



MANAGEMENT INSIGHT

Employee Relations Newsletter

MAY 2006

DAS Human Resources
Services Division

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Service Employees

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OREGON LOTTERY UNION VOTE

On May 23, 2006, the Employee Relations Board tallied the union election ballots for the Oregon Lottery. 295 of the 307 eligible employees cast ballots. However, three of ballots were voided, leaving 292 valid ballots. There were no ballots challenged.

- 127 voted for *SEIU, Local 503*
- 165 voted for *No Representation*

The majority of the vote, 56.5%, was to remain unrepresented. The parties have until June 2 to file objections to the conduct of the election.

HRSD DOCUMENT MANGEMENT

HRSD is in the process of organizing its electronic files with the help of Betsy Imholt, a professional organizer recently on loan from ODOT to DAS. Electronic File Organizing, or EFO, is a process of organizing electronic files in order to:

- Provide an efficient and reliable file structure that allows employees to access the electronic files needed to do their jobs
- Prevent the misfiling of files and the associated time wasted searching for those files
- Provide a file structure that is easy to use and easy to maintain
- Provide a structure that allows employees to easily comply with state record retention rules and law

Each HRSD section has dedicated time and attention to strategize how electronic files can be better organized. A division wide work group has been formed to finalize implementation and maintenance of the new structure. The new structure is expected to be up and running this summer. Betsy has also assisted sections with paper file and working space organization.

HRSD STAFFING UPDATE

Welcome - Linda Morrell joined HRSD on April 24, 2006, as the Executive Assistant for Sue Wilson, HRSD Division Administrator. Linda relocated from California. HRSD welcomes Linda.

Retirement - Diana Peccia, HR Management & Consultation Manager, will be retiring, effective July 1, 2006. Diana has over 30 years of State service, and has been with the HRMC unit for 5 years. Diana has been invaluable to HRSD and will be greatly missed.



The arbitrator, "... determined that he was not strictly bound to the terms of the last chance agreement, but rather must incorporate the language of the parties' collective bargaining agreement."



ARBITRATION & CASE SUMMARIES

by Mike Halpern—State Labor Relations Manager

AFSCME Local 189 vs. City of Portland (ERB Case No. UP-1-05; March 15, 2006)

An arbitration decision required the City of Portland to reinstate an employee who was discharged after testing positive on a drug test. At the time of his discharge, the employee was subject to a last chance agreement that he had signed after a previous positive drug test. Despite finding that the employee had violated the last chance agreement, the arbitrator ordered the employee's reinstatement because the City had violated its own policies and DOT regulations regarding employee privacy during the discharge proceedings. The arbitrator raised the City's privacy violations on his own, and found that they violated the collective bargaining agreement's just cause provision. The City refused to comply with the arbitration award and the Union filed an unfair labor practice complaint with the Employment Relations Board. The Board, following its past precedent requiring that a review of an arbitrator's award be limited in scope, enforced the award. In doing so, the Board stated that since the arbitrator was acting within his authority under the collective bargaining agreement, it would enforce the arbitration award regardless of its agreement or disagreement with the award's reasoning or result.

Facts: The Grievant worked as a Utility Worker 2 for the City of Portland and was covered by a collective bargaining agreement between the City and AFSCME Local 189. As a condition of employment, he was required to have and maintain a commercial driver's license (CDL). Because of the CDL, the Grievant was subject to drug and alcohol testing under a federal act. After testing positive for marijuana on a random drug test, the parties agreed that he would be subject to a last chance agreement which provided that a further positive drug test would be just cause for his immediate discharge. After again failing a random drug test, the Grievant was discharged in January, 2004. The discharge was appealed to arbitration under the collective bargaining agreement and the arbitrator set aside the termination despite finding that the Grievant had violated the last chance agreement. This result was based on the arbitrator's ruling that the City had failed to provide the Grievant with privacy protections afforded by DOT regulations and City policy during the discharge proceedings and that these actions violated the collective bargaining agreement's just cause provision. In lieu of termination, the arbitrator ordered that the Grievant be reinstated, but without back pay, subject to a new last chance agreement. The period off work was to be treated as an unpaid disciplinary suspension. The City notified the Union that the arbitration award was not enforceable and for that reason refused to implement it. The Union then filed this action with the Employment Relations Board seeking, among other things, to have the arbitration award enforced.

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Questions Presented: Did the arbitrator exceed his authority when he refused to enforce the last chance agreement because of his finding that the City violated DOT regulations and its own policy regarding employee privacy protections during the discharge proceedings? Did the City violate ORS 243.672 (1) (g) when it refused to implement the arbitration award?

