OREGON
CIVIL RIGHTS
NEWSLETTER

Published by the Oregon State Bar Civil Rights Section *December 2005*

The Class-of-One Theory: Should It Apply to Employment Actions?

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In employment law, some causes of action—wrongful discharge and intentional infliction of emotional distress, to name two—do not depend on the immutable characteristics of the affected person. But when the employer is a government and a suit is brought alleging inappropriate actions, a frequent claim is that the employer has violated that individual's Fourteenth Amendment equal protection rights under 42 USC § 1983 because the person is, for example, female or African-American or Hindu. The equal protection clause ensures that "all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 US 432, 439, 105 S Ct 3249, 87 L Ed 2d 313 (1985).

It is almost an article of faith that Fourteenth Amendment analysis turns on whether the plaintiff was treated differently because he or she belongs to a racial, religious, or ethnic class of people. But what if a plaintiff asserts merely that she was treated "differently from others 'similarly situated' and there is no rational basis for a difference in the treatment"? That doesn't state an equal protection claim . . . or does it? That is the issue currently before the U.S. Court of Appeals for the Ninth Circuit in *Engquist v. Oregon Department of Agriculture*, Nos. 05-35170 and 05-35263.

Anup Engquist brought suit against the Oregon Department of Agriculture (ODA) after she was passed over for a promotion and then became the first of several employees released from that agency's Export Service Center during budget cuts. Engquist alleged that her removal from government service was motivated in part by race and ethnicity (she was born in India and is therefore Asian and Indian), but also that she had, regardless of her race/ethnic status, been treated differently from others around her in the same circumstances. The case was tried in November 2004, and although the jury found for ODA on race discrimination, it awarded Engquist a six-figure verdict under the "class of one" approach to her equal protection claim. ODA has appealed.

Engquist's class-of-one theory arises out of language used in another context by the U.S. Supreme Court in *Village of Willowbrook v. Olech*, 528 US 562, 120 S Ct 123, 145 L Ed 2d 1060 (2000). *Village of Willowbrook* was based on the allegedly discriminatory regulations that a city placed on a property owner's connection to a municipal water supply. A comparison was made between the treatment of the allegedly aggrieved *Village of Willowbrook* plaintiff and other similarly situated citizens who were not subjected to the plaintiff's treatment. Subsequent cases that applied *Village of Willowbrook*—almost exclusively in a regulatory context—clearly identified a class of similarly situated individuals or entities that was being regulated: for example, developers subject to water quality regulations, builders subject to zoning regulations, ship owners subject to environmental restrictions on travel, and fishermen subject to catch limits.

Although the common understanding is that ordinary public-employment decisions—those that do not implicate a fundamental right or a suspect classification—are not subject to federal judicial review, even if they are mistaken, unreasonable, or pretextual, *see, e.g., Waters v. Churchill*, 511 US 661, 679, 114 S Ct 1878, 128 L Ed 2d 686 (1994), *Engquist* was not the first time that the U.S. District Court for the District of Oregon had been called upon to apply *Willowbrook* in the employment context. In *Cain v. Tigard-Tualatin School District 23J,* 262 F Supp 2d 1120 (D Or 2003), Judge Haggerty, adopting findings and recommendations by Magistrate Hubel, interpreted the U.S. Supreme Court's *per curiam* decision in *Village of Willowbrook* and refused to apply the class-of-one theory adopted in that case to the employment context. *Cain*, 262 F Supp 2d at 1130.

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✦ In This Issue

BOLI Final Orders
September–November 2005

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The Oregon Bureau of Labor and Industries (BOLI) investigates complaints and conducts administrative hearings in civil rights and wage and hour cases. This article summarizes the final orders that BOLI issued in civil rights cases from September through November 2005. BOLI final orders issued since 1996 can be accessed through the BOLI website, www.oregon.gov/boli. The full text of all BOLI final orders is available for purchase in 27 volumes plus a digest with regular supplements. The set is also available at most local law libraries.

Emerald Steel Fabricators, Inc.
27 BOLI __ (September 16, 2005)

The respondent, Emerald Steel Fabricators, Inc., hired the complainant through a temporary employment agency in January of 2003. The complainant worked full-time as a drill press operator in the respondent's machine shop for seven weeks. He showed up for work on time and performed his work satisfactorily, and on March 1, 2003, the respondent gave him a raise.

