interest would be 9% a year based on the amount that plaintiffs finally received in 2006-2007.

This case was started by John Hoag in 1997 and it is still going. Hopefully, it will be concluded in about a year.

You can read the opinion online at:<http://www.publications.ojd.state.or.us/S056376.htm>

Editorial Comment: John Hoag's dogged representation of this group of State employees pays off once again. This time he's created new law regarding the State's liability for post judgment interest that will benefit any employee or person who obtains a judgment against the State in the future.

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SUPREME COURT OF OREGON AFFIRMS THE REVOCATION OF THE WASHINGTON COUNTY CORRECTIONS OFFICER'S DPSST CERTIFICATE

The case of *Cuff v. Department of Public Safety Standards and Training*, 345 Or 462 (2008) began in 1999 when Corrections Officer Cuff had a CDL because he drove a corrections bus, failed a drug screen, first lied to his supervisors, and then told the truth that he had been using marijuana on a regular basis. In spite of all of this based upon language (since changed) of the contract between the Washington County Police Officers' Association and the County, Arbitrator reinstated Officer Cuff. The County sued arguing that doing so violated public policy, but the ERB ruled otherwise. That ruling was upheld by the Court of Appeals which pointed out that the revocation statute upon which the County relied did not have a clear statement of public policy against continued certification of police officers who used controlled substances. After that, the legislature amended the certification statutes regarding moral fitness and in 2004 DPSST started decertification proceedings against petitioner. The Court of Appeals upheld the decertification.

Officer Cuff argued that the statute was being improperly applied retroactively by DPSST. However, the Supreme Court rejected the analysis that DPSST had used and held the statute was not retroactive, but the Court pointed out that statute requires in order

to be certified as a public safety officer that the person must have not engaged in “conduct which would cause a reasonable person to have substantial doubt about the individual’s honesty, fairness and respect for the laws of others, or the laws of the state or the nation.” OAR 259-008-0010. The Court found that rule was sufficient to justify the revocation of the officer’s certification and stated that any analysis of a person’s behavior had to take into account past conduct. So, while the rule was not applied retroactively, the previous conduct of Officer Cuff justified revocation of his certification.

Editorial Comment: So ends a long saga.

2008

FMLA: EMPLOYERS CANNOT FORCE USE OF COMP TIME DURING FAMILY MEDICAL LEAVE

Recently an Oregon dispatch agency declared that it could no longer pay employees for compensatory time off (CTO) while they are on Family Medical Leave Act leave. Neither the FMLA nor the FLSA prohibits such use of compensatory time off. The FLSA bars an employer from (1) requiring an employee to use CTO for family medical leave and (2) counting CTO as part of the 12 weeks family medical leave required by the FMLA. To assert that the FMLA bars employers from allowing employees to use CTO misstates the law. The applicable federal regulation states:

(i) Section 7(o) of the Fair Labor Standards Act (FLSA) permits public employers under prescribed circumstances to substitute compensatory time off accrued at one and one-half hours for each overtime hour worked in lieu of paying cash to an employee when the employee works overtime hours as prescribed by the Act. There are limits to the amounts of hours of compensatory time an employee may accumulate depending upon whether the employee works in fire protection or law enforcement (480 hours) or elsewhere for a public agency (240 hours). *Compensatory time off is not a form of accrued paid leave that an employer may require the employee to substitute for unpaid FMLA leave.* The employee may request to use his/her balance of compensatory time for an FMLA reason. If the employer permits the accrual to be used in compliance with regulations, 29 CFR 553.25, *the absence which is paid from the employee's accrued compensatory time ``account'' may not be counted against the employee's FMLA leave entitlement.* 29 CFR 825.207(i). *(Emphasis added)*

2007

EMPLOYEES MUST BE PAID FOR MISSED REST BREAKS

The Oregon Court of Appeals recently ruled that employees who do not receive rest breaks required by Oregon law, must be paid for the missed rest breaks. The case arose in the private sector when employees of the Legacy Good Samaritan Hospital sued the employer for missed rest breaks and meal breaks. The Circuit Court dismissed their complaint for failure to state a claim.

On appeal, the Court of Appeals considered all the allegations in the complaint as though true. Plaintiffs claimed compensation for missed meal breaks and missed rest breaks. The Court upheld the Circuit Court's ruling that there was no claim for missed meal breaks. However, for the first time in Oregon Appellate Court Rule that employees were entitled to compensation for rest breaks if the employer did not provide them with 10 minute rest breaks every 4 hours.

OAR 839-020-0050 (1)(b), provides that employees must receive a 10 minute rest break for every 4 hours of work performed. Thus, the Court reasoned that in light of the OAR, Oregon employees are entitled to receive 4 hours of wages for 3 hours and 50 minutes of work. The OAR specifically provides that the rest period is to be provided "without deduction from the employee's pay." The Court concluded that "plaintiffs' allegation, then, is that, every 4 hours, plaintiffs provided 10 minutes of services for which they were entitled to be compensated, but were not." Thus, every 4 hours plaintiffs were entitled to an additional 10 minutes compensation if they were not provided a rest break. The Court of Appeals concluded that the Circuit Court erred in dismissing this complaint. *Gafur v. Legacy Good Samaritan Hospital and Medical Center*, 161 P3rd 319 (2007).

However, section (5) of the OAR allows a collective bargaining agreement to have language concerning breaks that can supersede the statute. Before an overtime claim is made each CBA must be reviewed.

Editorial Comment: As many of the members of our client Associations are painfully aware, failure to provide rest breaks is not limited to the private sector. In particular, employees working in correctional facilities frequently are not given a 10 minute rest break. Under this Court of Appeals decision, a claim can be brought in Circuit Court for unpaid wages and attorney's fees.

This case will in all probability be appealed. Also, we can expect employers to try to gut it in the negotiating process. In the meantime, do not hesitate to contact us if this is an issue for your members.

COURT OF APPEALS REAFFIRMS THAT COUNTY COMMISSIONERS CAN CONTROL A SHERIFF'S OFFICE THROUGH ONLINE BUDGET PROCESS

Daniel v. Board of County Commissioners, 212 Or App 76 (2007) arose when the sheriff tried to promote a sergeant to lieutenant when there were no budgeted vacancies for an additional lieutenant. The Commissioners denied the appointment and the sheriff sued. Meanwhile, the Commissioners passed a budget order which set the number of non union certified deputies in the department to a specific number and set salary for those deputies. Citing State law the court held that the Legislature has given the Commissioners the ability to fix the number of deputies and the salaries, i.e. the compensation for the number of deputies at each salary level.

Editorial Comment: The power of the purse string controls all.

2006

OREGON COURT OF APPEALS RULES THAT A PERSON RECEIVING PERS BENEFITS IS NOT ENTITLED TO INTEREST ON THE DISTRIBUTION OF BENEFITS

Joyce v. Public Employees Retirement Board, 209 Or App 289 (2006), involved a case where an employee, who was a member of PERS, died while still working for his employer. His wife was left his beneficiary. She elected to receive the benefits as an annuity. PERS then set up an account in her name. However, four months later she committed suicide. Her brother, who was appointed personal representative of the estate, asked PERS to allow the estate to rescind the election to receive the annuity on the grounds that the surviving spouse had been incompetent when she made the determination to take an annuity. PERS indicated it would so only if a court ruled she was incompetent at the time of election. A court later did so find. Three years later PERS paid a lump sum payment. The petitioner requested interest, and PERS denied it, ruling that interest was not available unless specifically authorized by law, and it was not authorized by law. The Court of Appeals affirmed that decision.

