OREGON
CIVIL RIGHTS
NEWSLETTER

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Why You Should Care About Blogs

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Online journals, also called "web logs" or "blogs," have become increasingly popular over the last few years. Thanks to companies like Blogger and MovableType, anyone can quickly create, post, and update a blog for little or no money. Uncensored and readily available to anyone with computer access, blog topics run the gamut from the mundane[1] to the professional.[2] Blogs are also making an appearance in the legal realm, either as the basis of lawsuits or as new practice tools.

What Is a Blog?

A blog is a web page that can be continually updated with new information. Each new update is referred to as a "post." The post indicates the time and date the update was made and can include additional identifiers, or tags, such as topic or author. Because blogs originated as a kind of online diary, most posts read like journal entries.

Authors, even those with limited computer skills, can customize their blogs in numerous ways. The background and font of the web page are easily altered. Authors can invite others to comment on each post, and those comments often appear in a separate pop-up window. Photographs and images are easily reposted on blogs, and in fact, many people now maintain photoblogs.[3]

Increasingly, individuals are posting group blogs, to which more than one author contributes content. Group blogs are generally focused on a particular broad topic, such as politics[4] or legal jurisprudence,[5] and authors may use the blog as a space to debate or underscore particular points of view. It is considered bad manners to delete the content of an author's post on a group blog when one disagrees with the opinion stated, even though it is generally possible to do so.

"Blawgs" are blogs in some way related to the law. Authors can include law students, law librarians, professors, and attorneys. Like their nonlegal siblings, blawgs' topics are diverse. Some blawgs have become nearly indispensable resources for certain practitioners, while others provide an outlet to vent the frustrations of law school and legal practice.[6]

Advising Clients About Blogs and Blogging

As seems to be happening more often in various aspects of modern life, the line between public and private life is blurred on blogs. People often write about their friends, families, jobs, and recent romantic adventures, but try to maintain anonymity by not using their full names or real email addresses. Since most people do not consult an attorney before posting a blog entry or commenting on another's blog, the attorney's job will most likely be explaining to an author what his or her legal responsibilities are after there has been a complaint.

You are responsible for what you post

Maintaining true anonymity on a blog is virtually impossible. A computer's numeric address (its IP address) can be traced and an Internet service provider's (ISP's) records discovered to establish who wrote what about whom on which website and when. Clients should be discouraged from trying to beg out of responsibility for information they personally published because they intended or wanted to remain anonymous.

If publishing particular information in a newspaper would be libelous, it is libelous online as well. If reprinting photographs, paintings, or book excerpts for the purpose of critiquing them would be fair use in the physical world, it is fair use in the virtual world as well. Because blogs make posting new information so easy, clients can find themselves in an intellectual property conundrum without having any clue about the difference between ®, ©, and ™. Fortunately, resources like the Electronic Frontier Foundation (EFF) are available to help people navigate the legal responsibilities raised by blogging.[7] The EFF is also a great resource for attorneys trying to understand cease-and-desist letters associated

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✦ In This Issue

Recent Decisions

Ninth Circuit Court of Appeals

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***Berry v. Department of Social Services,* No. 04-15566, 2006 WL 1133316 (9th Cir. May 1, 2006)**

The U.S. Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968), set a balancing test for governmental employers wherein the employee's right to freedom of religion is balanced against the employer's interest in avoiding a violation of the establishment clause, which mandates the separation of church and state. Applying the test to the plaintiff, the Ninth Circuit declined to allow him to share his religious views with the clients of his agency who met with him in his cubicle. It also denied him the opportunity to use a conference room for voluntary prayer meetings and to display religious objects in his cubicle. All of the plaintiff's proposed actions would have created a danger of violating the establishment clause, thus creating an undue hardship for the employer.