The complainant did not disclose when he was hired that he had a medical marijuana card issued under the Oregon Medical Marijuana Act (OMMA), because he was afraid he wouldn't be hired.

The complainant used medical marijuana one to three times per day during his period of employment with the respondent, to gain relief from a number of long-term conditions, including an anxiety disorder, panic attacks, chronic cramps, severe nausea, and vomiting. He never used marijuana at work or on the respondent's property. The agency found that the complainant was a disabled person because he suffered from mental and physical impairments that substantially limited him in the major life activity of eating.

On March 6, 2003, the complainant told his supervisor about his medical problems and disclosed that he had a medical marijuana card. He told the supervisor that he hoped to be hired as a regular employee and hoped that his disclosure would not get him fired. The supervisor asked the complainant if he had tried other medication, and the complainant explained that he had but that medical marijuana worked best for him.

On March 13, 2003, the complainant told his supervisor that he was moving to a new residence and asked if the respondent was going to hire him as a regular employee. The supervisor discharged the complainant, telling him that he was not needed to work for the respondent anymore.

The commissioner found that the complainant's disclosure constituted a request for reasonable accommodation and that the respondent failed to engage in a meaningful interactive process as required under Oregon and federal case law. The commissioner also found that the respondent discharged the complainant based on his use of medical marijuana and violated ORS 659A.112(2)(e) and (f) by failing to make reasonable accommodation and denying the complainant an employment opportunity.

The respondent raised a number of affirmative defenses, including that the OMMA does not require an employer to accommodate the use of medical marijuana in the workplace, that an employer is not required to permit a medical marijuana user to work in safety-sensitive positions, that an employer is free to ban illegal drug use under the federal Drug-Free Workplace Act of 1988, and that Oregon disability laws are to be construed to the extent possible consistent with the federal Americans with Disabilities Act,

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OREGON CIVIL RIGHTS NEWSLETTER

The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar
P.O. Box 1689
Lake Oswego, Oregon 97035

The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Supreme Court Update

Certiorari Granted

***Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259 (December 5, 2005)**

The U.S. Supreme Court has agreed to decide what constitutes an "adverse employment action" under Title VII of the Civil Rights Act of 1964 when an employer retaliates against an employee for reporting discrimination. The Sixth Circuit held that both a 37-day suspension without pay, regardless of whether reinstatement with back pay followed the suspension, and a transfer from a forklift operator position to a standard track laborer job, which paid the same but was more arduous, "dirtier," and carried less prestige, constituted adverse employment actions.

***Hamdan v. Rumsfeld*, No. 05-184 (November 7, 2005)**

The Court will decide whether the military commission established by President Bush to try Hamdan, who was captured in Afghanistan and transported to Guantanamo Bay Naval Station in Cuba, for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force, the Uniform Code of Military Justice, or the inherent powers of the president. The Court will also decide whether Hamdan can obtain judicial enforcement from an Article III court of rights protected under the 1949 Geneva Convention. The D. C. Circuit held that Congress authorized the military commission and that the Geneva Convention cannot be judicially enforced.

***Randall v. Sorrell*, No. 04-1528; *Vermont Republican State Commission v. Sorrell*, No. 04-1530; *Sorrell v. Randall*, 04-1697 (September 27, 2005)**

The Court will review whether a Vermont statute that imposes expenditure and contribution limitations on campaigns for state office violates the First Amendment. The Second Circuit held that the Supreme Court's decision in *Buckley v. Valeo*, 424 US 1, 96 S Ct 612, 46 L Ed 2d 659 (1976), permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests—in this case, preventing the reality and appearance of corruption and protecting the time of candidates and elected officials. The Second Circuit also upheld the statute's contribution limits of $200–$400 per two-year general election cycle.

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***Samson v. California*, No. 04-9728 (September 27, 2005)**

The Court will review a decision of the First Appellate District of the California Court of Appeal to decide whether the Fourth Amendment prohibits police from conducting a warrantless search of a person who is subject to a parole search condition, when there is no suspicion of criminal wrongdoing and the sole reason for the search is that the person is on parole.