DISPATCHER MUST BE PAID FOR REQUIRED COUNSELING SESSIONS

A Federal Court of Appeals recently ruled that an emergency 911 dispatcher must be paid for time spent attending and traveling to and from counseling sessions required by her employer.

The case arose when the dispatcher's employer required her to submit to a fitness for duty evaluation following an incident in which she was required to work back-to-back shifts. In the course of the second shift the dispatcher became very angry and upset and abruptly left work. As a result of this incident, she was ordered to submit to a fitness for

duty evaluation. Based on that evaluation she was required to attend weekly psychotherapy for six months. She attended 16 one-hour sessions outside her normal work schedule. Attending the counseling required two hours travel round trip per session.

The dispatcher sued under the Fair Labor Standards Act (FLSA). She argued that the time she spent traveling to the counseling sessions and attending the sessions should be considered compensable hours worked. The Court of Appeals noted the general FLSA rule that employees must be paid for all time spent in physical or mental exertion whether or not controlled and required by the employer and pursued necessarily and primarily for the benefit of the employer. The Court rejected the City's argument that the counseling sessions were primarily for the dispatcher's benefit. Attendance at the sessions was a mandatory condition of her employment. The fact that the agency was short staffed created a strong inference that the counseling sessions were for the benefit of the City. Furthermore, when the dispatcher asked to see her own therapist, with whom she had a prior medical relationship, the City refused her request.

The Court observed that while the U.S. Department of Labor has issued conflicting opinions regarding payment for attendance at physical or mental examinations, there were several opinions stating that mandatory physical and mental examinations conducted during nonworking hours must be considered compensable hours worked under the FLSA. The Court emphasized that its holding in this case was narrow and asserted that "by no means" does its ruling mean that every time an employer gets help for its employees, the employee must be compensated for the time spent.

Editorial Comment: Any time an employee is required by his/her employer to submit to a mandatory medical or psychiatric examination, a claim should be made for hours worked under the contract. If this claim is denied, consideration should be given to pursuing a claim for compensation under the FLSA.

SUPREME COURT RULES FOR THE PLAINTIFFS IN THE STATE OVERTIME CASE YOUNG V. STATE OF OREGON

The Supreme Court reversed the Court of Appeals in a concisely written opinion and ruled that the State should have paid all Plaintiffs overtime compensation at the rate of time and one half and not the fluctuating one half time rate.

In addition, the Court concluded that due to the plain wording of the statute, the State did not have a defense that would allow it to escape its obligation for "penalty pay," required by Oregon law when employees do not promptly pay wages when an employee quits or is fired. As a result, all members of the class action who terminated their employment with the State of Oregon should now be receiving 240 hours of severance pay (absent a few statutory exceptions such as a termination by the State for specific reasons).

The text of the decision may be found at the State's Web page at: www.ojd.state.or.us/rules and then go to: Opinions, Supreme Court, and April 13, 2006.

Editorial Comment: This does not change my plans, and as long as Linda and my health are good, I will continue practicing. John Hoag.

OREGON SUPREME COURT LEAVES THE DOOR OPEN A CRACK FOR A LAWSUIT IN A WRONGFUL DEATH CASE IN SPITE OF A WORKERS' COMPENSATION RECOVERY

Most attorneys assume that the remedy provided for a workers' compensation recovery will be the exclusive remedy for anyone who is injured or killed at work, and that their families are unable to recover anything more in a wrongful death lawsuit.

However, in the recent case of *Jaurez v. Winston Rock Products*, 341 Or 160 (2006), while rejecting a wrongful death lawsuit, based in part on the fact that the decedent had only his parents and adult children as survivors, the Court did leave the door open for a wrongful death case under other circumstances. While dismissing the case, the Court stated:

“...plaintiffs allege here that they have suffered a ‘loss of society, companionship, guidance, emotional support, services and financial assistance.’ Plaintiffs, however, do not allege that they possess any property right that defendant’s conduct has infringed. For example, plaintiffs do not allege that they were dependant on decedent for his services or financial assistance, that decedent had any legal obligation to provide such support, or that they had any other legal interest in his income. Neither do plaintiffs allege that they were legally entitled to decedent’s services or the value of his services.” *Id.* Pg. 173.

In spite of previous case law, this appears to leave some hope for a lawsuit from a surviving spouse and or dependent children if an employee was killed in the line of duty where they would allege that the Workers' Compensation remedy is so inadequate that they should be allowed to bring a common law suit for recovery. But the Supreme Court decision does not promise that the Court would uphold such a lawsuit, but merely that the Court would seriously consider it.

OREGON COURT OF APPEALS ALLOWS LAWSUITS AGAINST INDIVIDUAL PUBLIC SECTOR EMPLOYEES TO PROCEED WHERE DAMAGES ARE CLAIMED IN EXCESS OF THE TORT CLAIM LIMITS

The case of *Clarke v. Oregon Health Sciences University*, 206 Or App 610 (2006), involved a question where the alleged economic damages of the plaintiff of \$12,000,000 would exceed the tort claim limits. The State first substituted OSHU for individually named employees, and then moved to dismiss any pleadings for damages that exceed

\$200,000, which is the tort claim limit. However, the Court agreed that the limitations could not apply to a lawsuit against individual employees and reinstated the case against them.

Editorial Comment: There is a question as to the statutory obligation of the State to pay for those damages in excess of the tort claim limits. Expect this case to go to the Oregon Supreme Court.

FLSA Decision

A recent US District court in Western Missouri in the case of *Copeland v. ABB, Inc.*, made it clear that if an employee is ordered to go to a medical appointment for a work related injury, then the time spent at the appointment made it clear that if an employee is ordered to go to a medical appointment for a work related injury, then the time spent at the appointment is compensable. However, if the employee requests time off, the employer merely acquiesces or agrees to it, then it is non-compensable.

2005

U.S. SUPREME COURT RULES THAT EBAY SALE OF OFFICER'S SMUTTY VIDEOTAPES IS NOT CONSTITUTIONALLY PROTECTED

When the San Diego Police Department learned that one of its officers was selling “a videotape showing himself stripping off a police uniform and masturbating” on eBay, it ordered the officer to stop selling the tapes. The officer took some of his tapes off the eBay auction site, but left references to them, with prices, in his eBay seller’s profile. When the Department learned of the officer’s failure to follow its orders, it fired him.

Officer “Roe” (name withheld to protect the privacy of this sensitive officer’s dignity) sued, arguing that his termination violated his constitutionally protected freedom of speech. In a *per curiam* (unanimous), unsigned opinion, the U.S. Supreme Court declared, with “little difficulty”, that such conduct is not constitutionally protected.

The Supreme Court reviewed the limits of the First Amendment’s protections of speech by police officers and other public employees in analyzing Roe’s appeal. It once again declared that while government employees have First Amendment Rights, their employers can impose limits on those rights that would be unconstitutional if applied to the public at large.