Discussion and Ruling: Under ORS 243.672 (1) (g), it is an unfair labor practice for an employer to refuse to accept the terms of an arbitration award, where the parties have agreed to accept such awards as final and binding. In this case, the City justified its refusal to implement the arbitration award on multiple grounds: (1) that the arbitrator erred when he went beyond the last chance agreement in determining just cause since the last chance agreement was a settlement agreement voluntarily agreed to by all parties which modified the collective bargaining agreement; (2) that the arbitration was not fair or regular because the arbitrator himself raised the issue of the privacy violations; and (3) that the arbitration award violates public policy by failing to honor the means selected by the parties (the last chance agreement) to settle their differences.

In response to these arguments, the ERB first explained its standards for reviewing arbitration awards. The Board will enforce an arbitration award unless it is “clearly shown” that either: “(1) The parties did not, in a written contract, agree to accept such an award as final and binding upon them (for example, an arbitrator finds no violation of the agreement, but upholds a grievance as constituting an unfair labor practice; an arbitrator exceeds a limitation on his authority expressly provided in the collective bargaining agreement); or (2) Enforcement of the award would be contrary to public policy (for example, the award requires the commission of an unlawful act; the arbitration proceedings were not fair and regular and, thus, did not conform to normal due process requirements). [Citations omitted]”

The Board explained that it, “... will not engage in a right/wrong analysis of an arbitrator’s award. [Citations omitted] Nor will [it] conduct ‘an inquest into the arbitrator’s analysis.’ [Citations omitted] It is the arbitrator’s interpretation of the contract terms which the parties bargained for, and it is that interpretation to which the parties are bound. [Citations omitted].”

Turning to the facts of this case, the Board began by noting that it “... presents an issue which this Board has not previously directly addressed: whether the language of a last chance agreement can limit an arbitrator’s authority in a subsequent contractual arbitration proceeding.” The arbitrator, “...determined that he was not strictly bound to the terms of the last chance agreement, but rather must incorporate the language of the parties’ collective bargaining agreement.” The collective bargaining agreement provides that “ [t]he arbitrator’s decision shall be final and binding, but the arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of this Agreement.” The contract language,

So long as the arbitrator acted within his authority under the contract, an award will be enforced, regardless of this Board’s agreement or disagreement with the reasoning or result.”

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noted the Board, "... explicitly gives the arbitrator the authority to make his just-cause determination based on the contract. Since the contract does not define 'just cause,' and the last chance agreement did not waive or alter the language of [the just cause provision] of the labor contract, the arbitrator is free to utilize the general maxims of 'just cause,' and did so in this case."

The City's argument that the decision violated federal court precedent and the holdings of other arbitrators is, explained the Board, "irrelevant," since the "... Board does not decide whether the arbitrator's decision is right or wrong. [Citations omitted] So long as the arbitrator acted within his authority under the contract, an award will be enforced, regardless of this Board's agreement or disagreement with the reasoning or result."

The Board also dismissed the City's argument that the arbitrator erred when he himself raised the privacy violations issue, noting that prior Board precedent "... specifically held that an arbitrator may base the award on matters not argued by the parties." Finally, as to the City's public policy argument based on the "sanctity of contract" - the Board explained that, "To accept this argument would require us to interpret the contract language on our own and reject the arbitrator's interpretation because it differs from ours. This is precisely the type of right-wrong review that we will not engage in. The parties agreed to abide by the arbitrator's contract interpretation, and we will enforce that agreement even if we might have reached a different result. Public policy in Oregon strongly favors the finality and efficiency of arbitration. [Citation omitted] ... Arbitrator Helm's decision does not violate public policy. Quite the contrary. It supports this state's public policy favoring the conclusiveness of arbitration awards, as well as the policy favoring compliance with DOT regulations when administering drug or alcohol tests."

The Board concluded that the City violated ORS 243.672 (1) (g) by refusing to implement the arbitration award, and ordered the City to implement the terms of the award as soon as practicable.

"Public policy in Oregon strongly favors the finality and efficiency of arbitration."

Helpful Hint:



The Board noted in its decision that the last chance agreement did not include a provision waiving or altering the language of the collective bargaining agreement's just cause article. In light of this decision, when drafting last chance agreements, it may be prudent to consider whether to include such a provision. Questions regarding last chance agreements may be addressed to the Department of Justice, Labor and Employment Section, through individuals authorized by their agencies to consult with DOJ.