***Sanchez-Llamas v. Oregon*, No. 04-10566; *Bustillo v. Johnson*, No. 05-51 (November 7, 2005)**

In a pair of consolidated cases from the Oregon and Virginia Supreme Courts, the Court will determine whether the Vienna Convention conveys individual rights of consular notification and access to a foreign detainee enforceable in U.S. courts and, if so, whether a state's failure to notify a foreign detainee of his rights under the Convention requires suppression of statements to police. The Oregon Supreme Court held that the Convention does not create rights that individual foreign nationals may assert in a criminal proceeding.

***U.S. v. Grubbs*, No. 04-1414 (September 27, 2005)**

The Court will review a Ninth Circuit decision to determine whether the Fourth Amendment requires suppression of evidence when officers conduct a search under an anticipatory warrant after the warrant's triggering condition is satisfied, but the triggering condition is not set forth either in the warrant itself or in an affidavit that is both incorporated into the warrant and shown to the person whose property is being searched.

Certiorari Denied

***Cincinnati v. Barnes*, No. 05-292 (November 28, 2005)**

The Court refused to review a case in which a preoperative male-to-female transsexual living as a male while on duty as a police officer but living as a female off duty alleged that he was demoted for failing to conform to sex stereotypes. The Sixth Circuit affirmed a jury verdict for the officer, holding that the officer's demotion because of a failure to conform to sex stereotypes concerning how a man should look and behave constituted a claim for sex discrimination in violation of Title VII of the Civil Rights Act of 1964.

Argument Held

***Gonzales v. Oregon*, No. 04-623 (October 5, 2005)**

The Court has heard oral argument concerning Oregon's Death with Dignity Act. The Court will decide whether the U.S. attorney general may implement regulations prohibiting the distribution of federally controlled substances for the purpose of facilitating an individual's suicide. ✦

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THE CLASS-OF-ONE THEORY

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If one person or organization is singled out for regulatory enforcement, Judge Haggerty reasoned, it is understandable that the class-of-one theory can be applied. However, the employment context is different. Judge Haggerty wrote:

> The Supreme Court gave no indication that the holding extended beyond matters involving municipal property disputes. The Supreme Court surely would have spoken more clearly if it intended to extend the reach of the *Fourteenth Amendment's Equal Protection Clause* to every instance of arbitrary state action. Plaintiff's wide-ranging interpretation of *Village of Willowbrook* would grant relief to any public employee or student who was "singled out" by a state official. Such a reading extends well beyond the limits of the *Fourteenth Amendment*.

Cain, 262 F Supp 2d 1120, 1130 (2003).

Magistrate Hubel also was concerned about that potential result, and incorporated a cautionary holding from the federal court in Massachusetts into his findings and recommendation:

> While this theory may have some viability in certain contexts, . . . the applicability of the "class of one theory" to an employment-based equal protection claim seems dubious. *Olech* was a discriminatory zoning case, and Justice Breyer in his separate concurrence expressed concern about transforming "run-of-the-mill zoning cases into cases of constitutional right." In this case, if plaintiff is correct on the law, any public employee convinced that someone similarly situated is being treated more favorably could sue his or her employer under the *Fourteenth Amendment* for a violation of equal protection. Since practically every employee, public or private, is bound to be convinced at some point that he or she is getting the short end of the stick, it is not hard to imagine the bee hive of constitutional litigation that would be generated by this variant of this "class of one" doctrine. It seems unlikely that the Supreme Court intended such a dramatic result in its *per curiam* opinion in *Olech*.

Cain, 262 F Supp 2d at 1137 (quoting *Campagna v. Commonwealth of Massachusetts*, 206 F Supp 2d 120 (D Mass 2002)).

In *Engquist*, however, Magistrate Ashmanskas rejected ODA's summary judgment motion requesting application of the *Cain* opinion, stating that *Cain* was distinguishable. Judge Ashmanskas did not further elaborate on his reasoning in his written opinion.

Employment actions necessarily differentiate between employees. Employees differ by qualifications, job duties, seniority, and a host of other characteristics. As a general rule, employees are not similarly situated. The essence of personnel actions requires finding differences between employees and using those differences to establish priorities. Personnel actions, such as the promotion and layoff decisions in the *Engquist* case, by their very nature require an employer to single people out. The Supreme Court has come to the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Connick v. Myers*, 461 US 138, 143, 103 S Ct 1684, 75 L Ed 2d 708 (1983).