Public employees have the right to speak on matters of public concern, typically matters concerning government policies and the operations of government agencies that are of interest to the public at large. The Supreme Court observed that public employees are “uniquely qualified” to comment on such issues: “Were [public employees] not able to speak on these matters, the community would be deprived of informed opinions on

important public issues . . . The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's right to disseminate it."

Although Roe's activities took place outside the workplace, his termination was upheld since he took "deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer." His videos brought the mission of the SDPD and the professionalism of its officers into "serious disrepute."

The Point: While the First Amendment will generally protect an officer from being fired for speaking out on matters of "public concern" related to the operation of his/her department, it's not a license to market pornography, even in California. *City of San Diego v. Roe*, U.S. Supreme Court December 6, 2004.

Editor's Comment: Smutty?! It's beyond that.

OREGON COURT OF APPEALS AFFIRMS COURT ORDER REQUIRING: THE RELEASE OF VIRTUALLY ALL OF PORTLAND BUREAU'S INVESTIGATION INTO THE KENDRA JAMES SHOOTING

As most of you know, May 2003 Kendra James attempted to drive away from a traffic stop when she was in the process of being arrested. The arresting Officer attempted to drag her out of the car, and spray her with pepper spray, but the canister malfunctioned. He attempted to control her with a hair hold, but she was wearing a wig. Believing that he would either fall out of the car or be dragged or run over, he drew his gun and ordered James to turn off the ignition. When she did not comply he shot her.

The Portland Bureau's investigation resulted in a discipline of 900 hours unpaid leave. That letter imposing the sanction was released to the press. The Oregonian sued under the Oregon Public Records Law demanding that the internal investigation to be released. Under the Public Records Law, the District Attorney reviews such a request. The District Attorney ordered the records to be released subject to a few specified redactions. The City refused, and the Oregonian sued. The Circuit Court granted the Oregonian's request. The Court of Appeals in the case of *City of Portland v. Oregon Publishing Company*, 200 Or App 120 (2005) affirmed. The Court ruled as follows:

"When a public body withholds public records from disclosure, that body carries a burden sustaining that action on appeal. . . . That burden is daunting. Oregon has a 'strong and enduring policy that public records

and government activities be open to the public.'" "...Exceptions from disclosure are to be narrowly construed...The exemption at issue in this case does not impose an evenly weighed balancing test: The City must prove that the public interest in nondisclosure" clearly outweighs the interest in disclosure. *Id.* p. 124.

The City relied upon the affidavit of the Police Chief claiming that in order to encourage candid self evaluations that disciplinary action should not be disclosed on the grounds that there would be better candor from the Police Department employees if the reports were kept confidential.

The Courts response to that was as follows:

“...we observe generally that, although people may be more candid when they know that their statements will be disclosed to the public and, in particular, to the people about whom the statements are made, they are also more likely to be vindictive, careless or speculative-and therefore unreliable.” *Id.* p. 125.

The Court also stated that more importantly both the Circuit Court and it examined the documents *in camera* and found that the public need to know is outweighed by any alleged chilling effect. It noted that the documents included confidential memorandums up the chain of command analyzing the events, physical evidence and memorandums from the command review staff, and their votes on whether or not policies were violated and what the appropriate level of discipline would be. The Court stated that anonymous Whistle Blower complainants might be viewed differently, or highly personal criticism. The Court concluded:

“Supervisory personnel render judgments, but they are clinical and detached. To conclude the public disclosure of such judgments, may pursuant to supervisory duties, would discourage future conduct as an insult to the supervisors themselves.” *Id.* p. 127.

From the Court’s decision we do not know what documents the District Attorney ordered redacted (withheld) as the Oregonian did not contest that decision.

Editorial comment: On any high profile case, one can expect that almost no document will be exempt from the Public Records Law.

POSTSCRIPT: *On June 28, 2005 a federal jury concluded unanimously that Portland Officer Scott McCollister did not use excessive force when he shot Kendra James on May 5, 2003. The jury rejected a wrongful death suit filed by James’ father and her estate. Portland Police Association President Robert King was quoted by The Oregonian: “[The verdict] is the vindication of his actions that night . . . He acted properly in defense of his life, and we knew that when a jury of his peers saw all the evidence . . . that he acted out of necessity.”*

(State of Maine Case)

TERMINATION OF MAINE POLICE CHIEF WAS NOT RETALIATION FOR PROTECTED SPEECH

Following a chain of events that began with a dog at large call, Bethel Maine Police Chief Darren Tripp sued the Town Manager alleging violations of his constitutionally protected free speech rights and a state whistleblower statute.

In October 2002, Chief Tripp observed a dog at large and called the Department's animal control officer to the scene. The ACO responded and apprehended the suspect. A summons was issued to the suspect's owner, who repeatedly called Town Manager Scott Cole to complain about the summons. Cole then asked Chief Tripp to dismiss the summons. Tripp responded that the matter was now in the DA's hands. When Cole asked Tripp to ask the DA to "dump" the summons, Tripp replied that he was not comfortable doing so. The following March (2003) Cole suspended Chief Tripp for one month due to a series of incidents—some over 2 years old. In February 2004 Chief Tripp was fired, supposedly for his failure to respond to an armed robbery call.

Chief Tripp sued, alleging that the actual reasons he was fired were (1) his statement that he was not comfortable trying to get the summons dropped and (2) his statement to town officials that his relationship with the Town Manager had cooled. He characterized the incident as a dispute over whether citizens of affluent neighborhoods should be held to the same rules as those from more modest neighborhoods.

The U.S. Court of Appeals used a well-established three-part test to evaluate Chief Tripp's First Amendment claims: "(1) whether the speech involves a matter of public concern; (2) whether, when balanced against each other, the First Amendment interests of the plaintiff and the public outweigh the government's interest in functioning efficiently; and (3) whether the protected speech was a substantial or motivating factor in the adverse action against the plaintiff."

The Court rejected Tripp's claims. First, the cooling of his relationship with Town Manager Cole was not a matter of public concern—it was a classic example of speech concerning internal working conditions. Second, Chief Tripp's failure to mention to the Town Manager that he was concerned about the equal enforcement of the law prevented him from belatedly arguing that his statement that he was not "comfortable" asking the DA to dismiss the summons involved an issue of public concern. Moreover, the Court observed that there was no evidence of public concern or discussion on issues of equal enforcement of the law. The Court of Appeals adopted the district court's analysis of the situation:

“[T]he real dispute [was that] Tripp was upset that Cole was poking his nose into police business. . . . Although the 'big picture' might be newsworthy, the actual content, form and context of Tripp's speech reflect that Tripp was speaking primarily as an employee concerned about how he was going to perform his job with regard to the Thurston summons and about private perceptions that directly related

to his personal working relationships, not as a concerned public citizen speaking about matters predominantly of public concern.”

Tripp v. Cole, No. 04-2588 (1st Cir. 9/27/05).