***Cornwell v. Electra Cent. Credit Union,* 439 F.3d 1018 (9th Cir. 2006)**

The Ninth Circuit's decisions have been inconsistent on the issue of whether circumstantial evidence must rise either to the same level as direct evidence or to an even higher level in order to survive summary judgment in a discrimination action. Relying on the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Ninth Circuit now states that Title VII does not require a disparate treatment plaintiff relying on circumstantial evidence to produce either more or better evidence than a plaintiff who relies on direct evidence. In *Cornwell*, the evidence set forth in the complaint and supporting affidavits stated that the plaintiff was the only person of his race on the management team and the only person demoted from that team, and showed that the plaintiff had been excluded from meetings during the CEO's three-month tenure, that the CEO had offered to help him find a job with another company, and that he was replaced by a less experienced white employee.

***Denny v. Union Pacific R.R. Co.,* No. 04-35490, 2006 WL 561241 (9th Cir. March 9, 2006)**

In a split decision, the court found that an employee had "crossed the line" in his protest of a denial of family leave. During the course of the protest, the employee swore at his supervisor and suggested that they "take it outside," both of which resulted in his discharge. As it has in similar cases, the court found that the issue in the case was not what the employee had actually said, but rather what the employer reasonably believed he had said, since the retaliation claim was one of disparate treatment, which was an intentional act.

***Hulteen v. AT&T Corp.,* 441 F.3d 653 (9th Cir. 2006)**

Before the effective date of the Pregnancy Discrimination Act (PDA), an amendment to Title VII, an employer was permitted not to award service credit to employees on pregnancy leave, even though such credit was allowed for employees on other types of leave. The PDA changed that rule, but there remained the lingering effect of pre-PDA practices for long-term employees. The Ninth Circuit has now ruled that the PDA was not retroactive and therefore the lack of seniority or service credit for pre-PDA leaves is not discriminatory.

***Jespersen v. Harrah's Operating Co., Inc.,* No. 03-15045, 2006 WL 962533 (9th Cir. April 14, 2006) (en banc)**

The defendant required female employees tending bar to wear makeup, stockings, and colored nail polish and to wear their hair teased, curled, or

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Recycled/Recyclable

Is Preemployment Drug Testing by Public Employers Constitutional?

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Does a public employer violate the United States Constitution when it requires a job applicant, regardless of the job duties to be performed, to submit to a postoffer, preemployment drug test as a condition of employment? In response to a perceived problem of alcohol and drug use in the workplace, many employers, both public and private, have implemented postoffer, preemployment drug tests, primarily using urinalysis. The United States Supreme Court has held that when a drug test is performed by a public employer, it is a search within the meaning of the Constitution and must satisfy the Fourth Amendment's reasonableness requirement. Although the Supreme Court has not directly addressed whether postoffer, preemployment drug testing of applicants for public employment is reasonable under the Fourth Amendment, it has provided some guidance on the drug testing of employees, which has led to differing results among lower federal and state courts addressing the drug testing of applicants for public employment.

U.S. Supreme Court Provides Guidance: *Skinner, Von Raab,* and *Vernonia*

The Supreme Court has consistently held that a "compelled intrusion into the body for blood to be analyzed for alcohol content" is a search under the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). Similarly, breath-testing procedures and urinalysis also implicate the Fourth Amendment. *Id.* at 618.

The Fourth Amendment prohibits only searches that are unreasonable. In general, a search is unreasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause of individualized suspicion. *Id.* at 619. There are, however, recognized exceptions when "special needs," beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable and, thus, unnecessary. *Id.* In those situations, to determine what is reasonable, the practice in question is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests. *Id.*

Applying these standards, the Supreme Court in *Skinner* upheld drug and alcohol tests for *current* railway employees involved in train accidents and for those who violated certain safety rules. The Court found that the government's interest in ensuring the safety of the traveling public and of the employees themselves justified prohibiting covered employees from using alcohol or drugs on duty or while on-call and intruding on their privacy to obtain compliance.