Nonetheless, there seems to be at least some attempt in some of the circuits to take a *Willowbrook* approach to employment matters. Judge Ashmanksas noted three such cases: *Bartell v. Aurora Public Schools*, 263 F3d 1143 (10th Cir 2001); *Ciechon v. City of Chicago*, 686 F2d 511 (7th Cir 1982); and *Ziegler v. Jackson*, 638 F2d 776 (5th Cir 1981). However, these cases—two of which predate the limiting approach of *Willowbrook*—do not directly review situations in which promotion or termination was involved. Rather, each of the cases concerns differential discipline applied to people who had committed that same act. *See also Cobb v. Pozzi*, 363 F3d 89 (2d Cir 2003). Individuals were being punished in a different way for activities or behaviors that others were not being punished for.

When asked to apply the *Willowbrook* analysis directly to the question of promotion or termination—questions that relate uniquely to the individual's job performance—courts have been more reluctant to do so. *Campagna v. Commonwealth of Massachusetts*, 206 F Supp 2d 120 (D Mass 2002), *aff'd,* 334 F3d 150 (1st Cir 2003); *Kelley v. City of Albuquerque*, 2004 US Dist LEXIS 28151 (DNM 2004). The Second Circuit specifically declined to consider the argument, reserving it for another day. *Giordano v. City of New York*, 274 F3d 740, 743, 751 (2d Cir 2001).

As opposed to how some courts have approached discipline cases, most courts have been far more reluctant to apply a *Willowbrook* analysis in hiring, promotion, and termination cases. While the Eight Circuit Court of Appeals discussed taking a *Willowbrook* approach in *Batra v. Board of Regents of University of Nebraska*, 79 F3d 717 (8th Cir 1996), it did not apply *Willowbrook's* analysis and, ultimately, affirmed summary judgment for the state employer. The closest a court seems to have come in applying the *Willowbrook* analysis to a specific employment action is in *Hedrich v. Board of Regents of University of Wisconsin*, 274 F3d 1174 (7th Cir 2001):

> Where, as here, Hedrich alleges that she was a class of one—a heterosexual female professor who befriended Dr. Albrechtsen, a heterosexual male professor who had previously filed a sex discrimination complaint—it was her burden to show that the defendant's justification for discriminating against her was irrational and arbitrary. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000).

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> We agree with the district court that Hedrich did not present competent evidence on several of these elements. In particular, while she offered evidence that the criteria the faculty applied in assessing her scholarship were not consistent with those set out in the University Handbook, she had nothing to indicate that other tenure applicants in the Department were not assessed according to the same allegedly erroneous criteria. Hedrich also failed properly to present any evidence to support her claim that the real reason that each of the defendants acted to deny her tenure was to punish her for her friendship with Dr. Albrechtsen. To the contrary, the record reveals that male and female faculty members alike (including the male chairperson) voted to deny her tenure, and she has no theory to explain why the male members might have resented the heterosexual friendship. With no evidence on these two critical points, the court properly dismissed Hedrich's equal protection claim.

Hedrich, 274 F3d at 1183.

It does appear that, although the court ruled against the plaintiff in this case, it was prepared to apply the *Willowbrook* analysis to an individual tenure decision. *Hedrick*, however, is the only case post-*Willowbrook* that appears to have gone this far other than *Engquist.*

One concern that governments are likely to have if a *Willowbrook* analysis is applied to individual employment decisions is whether this new standard would diminish traditional management prerogatives by requiring federal courts to second-guess each public-sector employment decision, converting the Fourteenth Amendment into a civil code of employment criteria against which every management decision would be examined for a rational basis and for arbitrariness. Historically, that is not an area into which the federal judiciary has wanted to go.

The other question that would need to be examined is, what is the meaning, in a class-of-one context, of the phrase "similarly situated"? In *Campagna*, the court opined that a finding of "similar situation" is a tightly drawn net. 206 F Supp 2d at 127. Very minor distinctions in how parties are situated might be enough to render the comparison pool inapplicable. Distinctions such as extensive prior management background are not minor or immaterial when comparing two candidates for a single promotion. In a more entrepreneurial environment, would the revenue produced by the position held be counted or discarded in considering whether, as a matter of law, candidates for a layoff were similarly situated?