One week earlier, the same court held that an officer of the Puerto Rico Justice Department had been the victim of retaliation for protected speech. That officer complained to his superiors about irregularities in the investigation of drug trafficking rings and spoke with a news reporter about his concerns. The officer was fired following publication of 2 news articles, supposedly for jeopardizing an informant and an ongoing investigation. The Court observed that if the officer had in fact jeopardized an informant and an investigation, his speech would not have been protected. However, the jury could reasonably have concluded that employer acted because of the officer’s complaints about mismanagement and possible corruption in the conduct of drug trafficking investigations. The Court upheld an award of \$125,000 in damages. *Tejada-Batista v. Morales*, No. 03-1841 (1st Cir. 9/20/05).

Editorial Comment: Speech that arises from internal disputes, personnel matters, and personality conflicts is not protected by the First Amendment. An employer may lawfully terminate employees for such speech—subject of course to any just cause requirements of a collective bargaining agreement. Speech that involves matters of clear public concern—such as mismanagement or corruption and that include speech to the media, is much more likely to be protected by the First Amendment.

If the employee is acting as an Association or Guild representative, he may have additional protections under state law protecting union activity. A court might also consider his union status in deciding whether or not the speech at issue involves a public concern.

THE SUPREME COURT UPHOLDS MOST OF THE NEW PERS LEGISLATION

AS AN UNRELATED MATTER PERS HAS BEEN WITHHOLDING TOO MUCH TAXES ON RETIREES WITH A DUTY RELATED DISABILITY.

THE PERS DECISION

The Oregon Supreme Court upheld most of the new PERS reform legislation. The Court’s decision was based on its analysis of the PERS statutes, and the Court concluded that the only guarantee employees had was to have the formula calculation amount when they retire. The Court declared that the money match and pension plus annuity methods of calculating retirement payments were optional and not contractual in nature.

The good news is the Court did throw out the part of the legislation that eliminated the annual crediting of employees PERS accounts at the assumed rate. However, the crediting at the “assumed” rate, which historically has been at eight percent, is within the administrative discretion of the PERS Board to change by lowering that rate. So, in the future the assumed rate could be lowered significantly.

Secondly, the Court overturned taking away the annual COLA for retirees. However, the Court noted that it had not yet decided the *City of Eugene* case where Judge Lipscomb had ruled that the 1999 earnings credited should have only been 11 percent. The Court stated that when it decides that case, should it uphold Judge Lipscomb’s decision, it might declare that temporarily suspending the COLA in order to recoup the over payment would be legal.

The Court ruled that diverting the six percent employee contribution into a separate account was legal. The Court’s ruling was based on the fact that employees are still guaranteed the formula upon retirement. However, the six percent diversion means that part of an employees retirement account cannot be used to help the employee retire with the higher benefit level of the money match retirement option, and is not subject to the two percent annual COLA. Also, the Court upheld stopping future contributions into the variable program and adopting updated mortality tables.

This case was a 4 to 3 decision. Aggressive management attorneys could take the decision as a wedge to reopen the *OSPOA* decision and attempt to eliminate the six percent account altogether as long as the formula is provided at retirement. The Court’s decision cannot be construed as putting the controversy to rest as to what the Legislature or the PERS Board can do to lower employees' retirement benefits in the future.

PERS HAS BEEN WITHHOLDING TOO MUCH TAXES FROM RETIREES WHO HAVE A WORK RELATED DISABILITY

Recently, I was contacted by a retiree who retired because of a work related disability. For years PERS had been withholding taxes on virtually all of his disability benefits. However, since 1991 PERS should not have done so, as only part of that benefit is taxable due to laws passed that year. Retirees can file refund claims to recover their overpayments.

The problem is that the refund claims can only be filed within three years of when the retiree paid his or her taxes. There appears to be no remedy for overpayments in taxes which were made more than three years ago. A lawsuit against PERS over withholding too much taxes does not appear to be viable. The best solution is for a legislative fix authorizing PERS to be liable for those amounts. However, given PERS’ financial condition, such a solution is problematic at best.

2004

**NINTH CIRCUIT COURT OF APPEALS RULES THAT FLSA ONLY
REQUIRES AN EMPLOYER TO ALLOW COMP TIME OFF WITHIN A
“REASONABLE TIME,” NOT NECESSARILY ON THE DATE REQUESTED**

The case of *Mortensen v. County of Sacramento*, 2004 WL 1146264 (9th Circuit, May, 2004) occurred when an employee sued over the employer’s failure to give him comp time off as requested on a date certain. The employee cited the Department of Labor’s regulations in support of his position. However, the 9th Circuit joined the 5th Circuit in stating that the statute unambiguously holds that the employer must grant it within a reasonable period of time, citing the case of *Houston Police Officers Union v. City of Houston*, 330 F.3rd 298 (5th Cir. 2003). In this case, that the County believed it could deny a leave request when there were no available leaves slots open, was appropriate.

In accord with DOL advice, the argument made by the employee was there were other deputies available to work overtime. However, the employer wished to avoid overtime costs. The Court indicated that the standard that the employer must grant the time off “within a reasonable period” could be dependent upon the customary practices of the employer and how it was regulated in a collective bargaining agreement. In this case the facts were that within a 60-day period of when the date was requested, there were 18 days available when the employee could have taken time off. Therefore, the Court found that it was a matter of law, there was no disagreement as to the facts, and affirmed a granting of the summary judgment on behalf of the employer.

Editorial comment: Employer champagne corks should be popping, but on the other hand, this certainly is consistent with how interpretation of the FLSA has been going in the last few years.

**THE OREGON COURT OF APPEALS RULES THAT STATEMENTS MADE BY
EMPLOYEES IN AN INTERNAL INVESTIGATION AGAINST ANOTHER
EMPLOYEE ARE ABSOLUTELY PRIVILEGED AND THAT A LAWSUIT FOR
DEFAMATION CANNOT BE BROUGHT AGAINST THE EMPLOYEE WHO
MAKES THE STATEMENT**

The case of *Johnson v. Brown and Deschutes County*, 193 Or App 375 (2004), arose out of an internal investigation where Deschutes County fired a supervisor of the Adult Correction Program for work-related misconduct.

The former supervisor sued one of his employees who he supervised, Nancy Brown (we assume no relation to the Arbitrator), and the County for defamation based upon statements made during the County’s internal investigation. The Court ruled that when a public employee is required, as a condition of employment, to make statements in

performance of their official duties, i.e., during an IA, that those statements are absolutely privileged and that a claim for defamation will not fly.

Editorial comment: A lot of employers and some paranoid employees will breathe easier with this ruling. However, it is not an unexpected ruling given prior case decisions. The rationale for this ruling is that employees would be afraid to do their job and to give candid statements in the course of their employment if they were looking over their shoulder all the time in defamation cases.

CHANGES IN THE FLSA: EMPLOYEES WHO ARE POTENTIALLY EXEMPT FROM OVERTIME LOSE FUNDAMENTAL PROTECTIONS

The Bush administration decided it was time to “clarify” and “modernize” the FLSA as regards to exempt employees. Given the bent of the administration, it should come as no surprise that clarification makes it easier for employers to designate employees as exempt from overtime, i.e. having the executive, administrative, or professional exemption, and makes it easier for an employer to discipline the employees by suspending them without pay while still preserving their “salaried” status.