While the Court set forth significant guidance in *Skinner* with respect to the general application of Fourth Amendment principles to employment-related drug testing, the Court's decision issued the same day in *National Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989), is more instructive with regard to the validity of preemployment drug testing. In *Von Raab*, the Court upheld drug tests for U.S. Customs Service employees who sought transfer or promotion to certain positions, including those charged directly with enforcement of drug interdiction laws or those who carried firearms.

Additionally, in a case considering the constitutionality of a drug testing program for students seeking to participate in school athletics, the Court emphasized that any government intrusion on privacy rights must be justified by a "compelling" state interest, that is, the government interest must be important enough to justify the particular search the government seeks to undertake. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). Thus, the more the conduct intrudes on reasonable expectations of privacy, the more compelling the government interest must be to render the intrusion reasonable.

The Court made clear in *Skinner*, *Von Raab*, and *Vernonia* that any analysis to determine the constitutionality of an employment drug-testing program must identify and balance the government's interest in the program against the individual's reasonable expectation of privacy and the extent of the intrusion by the government into that privacy interest.

Following Supreme Court's Guidance, Other Courts Upheld Preemployment Drug Testing

In 1991, the Court of Appeals for the District of Columbia considered the constitutionality of the Department of Justice's requirement that all job applicants submit to a drug test as a condition of employment. *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991). In examining the job applicant's privacy interest, the court noted that an individual has a large measure of control over whether he or she will be subject to urine testing since no one is compelled to seek a job at the Department of Justice (DOJ). *Id.* at 1190. That is, should an applicant view a drug test as an indignity to be avoided, he merely needs to refrain from applying. *Id.* Additionally, applicants for DOJ jobs are required to submit to a thorough and exhaustive background investigation. *Id.* at 1190–1191. As a result, those applicants cannot reasonably expect to shield their private lives from government scrutiny during the hiring process. *Id.* at 1191. In examining the DOJ's interests, the court noted that the DOJ is not just any employer;

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rather, it has a legitimate interest in maintaining public confidence and trust, which would be undermined by drug use among its employees. *Id.* at 1192. Recognizing that this alone is insufficient to justify preemployment drug testing, the court also noted the considerable time and money the DOJ invests in employing new applicants, buttressing its interest in intruding on an individual's privacy. *Id.* at 1192.

Similarly, in *Loder v. City of Glendale*, 14 Cal. 4th 846, 927 P.2d 1200 (1997), the California Supreme Court, following the guidance of the U.S. Supreme Court described above, addressed a challenge to an employment-related drug testing program that required everyone who was conditionally offered a new position with the city to submit to urinalysis testing. The program applied to newly hired individuals and to current city employees who had been approved for promotion to a new position.

As applied to current employees seeking promotion, the court held that the city's drug testing program was inconsistent with *Von Raab* and thus unconstitutional. Specifically, although important government interests could justify the imposition of suspicionless drug testing for promotion to certain sensitive positions, those same interests were insufficient to justify testing of all current public employees seeking promotion, regardless of the position that was sought. *Id.* at 878. In arriving at this conclusion, the California Supreme Court focused on the U.S. Supreme Court's holding in *Von Raab* that an employer's legitimate interest in a drug-free workplace, without more, was insufficient to render suspicionless drug testing of current employees seeking promotion reasonable. *Id.* at 880.

As applied to job applicants, however, the court in *Loder* found that preemployment drug testing was reasonable under the Fourth Amendment. In arriving at this conclusion, the court examined two federal court decisions that had disagreed on the issue: *Willner v. Thornburgh, supra,* and *Georgia Association of Educators v. Harris*, 749 F. Supp. 1110 (N.D. Ga. 1990) (striking down a Georgia statute that authorized preemployment drug testing of all applicants for state employment).