The burden to present evidence that there is a comparator group that was similarly situated remains with the plaintiff. *City of Cleburne v. Cleburne Living Center*, 473 US 432, 439, 105 S Ct 3249, 87 L Ed 2d 313 (1985); *Marwood v. Elizabeth Forward School District*, 91 F3d 207 (3rd Cir 2004); *Bartell v. Aurora Public Schools*, 263 F3d 1143 (10th Cir 2001); *Giordano v. City of New York*, 274 F3d 740 (2d Cir 2001). Persons are "similarly situated" if they are in "all relevant respects" alike. *Nordlinger v. Hahn*, 505 US 1, 10, 112 S Ct 2326, 120 L Ed 2d 1992 (1992). "The goal of identifying a similarly situated class . . . is to isolate the factor allegedly subject to impermissible discrimination. The similarly situated group is the control group." *United States v. Aguilar*, 883 F2d 662, 706 (9th Cir 1989), *cert denied*, 498 US 1046 (1991).

Employees, generally, are considered similarly situated when they have similar jobs and display similar conduct. *Cf. Vasquez v. County of Los Angeles*, 349 F3d 634, 641 (9th Cir 2003). How would such a formulation affect specific employment decisions?

In *Engquist*, the plaintiff was not selected for a promotion. Three individuals applied for the same position. The plaintiff was one of two women applicants, and the only minority. If those were not the characteristics relevant to a class-of-one analysis, how does an employer make a reasoned analysis about what might, *ex post facto*, be considered an impermissible criterion? One of the themes in *Engquist* was allegations of personal animus. Would the courts constitutionalize interpersonal relationships? In *Hedrich* and *Batra*, the courts were called upon to reach decisions about the very specific merits of university tenure decisions. How, in the context of discussions about the merits of sometimes abstract scholarship and subjective judgments regarding teaching ability, can a case be made or defended regarding whether an individual is "similarly situated"?

These are the difficult and significant questions that the Ninth Circuit Court of Appeals must address in *Engquist*. The court's decision will have a major impact on public employment. If the court decides that a class-of-one claim can be brought in the employment context, the claims will likely almost always survive summary judgment, given the idiosyncratic nature of the proof. Many more class-of-one claims will be filed, increasing the cost of employment litigation in the public sector. Permitting such claims, on the other hand, could spur an increase in investment in manager training and employment systems, and reduce the incidence of such suits in the long run. Whichever way the Ninth Circuit rules, its decision will have a significant effect on public-sector employment litigation. ✦

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Promoting Workforce Diversity: Effective Strategies

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As more jobs are shipped overseas and American business is under increasing pressure to stay competitive in a still shaky economy, the question arises whether a diverse workforce will result in increased competitiveness—whether there is a business case for diversity. An analysis of the practices and policies of major multinational corporations demonstrates that there is, in fact, a strong business case for a diverse workforce, and, in particular, for effective corporate diversity programs.

Understanding the business case for a diverse workplace and effective corporate diversity programs first requires understanding what "diversity" means. Until recently, the notion of diversity in the workplace tended to be limited to issues of race and gender. Businesses, however, have begun to understand that diversity is far more encompassing, including not only factors such as race, gender, color, national origin, sexual orientation, age, religion, and ethnicity, but also less obvious identifiers like socioeconomic status, marital status, educational background, language/accent, and appearance. Regardless of how diversity is defined, it clearly is premised on embracing the differences that individuals invariably bring to the workplace.

Employers who are resistant to diversity should understand that the source of the future U.S. workforce is very different than it once was, and it includes many minorities and women. Of people entering the U.S. labor force between 2004 and 2014, 14.8% are expected to be black, 21.5% Hispanic, and 46.7% women. By 2014, minorities are expected to constitute 34.4% of the labor force, and women 46.8%.[1]

Not only is the source of America's workforce changing, the face of customers, clients, and consumers is also changing and reflects the vastly more diverse society that is the United States. Diversity is, and will continue to be, present in every workforce in one form or another. Businesses should understand that embracing and valuing diversity makes good business sense and is the right thing to do for employees, customers, shareholders, and other stakeholders.