For all three of the main exemptions, the Department of Labor eliminated the “guidance” that the employee perform no more than 20% of its work that is not exempt, i.e. the same work performed by hourly employees. Because of that elimination, employees can spend the vast majority of their time doing the same work as hourly or bargaining unit members and yet still retain their exempt status because they are either supervisory or administrative in nature, at least in theory. For professional employees the requirement of a degree in the field of expertise was eliminated with the employee being able to acquire the “expertise” on the job. This will make a significant difference for governments being able to claim that employees are exempt from overtime.

In the past, a lot of litigation has occurred over the requirement that exempt employees be paid on a salaried status. For the most part, suspensions without pay for less than a full workweek would destroy that salary status and, in some cases, have led to employer overtime liability. The DOL changed all this by allowing an employer to publish a standard of conduct which indicates that violations of specific offenses can result in discipline and, when the employer imposes discipline for alleged violations of that standard, the employer will not be destroying the employees’ salaried status by suspending them without pay. The net effect of these changes is to fairly effectively gut the requirement that exempt employees be paid on a salaried basis, especially in the public sector.

COURT OF APPEALS RULES THAT DPSST CAN REVOKE A POLICE CERTIFICATION THAT CONTAINS FALSE INFORMATION WITHOUT HAVING TO PROVE AN INTENT TO DECEIVE DPSST

The case of *Pierce v. DPSST*, arose because former Deputy Pierce believed that an old Assault IV conviction had in fact not been a finalized conviction because he entered into a diversion program. Therefore, he did not list the assault conviction in his application for basic certification to DPSST, even though he had fully disclosed it to his employer. Later, without warning, DPSST changed its certification question from listing convictions to listing arrests or convictions. Pierce missed that change when he applied for an intermediate certification.

DPSST revoked all of Pierce's certifications. Pierce argued that merely providing wrong information should not be cause for decertification, because there was no proof that he had an intent to deceive DPSST. At the hearing, testimony by way of letters from Sheriff Daniels and Undersheriff Brian Anderson were introduced which stated that they believed that Pierce did not intend to deceive DPSST as he had fully disclosed his misdemeanor assault arrest to them when he applied for a job.

Notwithstanding that, DPSST revoked the certification and the Court of Appeals upheld that, finding other statutes in the ORS's where the legislature required "deliberately falsifies" or "willful falsification" or evenly "knowingly falsifies" as standards for taking away State licenses. Therefore, the Court concluded: "The statute does not require specific and heightened mental state such as an intent to deceive."

Editorial comment: First, everyone should be paranoid in filling out their DPSST certification applications. Ironically, this case may have started because of a typographical error in Pierce's date of birth, which initially triggered DPSST's interest in his certification application. Second, a legislative change should be made but unless that is made a priority by both the OCPA and Police and Sheriff's Administrations, it is doubtful that one will take place. This biased advocate certainly believes that basic justice did not take place in this case. A more likely explanation for the different statutory standards throughout the ORS is that different legislative enactments did not consider other legislative enactments in this area.

2003

SUPREME COURT APPOINTS COURT OF APPEALS JUDGE DAVID BREWER AS SPECIAL MASTER RECOMMENDED FINDINGS OF FACT ARE DUE TO THE COURT NO LATER THAN APRIL 12, 2004

Before being on the Court of Appeals, Judge Brewer has been a Lane County Circuit Court Judge where he was highly regarded for his abilities and respected for his judicial temperament. This makes him an excellent appointment to be Special Master in what are now seven consolidated cases.

His assignment is to rule on motions that may be filed and to submit to Recommended Findings of Fact to the Supreme Court no later than April 12, 2004.

In a status conference on Monday October 27th, Judge Brewer indicated that he intended to meet that deadline and wanted the trial on any disputed facts to be heard no later than February.

Generally, the duties of a Special Master include taking testimony and preparing Findings of Facts for a Court, which will apply them to legal principles. However, since Judge Brewer was given authority to rule on any motions that may be filed, Daryl Garrettson and myself will be filing a Motion for Summary Judgment this week arguing that there are no facts in dispute concerning the fact that the new PERS legislation, HB 2003 and 2004, "impair" the contract that employees had with their employers. Judge Brewer has indicated some reluctance to rule on that motion because traditionally a Special Master does not make legal rulings.

However, a ruling in this area would be helpful, as I believe the case will turn on whether the deficit that PERS faces is sufficient to justify a public policy exception allowing the State to change the contract that employees have had for retirement benefits.

The next hearing, which like all proceedings in this case is open to the public, will be on November 12th at 9:00 a.m. At that time motions regarding the defenses raised by the City of Eugene and other local government Defendants will be heard, and the Court will establish litigation deadlines.

OREGON SUPREME COURT REVERSES THE COURT OF APPEALS DECISION AND UPHOLDS THE ARBITRATOR'S REINSTATEMENT OF THE WASHINGTON COUNTY CORRECTIONS OFFICER WHO WAS FIRED FOR SMOKING MARIJUANA

The issue for the Supreme Court was whether under the facts of the case, the employee violated a "public policy requirement as clearly defined in statutes or judicial decisions." (O.R.S. 243.706 (1))

This is the case where the Officer flunked a drug test required by his CDL because he had been smoking marijuana nearly every day for a month before he took the test. The Arbitrator had relied on the drug testing language, which mandated a plan of assistance and counseling for first time usage and reversed termination of the Corrections Officer. The Employment Relations Board had sustained that but the Court of Appeals reversed it.

The Supreme Court relied on the fact that the statute, which required DPSST to revoke an officer's certificate, required the officer to be convicted of the possession of a narcotic and dangerous drug. The Court first ruled that whether or not the officer should

remain certified was not the question, but whether or not the statute was violated so as to prevent the officer's reinstatement. The Court noted that this was not serious misconduct related to work as specifically enumerated in ORS 243.706. The Court also found relevant the evidence in the hearing that no one else would have been prosecuted for such an offense. Lastly, the Court determined that the statute required a conviction, and not merely that the conduct in question occurred. Therefore, the case was reversed and remanded to the Court of Appeals to review other employer arguments including whether there was dishonesty in the case, which the ERB refused to consider.

Editorial Comment: I would not have predicted this decision. The Officer had confessed to doing what he was charged. However, the Court narrowly interpreted the former statute dealing with DPSST de-certification (today it is the same as an OAR), and held that because the statute required a conviction rather than the use of drugs, that was the standard to which the Court would adhere and apply ORS 243.706. Therefore, in the end result we will see more prosecutions by the friendly DAs to ensure that this omission does not reoccur.

2002

THE COURT OF APPEALS UPHOLDS JUDGMENT AGAINST CITY OF MEDFORD FOR SEX DISCRIMINATION

The case of *Ettner v. City of Medford*, 178 Or App 303, (2001), occurred because the City of Medford terminated a probationary female firefighter.

The relevant facts of this case were that the plaintiff has previously worked as a seasonal firefighter for the State of Oregon while attending SOC. She also worked for a private company as a firefighter in Josephine County for three years before she took the job. Incidentally, after she was terminated, she successfully completed her probationary period to become a firefighter in the City of Grants Pass. Her former employer and current employer produced witnesses who testified that she was a strong and able firefighter.