Two general articles on last chance agreements, prepared by the Labor and Employment Section of the Department of Justice, appear in the February 2004 and April 2004 issues of the Management Insight.

NOTES FROM THE DEPARTMENT OF JUSTICE

by Helle Rode—Labor & Employment Section

12 GOLDEN RULES: MANAGEMENT OF TEMPORARY EMPLOYEES

1. Be familiar with DAS' policy and the statutes related to temporary employees. Ask questions if items are not clear.
2. Review the union contract and follow it to the letter. Get assistance from DAS LRU as needed.
3. Follow agency/state policies just as you would with a permanent employee (except where temporary employees are expressly excluded from application of the policy).
4. Do the proper paperwork when the temporary employee is hired. Update the paperwork if the employee's status changes or the temporary assignment is extended. Properly specify the basis for the employee's temporary status and the anticipated ending date of their employment. Do not use outdated forms; always check the DAS website for current forms.
5. If the temporary employee is injured on-the-job, treat the employee as you would any other injured worker. Remember that the employee is now in a protected class. Check with DOJ or Risk Management if you have any questions, especially with regard to return to work, light duty and early termination.
6. Do not terminate a temporary employee who is in a protected class (know your protected classes) without checking with DOJ/legal counsel.
7. If the temporary employee complains of harassment or discrimination, investigate and respond to the situation properly, as you would a permanent employee's complaint of harassment or discrimination.
8. If the temporary employee files a complaint with BOLI or the EEOC, have DOJ review the response before it goes out. Remember that BOLI and EEOC are no longer generous with extensions of time, so get the complaint and preferably a draft response to DOJ within one week.
9. Watch out for protected absences, e.g., worker's compensation leave, and do not count those when ending a temporary assignment.
10. Do not retaliate against a temporary employee who raises work place concerns, especially issues related to terms and conditions of employment, harassment or discrimination. If the employee has raised concerns, check with DOJ before ending the temporary assignment.
11. Be aware that temporary employees are covered under most state, federal and local statutes/laws governing employees. Be aware that they have 1st Amendment (and Article 8) rights and other constitutional rights afforded public employees.
12. Train your supervisors and managers on appropriate documentation and treatment of temporary employees. If appropriate documentation is not done, take corrective action against the supervisor/manager.



*Check the
DAS website
for current
forms*



[http://
www.oregon.gov
/DAS/
index.shtml](http://www.oregon.gov/DAS/index.shtml)





“the Court limited its decision to the definition of “disabled person” under Oregon law and did not reach the issue of whether medical marijuana must be allowed as a reasonable accommodation for a disability.”



NOTES FROM DOJ CONTINUED

NEW OREGON SUPREME COURT CASE ON DEFINITION OF DISABILITY AND MEDICAL MARIJUANA USE

by Linda Kessel—Labor & Employment Section

INTRODUCTION

On May 4, 2006, the Oregon Supreme Court issued its decision in the case of *Washburn v. Columbia Forest Products, Inc.*¹ The Court ruled that employees do not have a disability if they are able to mitigate the effects of their impairment with prescription medication (or other mitigating measures) so that their impairment is no longer substantially limiting. This case is important because it changes Oregon law with regard to the definition of “disabled person” to more closely align with the federal Americans with Disabilities Act (ADA) and United States Supreme Court rulings on cases under the ADA.

Although the facts of the case involve the use of marijuana under Oregon’s Medical Marijuana Act, the Court limited its decision to the definition of “disabled person” under Oregon law and did not reach the issue of whether medical marijuana must be allowed as a reasonable accommodation for a disability. Therefore, until the Court hears a case on point, we do not know what will happen in a case where medical marijuana is the only mitigating measure.

FACTS

Columbia Forest Products, Inc. (Columbia) employed Washburn as a millwright in its Klamath Falls facility. Washburn had suffered from muscle spasms in his legs, which limited his ability to sleep when left untreated. Washburn had used prescription medication to control his muscle spasms and help him sleep. However, in August 1999, Washburn’s doctor approved Washburn for participation in Oregon’s medical marijuana program. Washburn later received a medical marijuana registry identification card and with his doctor’s approval, he started smoking marijuana before he went to sleep every night. Washburn claims the marijuana treated his condition far more effectively than the prescription medication.

Throughout Washburn’s employment, Columbia had in force a workplace drug policy that prohibited employees from reporting to work with controlled substances in their system, including marijuana. An employee who violated this policy was subject to disciplinary action, including the possibility of termination. Columbia’s drug test, a urinalysis, was able to determine only if the person tested had used marijuana within the previous two to three weeks, not if the person tested was actually under the influence or intoxicated at the time of the testing. Because Washburn had been smoking medical marijuana every night, he failed the drug test, and Columbia placed Washburn on a leave of absence. Columbia conditioned Washburn’s return to work on passing the drug test.