Importantly, the California Supreme Court found "that an employer has a significantly greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting similar testing of current employees." *Loder*, 14 Cal. 4th at 882. The key distinction made by the court between job applicants and current employees was the same one raised in *Willner*, that is, an employer has the ability to observe its current employees for signs of drug use, whereas, since a job applicant is a total stranger, an employer does not have the opportunity to personally evaluate the applicant for signs of drug use before committing to a considerable investment and hiring and training the applicant. *Id.* at 883.

Further, the court found in *Loder* that a drug testing requirement imposed a lesser intrusion on reasonable expectations of privacy when conducted as part of a lawful preemployment medical examination that a job applicant is required to undergo in any event. *Id.* at 882. The court closely considered the interplay of the ADA's provisions regarding postoffer, preemployment medical examinations. In particular, the court noted that the ADA permits such exams only if they are required of all entering employees, regardless of whether the exam is job-related or consistent with business necessity. *Id.* at 885 (citing 42 U.S.C. § 12112(d)(2), (3) and 29 C.F.R. § 1630.14(b)(3)). While recognizing that the ADA does not determine the scope of a job applicant's reasonable expectation of privacy for Fourth Amendment purposes, the court stated that it does reflect the general societal understanding that a requirement that all job applicants submit to a medical examination before beginning employment does not violate an applicant's reasonable expectations of privacy. *Id.* at 886.

Based on these considerations, the court found that an employer has a significantly greater interest in conducting suspicionless drug testing of job applicants than it does in testing current employees seeking promotion, and that the imposition of a urinalysis drug testing requirement as part of a lawful preemployment medical examination, on balance, is a lawful intrusion on a job applicant's reasonable expectations of privacy. *Id.* at 886–887.

As seen in *Willner* and *Loder*, courts were beginning to find that preemployment drug testing of job applicants was constitutionally permissible. These decisions, however, were careful to distinguish the reasonableness of testing job applicants as opposed to current employees, even when the current employees were seeking promotion.

The Supreme Court Speaks Again: *Chandler v. Miller*

Four months after the California Supreme Court issued its decision in *Loder*, the U.S. Supreme Court announced its decision in *Chandler v. Miller*, 520 U.S. 305, 117 S. Ct. 1295, 137 L. Ed. 2d 513 (1997). In *Chandler*, the Court examined a Georgia statute that required candidates for high elected public office to submit to and pass a drug test before their names would be placed on the ballot. The Court held that the mandatory drug test was a constitutionally impermissible, suspicionless search. The Court relied solely on *Skinner*, *Von Raab*, and *Vernonia* to inform its analysis. *Id.* at 318. It focused on the fact that there was no demonstrable problem of drug abuse by elected state officials in Georgia and thus no special need for suspicionless drug testing of candidates. *Id.* at 319.

The Court, however, noted that "a demonstrable problem of drug abuse, while not in all cases necessary to the

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In Chandler*, the Court examined a Georgia statute that required candidates for high elected public office to submit to and pass a drug test before their names would be placed on the ballot.*

validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program." *Id.* In contrast to the effective testing regimes upheld in *Skinner*, *Von Raab*, and *Vernonia*, the Georgia statute was not well designed to identify candidates who abused drugs or to deter drug users from seeking election to state office. *Id.* Because the drug testing had to be completed at a specific time, which was specified in advance, any candidate who was not prohibitively addicted could abstain from drug use for a pretest period sufficient to avoid detection; thus the statute undermined its purported purpose. *Id.* at 319–320. A job applicant, by contrast, does not know precisely when action will be taken on his or her application and, thus, cannot similarly thwart the purpose of a preemployment drug test. The Court also emphasized that since candidates for public office are subject to relentless scrutiny by their peers, the public, and the press, any actual concerns of drug abuse would likely become evident during the campaign process. *Id.* at 321.