When plaintiff started working in Medford, some male firefighters reported their wives were disturbed over the idea of gender integrated quarters. A newly hired chief, who wanted to employ female fire fighters, (previously there had been none) was told by senior staff that hiring a female would hurt morale. Some of those persons were used as evaluators for plaintiff's testing at the end of her probationary period. She became the only firefighter to flunk some of the tests. The tests were administered to her differently from others and she wasn't allowed to retake them as other firefighters had been.

The City's defense was that it treated plaintiff differently on the tests because she was "psychologically and physically drained" after taking the tests, and it gave her more training in an attempt to get her to pass the test, which she was unable to do.

The Court found that the plaintiff did not have to prove that the defendant acted with ill will. She only had to prove that she was treated less favorably than male candidates because of sex.

The Court rejected the City's attempt to prove that there was an objective testing process, and plaintiff produced expert witnesses who testified as to the subjectivity of the evaluation process. The Court criticized the fact that the so-called objective testers were collaborating on their scores as opposed to reaching them independently. It also criticized the fact that the plaintiff didn't know which of the tasks she would be tested for and that she was treated uniquely in that she was not allowed a second chance to retake the test. The Court concluded commenting that the whole overall picture in the record was of an "ambience of animus towards female firefighters."

Editorial Comment: When I represented Lane County in employment matters, I developed a theory. If an employer looks incompetent and its defense is incompetent but clean, it will usually lose. The City of Medford not only looked incompetent but appealed a record replete with instances of discriminatory remarks based on sex. It truly deserved to lose.

COURT OF APPEALS RULES THAT ANY PUBLIC SAFETY OFFICER WHO ADMITS TO VIOLATING STATUTES FOR WHICH DPSST MUST REVOKE CERTIFICATION CANNOT BE REINSTATED BY AN ARBITRATOR'S DECISION

This is the case of *Washington County Police Officers' Association v. Washington County*, which was decided recently by the Court of Appeals, 181 Or App 448 (2002). This case started through the legal system a number of years ago when Washington County terminated a corrections officer for smoking marijuana. The arbitrator reinstated the officer based upon Washington County's Collective Bargaining Agreement, which gave any employee who tested positive for the presence of illegal drugs access to the EAP before the employee could be terminated. The arbitrator's reinstatement of the employee was upheld by the ERB.

The County had appealed this decision to the Court of Appeals and argued that ORS 243.706 (1) required the arbitration award to be unenforceable because "public policy requirements are clearly defined in statutes or judicial decisions." At the time the officer admitted smoking marijuana, statutes governing DPSST certification provided that the conviction of any drug offense required the revocation of a certification by DPSST.

Even noting while this statute no longer was in existence, (there is an Administrative Rule which has the same requirement) the Oregon Court of Appeals ruled that because the statute was in effect when the officer admittedly possessed marijuana, the DPSST mandatory revocation requirement was an expression of public policy of what conduct was inappropriate for a person to be a public safety officer. Therefore, no arbitrator could reinstate an employee who had been terminated for conduct which admittedly violated

the statute. The fact the officer had never been convicted of violating the statute, the fact that a conviction would be punishable only by a fine, and the fact that Washington County had a Collective Bargaining Agreement, which prohibited terminating an employee under such circumstances, was ruled to be irrelevant.

Editorial Comment: Given the fact that the corrections officer in question was smoking marijuana nightly, had a CDL license as part of his job, and was therefore subject to random drug testing, the end result is understandable on the grounds that the individual was too stupid to be a corrections officer. However, in the “big picture” this case is extremely significant. It is this author’s prediction that there will be pressure brought to bear by employers on DPSST to pass rules requiring mandatory revocation of public safety certifications for a variety of offenses so that employers will be sure that they do not lose discipline cases.

DPSST’s challenge for the future will be to ensure that its rules are applied in an evenhanded matter, are not overly draconian, and for such events as alcohol abuse, have elements of rehabilitation built into them. The greatest challenge of DPSST will be to apply these rules evenhandedly for all certified public safety employees, whether they are supervisors, line officers, police chiefs, or elected sheriffs.

FAIR LABOR STANDARDS ACT LITIGATION:

CITY OF MILWAUKIE’S COMPENSATORY TIME OFF POLICY FOUND TO VIOLATE THE FLSA

In a significant ruling, the Court while acknowledging that the FLSA time off regulations have flexibility built into them, found that the City’s rule of an automatic denial of a comp time off request, if the City had to pay overtime for a replacement, or to bring in a replacement from another shift or precinct, did not comply with the employer’s obligation under FLSA, which is that the employer could only deny a request if granting it would cause “undue disruption.”

After the Court’s ruling the parties were able to settle the case and negotiate a new comp time policy that was acceptable to both.

Editorial Comment: In one sense, the police officers are lucky that the City didn’t decide to do away with comp time all together. Federal statutes indicate that comp time cannot be used unless both sides freely agree to it.

THE 7th CIRCUIT RULES THAT A PAY BACK OF TRAINING COSTS REQUIRED DOES NOT VIOLATE THE FLSA

The Wisconsin city of Two Rivers had a provision in its labor agreement that if a paramedic left within 3 years of employment, the paramedic would reimburse the City for its cost of its training, one third of which was done on company time. The issue when a paramedic left early was whether such a requirement violated the FLSA. The District Court agreed with the employee. However, the 7th Circuit reversed with the ruling that since an employer could require an employee to hold a degree as a condition of hiring, requiring an employee to payback training costs as a condition of leaving would not violate the FLSA.

However, the same Court rejected the City's position that it had a fluctuating workweek, where in essence only half time was owed when an employee worked over the normal straight time number of hours in a pay period. The reason for this is that the FLSA requires that there be an agreement for the fluctuating workweek method of paying for overtime before work commenced. There was no such agreement, and the 7th Circuit did not approve the fluctuating workweek method.

GEORGE BUSH'S DEPARTMENT OF LABOR REVERSES PRIOR ADMINISTRATIVE DECISIONS AND RULES THAT UNDER CERTAIN CIRCUMSTANCES PAID FIREFIGHTERS MAY VOLUNTEER IN THE SAME JURISDICTION WITHOUT FLSA OVERTIME LIABILITY

Using the threat to the country after 9-11, DOL ruled that "career employees" can be part time volunteers under certain circumstances for ostensibly separate volunteer fire companies or paramedic squads within their employer's jurisdiction. This is a significant reversal of prior DOL policy and relied in part on the case of *Benshoff v. City of Virginia Beach*, 180 F.3d 136 (1999), which upheld firefighters volunteering to be EMS workers for a separate non-profit rescue squad, even though that squad was significantly controlled by the firefighters' employer.

In reaching that ruling the Court found it significant that there was a long history of a volunteer search and rescue corporation being independent of the County, that the volunteer corporation controlled promotions within its ranks, had its own bylaws and board of directors, and up until recently, the County was not regulating what the corporation did.

The DOL looked at this for justification of its new rule, even though it had opposed the Court's ruling in a "Friend of Court" brief back in 1999, and argued that there was enough control of employee's actions by the County to create a joint employment condition so as to impose overtime liability for the volunteering. However, in the future the IAFF may litigate employer conduct in this area in an attempt to invalidate these new regulations.