The Business Case for Diversity

The buying power of minorities will continue to grow at a faster rate than that of white households for at least the next five years. By 2010, the combined buying power of African Americans, Asian Americans, and Native Americans will exceed $1.7 trillion.[2] Attracting some of those dollars is but one of many reasons to embrace diversity. Embracing diversity makes good business sense because it can

- Increase competitiveness in new American and global markets
- Expand market share through access to new markets
- Deepen customer loyalty
- Increase shareholder value
- Enhance the available pool of employee talent
- Increase creativity, innovation, productivity, and revenue
- Improve recruitment, retention, and morale
- Multiply return on investment

Another major reason to promote diversity in the workforce is, of course, to reduce the company's susceptibility to employment discrimination charges and lawsuits. Employment discrimination is the second-largest single source of federal civil litigation; approximately 21,000 employment discrimination lawsuits are filed annually.[3] From 2000 to 2004, an average of 81,181 discrimination charges were filed annually with the U.S. Equal Employment Opportunity Commission; race discrimination claims were the most frequent, followed by sex discrimination claims.[4] And discrimination claims can be costly. In July 2004, for example, Morgan Stanley agreed to pay $54 million to settle allegations that it underpaid and failed to promote women. Shortly thereafter, Boeing Co. settled similar claims by agreeing to pay up to $72.5 million.[5]

Effective Strategies

Listed below are strategies that businesses can use to effectively promote workforce diversity.

Monitor and act on workforce data

- Create and maintain a validated employment database and analyze trends and issues concerning hiring, promotion, pay equity, discipline, and termination for all employees, especially women and minorities.

Increase executive management's awareness of, and involvement in, workforce diversity issues

- Require regular reporting to the highest level of management on workforce data and trends, including (a) hiring, promotion, pay, discipline, and termination of women and minorities, (b) discrimination complaints, and (c) effectiveness of diversity initiatives and programs.
- Demand that senior management develop increased awareness and knowledge of workplace and diversity issues and recognize the corresponding legal and business risks.

Set aggressive but achievable annual targets for diversity hiring and promotion by department and hiring manager

- Consult benchmark standards to set targets (e.g., *Fortune* magazine's "50 Best Companies for Minorities").
- Consider using "diversity scorecards" to track progress (showing, e.g., opportunities and placements).

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- Incorporate diversity targets into performance objectives for department heads, hiring managers, and other key employees.

Eliminate any miscommunication among hiring managers, human resources personnel, and recruiters

- Know the hiring manager's objectives and set realistic expectations.
- Ensure close coordination during the hiring process.
- Identify and implement "lessons learned" from each hire.

Develop a fair and effective process for resolving employee complaints

- Ensure that the entire process, including the complaint investigation, is thorough and comprehensive.
- Assign responsibility for each component of the process.
- Require prompt and thorough complaint investigation by a trained professional.
- Determine supervisory and employee training needs.
- Consider alternative dispute resolution mechanisms (e.g., mediation, arbitration, and peer review).

Ensure that hiring, compensation, discipline, and promotion practices are equitable

- Require annual review of applicable policies and procedures by the legal department or outside experts.
- Demand consistent application and enforcement of all policies.
- Discipline supervisors and managers who fail to consistently enforce the policies.

Diversity is reality. Implementing a successful diversity program can be an important component of an employer's economic success and success in the community. The program should include strong leadership and commitment from top management; clear understanding and agreement about the business case for diversity; a clear, specific strategy and action plan; attainable goals and timelines; and recognition of successes and failures.

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A prior version of this article was published in the May 6, 2005, issue of *The Business Journal of Portland*.

Endnotes

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3. Kirsten Downey, "Workers' Moment: With Its Dispute Resolution Process, Kodak Joins a Trend, *The Washington Post*, Sept 21, 2003, p F01.

4. U.S. Equal Employment Opportunity Commission, "Charge Statistics FY 1992 Through FY 2004," www.eeoc.gov/state/charges.html.

5. Amy Joyce, "The Bias Breakdown: Asians and Black Lead in Perceived Discrimination at Work," *The Washington Post*, Dec 9, 2005, www.washington post.com/wp-dyn/content/article/2005/12/08/AR2005120802037.html.