Subsequent Lower Court Decisions Have Rejected Drug Testing for All Applicants

Although *Chandler* dealt solely with the testing of candidates for elected government positions, lower courts have relied on that decision and whether a "demonstrable problem of drug abuse" existed to determine the reasonableness of preemployment drug testing for nonelected government positions. Thus, based primarily on the Court's holding in *Chandler*, the U.S. District Court for the Southern District of Florida struck down a Florida city's policy that required all job applicants to submit to drug testing as a condition of employment. *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337 (2000). Importantly, in *Baron*, the court noted that the city had no evidence or history of prior drug use among its employees. In essence, the city's "symbolic" desire to maintain its positive image and provide "tangible assurances that public funds are in good hands and are not in jeopardy of being squandered by impaired employees" was an insufficient governmental "special need" to justify suspicionless drug testing. *Id.* at 1341.

In *Lanier v. City of Woodburn*, No. 04-1865-KI, 2005 WL 3050470 (D. Or. Nov. 14, 2005) (unpublished opinion), *appeal filed*, the U.S. District Court for the District of Oregon considered the constitutionality of the city of Woodburn's postoffer, preemployment drug and alcohol screening requirement for all applicants for city positions. The city argued that it had a legitimate interest in having a drug-free workplace, in light of the past experience of department heads who were concerned about employee drug use. *Id.* at *5.

The court, however, found that the city had failed to articulate a specialized need for suspicionless drug testing of job applicants. The court noted that the city's generalized interest in a drug-free workplace was insufficient to establish a special need under *Chandler*, and that the city did not have concrete evidence documenting drug use among city employees. *Id.* at *5–6. The court also found that, unlike the circumstances in *Willner* and *Loder*, here the applicant's expectation of privacy had not been diminished, given that the city did not simultaneously require a full medical examination or the disclosure of other personal information. *Id.* at *6 (noting that the court was not addressing whether the city's drug policy was unconstitutional when the drug test was required as part of a job-related medical examination).

Implementing a Drug Testing Program

Before a public employer implements a postoffer, preemployment drug testing program for job applicants, it should consider the following issues. First, does the entity have a documented history of drug use among its employees? Although the Supreme Court has stated that a demonstrable problem of drug abuse is not necessary in all situations, several courts have held that if a policy applies to all employees, not just to those in positions implicating safety issues, a desire to promote a drug-free workplace is an insufficient justification. If the entity is not experiencing an actual drug problem, it should consider limiting drug testing to positions that require the candidate to execute safety-sensitive tasks or involve the enforcement of drug laws or otherwise specifically justify the intrusion of a drug test on the applicant.

Second, how will the drug test be implemented? If the drug test will be part of a comprehensive employment-related medical examination, it will probably be found less intrusive on the job applicant's privacy than a drug test by itself. Ironically, the more information the employer requires the applicant to provide as a condition of employment, the more likely it is that a court will find the drug test to be reasonable. ✦

Amy Buckler is an associate at Barron Liebman LLP. She assisted in writing the briefs submitted to the district court on behalf of the city of Woodburn in the Lanier case while an associate at Hoffman Hart & Wagner LLP, arguing that the city's postoffer, preemployment drug screening policy was constitutional.

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with blogging and discovery requests issued to ISPs.

Some school districts are now establishing policies that hold students accountable for what they blog or comment about, even during non-school hours on private computer equipment.[8] At this time it does not appear that such policies have been challenged, though they present serious questions regarding legal authority and prior restraints on speech.

You are not responsible for what you don't write

Many blogs invite readers to comment on posts. Blog authors can decide whether they will edit or delete comments, and those that do often publish the guidelines they use.[9] A federal court recently dismissed a complaint against a blog author who failed to delete comments regarding the plaintiff that the plaintiff found offensive and asserted were false.[10] The court held that the blog's author was not responsible for the speech of others because, when acting as the host for the comments, he was similar to an Internet provider.