COURT OF APPEALS RECONFIRMS THAT STATE LAW REQUIRES DISABILITY ACCOMMODATION FOR ANY JOB THAT AN EMPLOYEE CAN

DO IN A CLASSIFICATION AND NOT FOR THE DUTIES OF THE CLASSIFICATION IN GENERAL

The Case of *Evans v. Multnomah County Sheriff's Office*, 184 Or App. 733 (2002) occurred because the plaintiff, a corrections officer, was terminated due to his medical condition. Plaintiff had heart surgery and the doctor stated that the plaintiff had a permanent condition which would cause him to need to avoid the potential for traumatic incident injury, which translates as no contact with inmates. However, the plaintiff identified 18 posts filled by corrections officers in Multnomah County which had little or no inmate contact. Multnomah County kept employees in temporary work assignments while temporarily disabled, but was refusing to use them for permanently disabled employees.

Citing the previous disability case concerning a state corrections officer, which was written up in this newsletter, *Anglin v. Department of Corrections*, 160 Or App. 463 (1999), the Court of Appeals ruled that the reasonable accommodation to plaintiff was to allow him to have one of those jobs.

More significantly, the Court discussed the Americans With Disabilities Act and claimed that its decision was in conformity with Federal Court decisions.

Editorial Comment: In spite of the Court's efforts, the ADA is not being interpreted consistent with Oregon's disability cases and, in fact, I would predict and have predicted an opposite result in at least every other Circuit but the Ninth Circuit. However, this is good news for public safety employees who work for large employers. I would expect, over time, for employers to eliminate a lot of these light duty positions by changing job duties and classifications due to a concern that they would have too many disabled employees on their staff.

2001

THE COURT OF APPEALS REVERSES EMPLOYMENT RELATIONS BOARD ORDER THAT JEFFERSON COUNTY HAD NO STANDING TO FILE AN UNFAIR LABOR PRACTICE FOR SECONDARY PICKETING AGAINST COMMISSIONERS' PRIVATE BUSINESSES

This case arose out of the continuing saga of the strike of OPEU in Jefferson County. There were allegations during the strike that OPEU had picketed the personal businesses of three County Commissioners, handed out flyers, and carried signs on sidewalks and in parking lots. The ERB dismissed the complaint, indicating the County did not have standing to file the ULP as it was not an injured party. The Court of Appeals, reviewing the legislative history of SB 750 reversed. It concluded that the Legislature contemplated that an Unfair Labor Practice Complaint could be brought by an employer when their elected officials were subject to secondary picketing. The case was

remanded to the ERB for a decision on the merits of the County's claim and on the constitutionality of the statute.

COURT OF APPEALS AFFIRMS ERB ORDER ALLOWING TEMPORARY EMPLOYEES TO JOIN A BARGAINING UNIT OF STATE EMPLOYEES

The ERB had previously ruled that temporary employees could join a bargaining unit of State employees. The State appealed, arguing that definitions in State statutes excluded temporary employees from the collective bargaining laws.

The Court of Appeals ruled against the State's legal argument and held that based on the record which showed that a high percentage of employees had started out as temporary employees, they had a community of interest with the rest of the bargaining unit.

In a separate decision, the Employment Relations Board ordered the temporary employees who had no right to strike, i.e., Correction Officers, to be placed in the large bargaining unit, which represented employees with right to interest arbitration.

THE U.S. SUPREME COURT RULES THAT BASED ON THE ELEVENTH AMENDMENT, STATE EMPLOYEES MAY NOT SUE THE STATE FOR FAILURE TO COMPLY WITH THE AMERICANS WITH DISABILITIES ACT

The case of *Board of Trustees of the University of Alabama v. Garrett, et. al.*, decided in February, 2001, S.Ct. 99-1240, is an extension of previous Supreme Court rulings giving life to the Eleventh Amendment by restricting State Employee's ability to sue the State. The Supreme Court's decision was based on the fact that there was no legislative history showing that Congress had "identified a history and pattern of irrational employment discrimination by the States against the disabled."

Editorial Comment: The Reagan appointments continue to strike back. This was a classic five to four decision. On the other hand, under Oregon Law, there is a strong argument that can be made that because of the Oregon Tort Claims Act, Oregon has waived its Eleventh Amendment Immunity. Moreover, Oregon's anti discrimination statutes in many areas exceed the protections of the ADA.

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FAIR LABOR STANDARDS ACT DECISION HOLDS THAT EMPLOYEES WHO COULD NOT LEAVE THE EMPLOYERS' WORKPLACE DURING THE LUNCH HOUR WERE NOT ENTITLED TO BE COMPENSATED FOR THAT TIME BECAUSE THE EMPLOYEES WERE STILL RELIEVED OF ALL DUTIES AND RECEIVED A THIRTY MINUTE UNINTERRUPTED BREAK

This is a decision that may not have been ruled on the same way in other jurisdictions, but the court in this case based its decision on the Federal CFR's which required the employee to be free to leave the "duty post" as opposed to an employer's premise.

AMERICANS WITH DISABILITIES ACT DECISION:

THE NINTH CIRCUIT COURT OF APPEALS RULED THAT THE CITY OF SAN JOSE MUST PROVIDE MORE RESTRICTED DUTY POSITIONS FOR POLICE OFFICERS

The City of San Jose had had a past practice of providing for a limited number of restricted duty positions for police officers who received injuries at work. The City had strict control on the numbers of positions because it had a general rule that all officers must rotate back to patrol and cannot stay in specialty positions.

In this case, officers backed by the Police Guild sued, alleging that the policy that the guild had negotiated with the City did not accommodate employees' disability by not allowing more positions to be available. The testimony at the trial was that the "modified duty positions" were so limited that officers in them were subject to ridicule for being on the modified duty. Officers also testified that it affected their promotional opportunities.

The District Court dismissed the case, finding that under the ADA that no positions need to be so restricted, and basically told the plaintiffs that they were lucky to get what the City gave them. However, the Ninth Circuit Court of Appeals found that there was no justification for the limitation that the City put on the limited number of positions which officers could have for limited duty and that a far greater number of positions existed for officers with physical limitations such as a back problem which prevented fighting with people. Therefore, the summary judgment order which had

initially been entered on behalf of the City was reversed and remanded for a full trial on the merits.

Editorial Comment: Virtually every other Court in the country would have ruled as the District Court did. This case was extremely well litigated by the plaintiffs but the limitation of the holding may be that it will only be applied to the largest police departments in the country. In addition, should the Supreme Court accept review of this case, it is doubtful that that decision will stand.

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COURT DECISIONS CONCERNING THE FMLA

The FMLA has prompted significant litigation around the country as to the limits of what an employer can require from an employee before the employee may return to work after the employee takes FMLA leave.

In a mostly unpublished decision of *Underhill v. Willamina Lumber Co.*, USDC Op 98-630-AS, (1999 US Dist. Lexis 9722,) Judge Ashmanskas issued a ruling on cross motions for summary in the case. This opinion is not published because the case settled as a result of the Court's decisions.

In this particular case, while working in a sawmill the plaintiff suffered a head injury, which caused him to have problems with the adjustment of his medications. Plaintiff took FMLA leave in order to work with his physician to adjust his medication levels to the appropriate levels. Then the plaintiff presented to his employer a letter indicating that he was fully released to return to work.