Recent Decisions

Ninth Circuit Court of Appeals

***EEOC v. National Education Association–Alaska*, No. 04-35029 (9th Cir Sept 2, 2005)**

The EEOC filed charges on behalf of three female employees, alleging that the NEAA created a sex-based hostile work environment. The district court granted summary judgment to the defendants, finding that the admittedly hostile conduct of the employee's director was not "because of sex." The district court concluded that because the director's conduct did not include sexual overtures or lewd comments or references to female employees in gender-specific terms, the conduct was not "of a sexual nature" or motivated by "sexual animus." The Ninth Circuit reversed the grant of summary judgment, finding that

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while sex- or gender-specific content is one way to establish discriminatory harassment, direct comparative evidence of how the alleged harasser treated members of both sexes is another available evidentiary route. Under this "differential effects" approach to proving discriminatory harassment, the ultimate question is whether the alleged harasser's behavior affected women more adversely that it affected men. To this end, under Title VII "evidence of differences in subjective effects is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex- or gender-specific."

***Hardage v. CBS Broadcasting, Inc.*, No. 03-35906 (9th Cir Nov 1, 2005)**

After resigning from his position as local sales manager, the plaintiff alleged sexual harassment and retaliation for refusing the sexual advances of his female supervisor. In response, CBS asserted the *Ellerth-Faragher* defense. In Title VII sexual harassment cases, an employer is vicariously liable for the hostile work environment created by a supervisor with authority over the employee. However, the employer can assert an affirmative defense to vicarious liability when (1) no tangible employment action has been taken against the employee, (2) the employer has exercised reasonable care to prevent and correct harassment, and (3) the employee unreasonably failed to take advantage of

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preventative or corrective opportunities. The district court concluded that CBS had established the *Ellerth-Faragher* defense and granted summary judgment in its favor. On appeal, the plaintiff argued that CBS was not entitled to the defense because a tangible employment action had been taken against him, specifically, that his resignation was, in fact, a constructive discharge resulting from the hostile work environment created by his supervisor. The Ninth Circuit rejected this argument because five months had elapsed between the employee's resignation and his supervisor's last inappropriate sexual advances. The court affirmed summary judgment for the employer based on the *Ellerth-Faragher* defense.

U.S. District Court, District of Oregon

Pittman v. Oregon Employment Department
CV-05-509-BR (D Or Aug 8, 2005)

After being terminated, the plaintiff filed suit against the Oregon Employment Department, alleging discrimination under 42 USC § 1981 and § 1983. The state moved to dismiss the § 1983 claim on the ground that the state is not a "person" within the meaning of § 1983. The district court agreed. The state then argued that the § 1981 claim should be dismissed because § 1981 does not grant private individuals the right to sue states, and because the Eleventh Amendment immunizes states from § 1981 actions anyway. The district court rejected the second argument, finding that the state had waived its immunity under the Eleventh Amendment when it voluntarily invoked the federal court's jurisdiction by removing the case from state to federal court. The district court affirmed the first argument, however, concluding that because states are not "persons" subject to suit under § 1983, subjecting states to suits under § 1981 would impose a substantive change on federal civil rights law.

Oregon State Courts

Bjursrtom v. Oregon Lottery,
202 Or App 162, 120 P3d 1235 (2005)

The employee had made complaints about the employer's policies on the use of safety shoes and break periods, its decision to sell decommissioned ladders, and the alleged incompetence of the human resources staff. When the employee was terminated for dishonesty, he sued, alleging violations of the Oregon Public Employee Whistleblower Law. The court concluded that the whistleblower law does not protect any and every disclosure of evidence of mismanagement, but only disclosures of "serious agency misconduct having the effect of actually or potentially undermining the agency's ability to fulfill its public mission." Because the plaintiff's complaints of mismanagement failed even to approach that standard, the court affirmed the circuit court's grant of summary judgment. ✦

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which does not require accommodation of marijuana use.

The commissioner denied those defenses, noting that the agency is bound by the Oregon Court of Appeals decision in *Washburn v. Columbia Forest Products, Inc.*, 197 Or App 104, 104 P3d 609 (2005) until such time as the Oregon Supreme Court reverses the decision.

The respondent also asked the agency to consider the U.S. Supreme Court decision in *Gonzales v. Raich*, 125 S Ct 2195 (2005), in which the Court held that Congress has the authority to prohibit local cultivation of marijuana even if it was used for medicinal purposes pursuant to California law. The commissioner found that *Raich* did not affect the agency's findings for the complainant, citing the Oregon attorney general's determination that "*Raich* does not invalidate the OMMA nor require that Oregon repeal the OMMA, and does not oblige Oregon to follow the federal Controlled Substances Act . . . ."

The commissioner awarded the complainant $8,013.50 in back pay and $20,000 in damages for emotional distress. ✦

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