Working and blogging don't mix

Many employers, Microsoft and Delta among them, have been caught off guard by what their employees have posted about their jobs on personal blogs. The employees have been equally surprised that they could lose their jobs for what they posted on a blog. Microsoft was embarrassed by a contract employee's posting camera-phone pictures of Power Mac G5 computers being delivered to its Redmond Campus;[11] Delta dismissed a flight attendant who posted "risqué" photos of herself in an empty plane wearing her uniform.[12]

Being fired for what you write about your job on your blog is known as being "dooced." The term refers to www.dooce.com, the blog of Heather Armstrong, who is the first person known to have been fired because of information she posted on her blog.[13] Although most employers do not directly address blogs or web pages in their personnel rules, the personnel rules regarding trade secrets, confidentiality, and use of company equipment can all potentially apply to an employee's blogging activities.

Employers need not establish new personnel rules to address blogs, but they should review their existing rules to ensure that the rules protect their interests when applied to online activity. Employees should be reminded that even if they cannot recite the personnel rules or confidentiality agreement they signed when they were hired, they are assumed to be aware of those rules and restrictions, and are expected to limit their online activities accordingly. Employers must also understand that consistent enforcement of their personnel rules is the best way to keep employees informed of company policies and avoid problems like those described here.

Using Blogs to Improve (and Increase) Your Practice

Blogs are not all liability or privacy traps. Many blogs provide an abundance of valuable information, complete with links to additional resources. Blawgs can serve as 24-hour CLEs where attorneys exchange information about recent court opinions, proposed legislation, or new law suits.[14] Attorneys with unusual practices, like library law,[15] can easily, and cheaply, connect with a much larger community of practitioners than might exist in their city or state. Some attorneys have even found a way to turn their blogging into profits, establishing themselves as experts in their fields by regularly publishing on their blogs and reaching a wider audience than most traditional legal journals enjoy.[16]

If you are interested in learning about how blogs might enhance your practice, I suggest that you begin by reviewing these sites and following the links that pique your interest:

- **Blawg**, www.blawg.org, "Your Source for Law & Legal Related Weblogs."
- **How Appealing**, http://howappealing.law.com/, "The Web's first blog devoted to appellate litigation."
- **SCOTUSblog**, www.scotusblog.com/, covering every decision of the United States Supreme Court.
- **Jack Bog's Blog**, http://bojack.org/, Lewis & Clark Tax Law Professor Jack Bogdanski explains his point of view on most everything. ✦

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Endnotes

1. Musing from an Unarmed Chihuahua, www.planethunt.com/musings/.

2. SCOTUSblog, www.scotusblog.com/.

3. Photoblogs.org, www.photoblogs.org/.

4. Daily Kos, www.dailykos.com/.

5. The Volokh Conspiracy, www.volokh.com/.

6. Patently-O, http://patentlaw.typepad.com/; Anonymous Lawyer, http://anonymouslawyer.blogspot.com/.

7. EFF: Legal Guide for Bloggers, www.eff.org/bloggers/lg/.

8. Ed Collins, "Schools crack down on inappropriate blogs," *Chicago Sun-Times*, May 23, 2006, www.suntimes.com/output/tech/cst-nws-online23.html. Last accessed June 5, 2006.

9. See, e.g., An Exploration of Portland Food and Drink, www.portlandfoodanddrink .com/?p=527.

10. *DiMeo v. Max*, No. 06-1544, Opinion and Order (E.D. Pa. May 26, 2006), www.paed.uscourts.gov/documents/opinions/06D0657P.pdf.

11. "Fifteen minutes of fame," Eclecticism, www.michaelhanscom.com/eclecticism/2003/10/fifteen_minutes.html. Last accessed June 5, 2006.

12. Diary of a Fired Flight Attendant, http://queenofsky.journalspace.com/. Last accessed June 5, 2006.

13. Todd Wallack, "BLOGS: Beware if your blog is related to work," SFGate.com, Jan. 24, 2005, www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/01/24/BUGCEAT1I01.DTL. Last accessed June 5, 2006.