The employer was concerned about the plaintiff's working around moving equipment and sent to the employee's doctor a copy of his job description and requested a more detailed opinion. The doctor replied with some detail indicating that it was his opinion that the employee did not pose an unreasonable risk for seizure development. However, the employer refused to allow the plaintiff to return to work and refused to pay him in the interim. Defendant scheduled plaintiff for an independent medical exam, but the plaintiff announced that he considered himself terminated by virtue of defendant's action.

The Court's first decision is that plaintiff could not have a cause of action for common law discharge under Oregon law. That is a non-statutory cause of action. The Court found that these areas have been pre-empted by both the FMLA and the ADA.

The Court found that the FMLA allowed employees to receive up to 12 weeks per year for care of their own or family members' serious health conditions. The FMLA also prohibits employers from interfering with an employee's exercise of rights under the FMLA. The Court held that a violation of the FMLA was a strict liability offense. The Court found that the FMLA allowed an employer to have a uniform policy for requiring

certification to return from a leave as long as it was not specific to the FMLA and noted also that the statute could be superseded by State law or a local collective bargaining agreement addressing the return to work of employees. The Court also found that the employer may require a fitness for duty certification but that once it is provided, no additional information can be requested, and that the employer also could not delay the employee's return to work.

In this case, the Court found that there was no evidence that the defendant had a policy of requiring medical certifications for employees in all cases before they are able to return to work. Therefore, the defendant violated the statute by demanding a certification from the employee who was out on an FMLA leave.

In addition, the Court found that the FMLA allowed the employer to receive a simple statement from the health care provider and nothing further.

In this case, the Court recognized that because the plaintiff was pursuing a claim under the ADA and the FMLA, there was a split of authority nationwide as to whether the ADA, which would allow significant employer inquiry, conflicted with the FMLA. The Court concluded it didn't matter if it did or not, even though there were decisions around the country that ruled to the contrary, and found that the more specific statute, i.e., the FMLA, was controlling.

Editorial comment: There are a couple of limitations with this case. The first is that litigation will ensue in this area for years to come, as there is a national split of authority. The second is that these rules can be superseded by provisions in a collective bargaining agreement. Therefore, it is important that collective bargaining agreements be carefully examined upon renewal to take advantage of the provisions of the FMLA.

U.S. SUPREME COURT DECISION ON COMPENSATORY TIME

In the case of *Christensen v. Harris County*, which was decided May 1 by the Supreme Court (perhaps this was the Supreme Court's response to May Day demonstrations). The Supreme Court ruled that the FLSA does not prohibit employers from placing caps on the number of hours of compensatory time public employees could accumulate and could even require employees to use the compensatory time. In making this conclusion, the Supreme Court noted that there was no prohibition in the FLSA of employer's so requiring, and pointed to other provisions of the FLSA where there were restrictions on what employers could do with compensatory time. The Court also noted other sections of the FLSA which allowed an employer to cash out accumulated compensatory time at its whim.

The Court left untouched the Department of Labor opinions that employees must be permitted to take compensatory time off unless it would create an "unusual hardship on employers" which has been interpreted to say virtually unless no one can be found to work the overtime.

Editorial comment: This case is justified from a narrow construction of the FLSA, even if it went against advisory opinions from the DOL and its arguments to the Supreme Court. However, this case will have no practical effect on Oregon's collective bargaining agreements. At the most, agreements should be carefully written to insure that an employer cannot cash out compensatory time at will, nor order employees to take time off against their wishes.

OREGON COURT OF APPEALS RULES THAT A SELF INSURED EMPLOYER HAS TO PROVIDE UNINSURED MOTORIST COVERAGE

This was an issue that arose years ago in litigation between the City of Salem and the Salem Police Employees Union. The argument was over whether the City had to provide uninsured motorists coverage through self-insurance, even though it provided workers compensation benefits.

The City, which ended up suing the Union and the individual officers who were claiming a right to uninsured motorist's coverage, prevailed in Circuit Court.

In a complicated decision based upon the interpretation of State statute, the Oregon Court of Appeals disagreed and reversed the decision.

Editorial Comments: This is important for law enforcement labor organizations to ensure that this additional benefit is available. Even though workers compensation covers all out of pocket expenses in a job related auto accident, the uninsured motorists coverage will cover pain and suffering, which is not picked up through the workers compensation system. Expect employer lobbying groups to attempt to amend the statute this next legislative session.

SIXTH CIRCUIT COURT OF APPEALS RULES THAT A CORRECTION OFFICER IS ENTITLED TO PAY FOR TRAINING TIME AS A PATROL OFFICER UNDER THE FLSA

The case of *Farmer v. Ottawa County*, (6th Cir. No. 98-2321, April 2000) came as no surprise to attorneys who have been following FLSA litigation and letter opinions from the U.S. Department of Labor. In that case, a correction officer was told that before he could become a deputy sheriff again, he would have to complete the department field training officer program. He did so and ended up suing to be paid for that time. The 6th Circuit analyzed the case and utilized a four part test which was established by the Department of Labor which stated that training need not be compensated if:

1. The attendance at the training occurs outside the employee's regular working hours,
2. Attendance by the employee is voluntary,
3. The training program is "not directly related to the employee's job," and

4. The employee performs “no productive work during the training.”

The issue was the fourth test, productive work. The Court found that during the training program, the plaintiff performed all the regular duties of a patrol deputy, which was similar to corrections officers because the standard policies required officers to respond to certain life threatening situations. Because the Court determined this was productive work, the plaintiff was awarded liquidated (double) damages, an amount equal to the back pay, because the County failed to show that its violation of the Act was made in good faith as interpreted by the Courts.

COURT OF APPEALS REVERSES THE ERB AND RULES THAT AN ARBITRATOR’S DECISION SETTING ASIDE DISCIPLINE IN DESCHUTES COUNTY IS ENFORCEABLE IN SPITE OF ORS 243.706

This case arose because an arbitrator reinstated an employee who the arbitrator concluded had used excessive force on an inmate. The reason the arbitrator did so was because the Sheriff’s office had not charged the employee with using excessive force, but with failing to supervise another employee whom the Sheriff concluded had used excessive force. The ERB refused to enforce the arbitrator’s award on the basis that once the arbitrator found excessive force had been used, the arbitrator was powerless to set aside the discipline.

The Court of Appeals disagreed with the ERB’s decision and reversed it. The Court concluded that once the County limited its charges against the employee to a failure to supervise, as opposed to direct use of excessive force, then the County could not rely on ORS 243.706 which requires that arbitration decisions where an employee is charged with excessive force, or sexual misconduct, cannot be set aside based upon the evenhanded enforcement of the rule, or the evenhandedness of the discipline.

Editorial comment: When the dust settles, the series of decisions that dealt with this case will be virtually meaningless. It has long been an accepted practice that what an employer charges an employee with will be the basis of the arbitration decision. The Court of Appeal’s decision simply reinforces the obvious. In this writer’s opinion, the ERB panicked when it saw an allegation of excessive force and its attempt to impose a newly enacted statute on the case is in error.