14. See, e.g., Sentencing Law and Policy, http://sentencing.typepad.com/.

15. Library Law Blog, http://blog.library law.com/.

16. Alan Cohen, "Associate's IP Blog is Patently Good Publicity," lawjobs.com, May 11, 2006, www.law.com/jsp/law/careercenter/lawArticleCareerCenter.jsp?id=1147251931103. Last accessed June 5, 2006.

Supreme Court Update

Decided

Brigham City, Utah v. Stuart,
No. 05-502 (May 22, 2006)

In reversing the Supreme Court of Utah, the United States Supreme Court held 9–0 that police may enter a home without a search warrant when they have an objectively reasonable basis for believing that an occupant is seriously injured or imminently threatened with serious injury.

Garcetti v. Ceballos,
No. 04-473 (May 30, 2006)

The Court reversed the Ninth Circuit in a 5–4 vote, holding that the First Amendment does not protect the statements of public employees made pursuant to their official duties.

Georgia v. Randolph,
No. 04-1067 (March 22, 2006)

In a 5–3 vote (Justice Alito did not take part), the Court affirmed the Supreme Court of Georgia, holding that when an occupant of a residence gives police permission to search the residence, but a co-occupant is present and refuses to give consent, the co-occupant's refusal to permit entry renders the warrantless entry and search unreasonable and invalid as to the co-occupant.

Rumsfeld v. Forum for Academic and Institutional Rights, Inc.,
No. 04-1152 (March 6, 2006)

The Court ruled 8–0 (Justice Alito did not take part) that the Solomon Amendment, a statute providing that an entire educational institution will lose certain federal funds if any part of the institution denies military recruiters access equal to that provided other recruiters, does not violate the First Amendment of the Constitution. The decision reversed the Third Circuit's decision, which had held that the Solomon Amendment violated the unconstitutional-conditions doctrine by forcing a law school to choose between surrendering First Amendment rights and losing federal money for its university.

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Fisher & Phillips LLP

U.S. v. Georgia, **No. 04-1203 (Jan. 10, 2006); *Goodman v. Georgia,* No. 04-1236 (Jan. 10, 2006)**

These companion cases arose out of a prisoner's claims under the Americans with Disabilities Act (ADA) against a state prison and prison officials. The Supreme Court held 9–0 that Title II of the ADA validly abrogates state sovereign immunity insofar as Title II creates a private cause of action for damages against the states for conduct that actually violates the Fourteenth Amendment.

U.S. v. Grubbs,
No. 04-1414 (March 21, 2006)

The Court reversed the Ninth Circuit in an 8–0 opinion (Justice Alito did not take part), holding that an "anticipatory" search warrant, in which the warrant contains a triggering condition (other than the mere passage of time), does not necessarily violate the Fourth Amendment provision prohibiting the issuance of warrants without probable cause, and that anticipatory warrants should be examined under the same standard as ordinary warrants.

Certiorari Granted

Carey v. Musladin,
No. 05-785 (April 17, 2006)

The Court will decide whether the Ninth Circuit exceeded its authority by overturning a state murder conviction on the ground that the courtroom spectators included three of the victim's family members who wore buttons depicting the deceased.

Meredith v. Jefferson Cty. Bd. of Ed., **No. 05-915 (June 5, 2006)**

The Supreme Court will review a case from the Sixth Circuit that affirmed without a detailed opinion a Western District of Kentucky decision, which held that a part of the school district's plan to distribute student enrollment using race as a factor did not violate the equal protection clause because the district had a compelling interest in achieving and maintaining racially balanced schools and it was narrowly tailored because it used broad racial guidelines along with neutral means such as geographic boundaries, special programs, and student choice to achieve racial integration. The district court, however, struck down the plan to the extent that it incorporated procedures that separated students into racial categories in a manner that appeared completely unnecessary to accomplish its objectives.

Parents Involved in Community Schools v. Seattle School Dist. No. 1, **No. 05-908 (June 5, 2006)**

The Supreme Court will review a Ninth Circuit en banc decision that approved the use of race as an "integration tiebreaker" in determining which students would be assigned to racially concentrated high schools in Seattle. The Ninth Circuit held that using race as a factor did not violate the Constitution's equal protection clause because it was narrowly tailored to achieve the district's compelling interests in obtaining the educational and social benefits of racial diversity in secondary education and avoiding racially concentrated or isolated schools resulting from Seattle's segregated housing pattern. The Supreme Court set oral arguments in tandem with *Meredith v. Jefferson Cty. Bd. of Ed.*, No. 05-915. ✦

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styled. On the other hand, males were prohibited from wearing makeup or nail polish and were required to maintain short haircuts and neatly trimmed fingernails. The plaintiff, a female, was terminated for failing to comply with the policy, and she brought an action under Title VII, alleging that the defendant's policy created an "unequal burden" that violated the Ninth Circuit standard in *Franks v. United Airlines*, 216 F.3d 845 (9th Cir. 2000).

The Ninth Circuit, however, in an en banc proceeding, dismissed the plaintiff's case because she did not submit evidence to prove that the employer's rules were more burdensome for women than for men. The court also found that the employer's rules did not violate the Supreme Court's sexual stereotyping analysis of *Pricewaterhouse v. Hopkins*, 490 U.S. 228 (1989), since they did not require the plaintiff "to conform to a stereotypical image that would objectively impede her ability to perform her job requirements." The four dissenting judges would have taken judicial notice of the unequal burdens imposed by the policy and stated that the policy required a gender-based stereotype to assume that "women's undoctored faces compare unfavorably to men's . . . without full makeup."

Oregon State Courts

Washburn v. Columbia Forest Products, Inc.,
SC S52254, 2006 WL 1173152 (Or. May 4, 2006)

In a long-awaited decision, the Oregon Supreme Court has addressed the issue of medical marijuana in the workplace. It was expected that the court would address the issue decided by the Oregon Court of Appeals—whether an employer was required to accommodate a medical marijuana user who tested positive on a workplace drug test if the worker was disabled, even though the use of marijuana is illegal under federal law. Many commentators expected the Oregon Supreme Court to reverse the Oregon Court of Appeals opinion on this topic, especially given the intervening opinion by the U.S. Supreme Court in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), which held that there was no loophole in the federal government's position that the use of marijuana as a controlled substance is always a violation of the criminal laws. The Oregon Supreme Court, unfortunately, did not address this issue.

However, the court did address a far more significant issue—whether the existence of a disability is determined before or after mitigating circumstances. Rulings under the federal Americans with Disabilities Act (ADA) state that the existence or absence of a disability is determined after a person has applied mitigating circumstances (medication, use of a prosthetic limb, wearing of glasses, etc.). The Oregon Court of Appeals found that the existence of a disability under Oregon law should be considered before mitigating circumstances. The Oregon Supreme Court, however, found that both the ADA and the Oregon statutes require that persons should be looked at as individuals and not as a class. Therefore, the mere existence of a particular disease or condition should not, as a class, be determined to be disabling. Instead, the determination of whether, after the application of mitigating circumstances, a disability exists should be made on an individual basis. The Oregon Supreme Court held that because the plaintiff could counteract his physical impairment by using prescription medication, he was not disabled under Oregon law. The court therefore reversed the court of appeals decision and affirmed the trial court's grant of summary judgment for the employer.

Eusterman v. Northwest Permanente, P.C.,
204 Or. App. 224, 129 P.3d 213 (2006)

The tort of wrongful discharge under Oregon law is an exception to at-will employment and occurs when (1) the discharge is for exercising a job-related right that reflects an important public policy and (2) the discharge occurs while the employee is performing an important public duty. The court held that courts cannot create a public duty to support the tort of wrongful discharge, but must find one in existing constitutional or statutory provisions of state law. The court found that the plaintiff failed to show that the acts for which he was terminated constituted the performance of an "important public duty," and therefore affirmed summary judgment for the employer. ✦

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