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However, as Washburn continued to use medical marijuana, he failed when he took the test a second time. As a result of the second drug test failure, Columbia terminated Washburn in March 2001. Subsequently, Washburn brought a claim against Columbia for disability discrimination and failure to reasonably accommodate.

LEGAL BACKGROUND TO CASE

Although the Court's decision was limited to disability discrimination under Oregon law, an understanding of the relationship between federal and Oregon law is helpful in understanding the impact of the Court's decision. The ADA was enacted on July 26, 1990 to eliminate discrimination against individuals with disabilities.² The ADA prohibits discrimination against a qualified individual with a disability because of that disability with regard to the hiring process, terms and conditions of employment, or discharge of such an employee.³ Failure to make a reasonable accommodation to a known physical or mental limitation of an otherwise qualified individual with a disability constitutes unlawful discrimination, unless the employer can show that providing the accommodation would impose an undue hardship on the employer.⁴

The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment."⁵ In 1999, in a series of decisions,⁶ the United States Supreme Court held that if, after the use of corrective measures, such as eyeglasses or medication, the individual is no longer substantially limited in a major life activity, the individual will no longer qualify as disabled under the ADA.⁷

Like the ADA, Oregon's disability discrimination statute makes it an unlawful employment practice for an employer to discriminate against an otherwise qualified person with a disability.⁸ An employer who fails to make a reasonable accommodation to a known physical or mental limitation of an otherwise qualified employee with a disability violates the Oregon statute, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the business operations of the employer.⁹

Also like the ADA, Oregon law defines a "disabled person" as an "individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment."¹⁰ The Oregon disability discrimination statute closely follows the language of the ADA and the legislature has directed in ORS 659A.139 that the disability discrimination statutes, for the most part, are to be construed in a manner consistent with similar provisions in the ADA.¹¹ However, as the Court of Appeals noted, the definition of a disabled person is found in ORS 659A.100, which is not a statute listed in ORS 659A.139. Because the definition statute was omitted from statutes listed in ORS 659A.139, the Court of Appeals held that it would not consider mitigating factors in deciding whether or not an individual was a disabled person, even though the United States Supreme Court

"Oregon law defines a 'disabled person' as an 'individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.'"

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has so ruled in cases under the ADA.¹² The Oregon Supreme Court holding in *Washburn* reverses the Court of Appeals, and now Oregon disability discrimination law closely aligns with federal case law under the ADA.¹³

THE OREGON COURT'S ANALYSIS

The Oregon Supreme Court in *Washburn* held that mitigating measures must be considered in determining if an individual meets the definition of disabled person under ORS 659A.100.

The Court first looked to the statutory definition of a disabled person under ORS 659A.100. A “disabled person” is someone who has an impairment which “substantially limits” a major life activity. ORS 659A.100(2)(d) defines “substantially limits” to mean:

- (A) The impairment renders the individual unable to perform a major life activity that the average person in the general population can perform; or
- (B) The impairment significantly restricts the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity.

The Court found that this definition of “substantially limits” required an individualized assessment of the effect of the impairment on the individual, not the effect of the impairment on the general population. The Court held that the legislature could not have intended employers to ignore measures that affect the extent and effect of an individual’s impairment when determining who is a disabled person. Moreover, the Court noted that limitations on a major life activity that are merely hypothetical or potential, do not render the impairment a “disability.” The Court specifically held that “with regard to the substantive provisions set out in ORS 659A.112 to 659A.139, the legislature intended the definition of ‘disabled person’ to be construed in light of mitigating measures that counteract or ameliorate an individual’s impairment.”

Applying these principles to the facts of the *Washburn* case, the Court found that because Washburn was able to mitigate his leg spasms with prescription medication, his impairment did not substantially limit a major life activity, i.e., sleeping, and therefore he did not qualify as a “disabled person” under Oregon law. As Washburn is not a “disabled person,” his employer, Columbia, did not have to reasonably accommodate him and did not discriminate against him when it fired him for failing workplace drug policy tests.

PRACTICE TIPS FOR HR

The Labor and Employment Section of the Department of Justice suggests the following practice tips for state agencies:

- When an employee requests a reasonable accommodation for medical marijuana use, first determine whether the employee has a disability under

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“The Oregon Supreme Court in Washburn held that mitigating measures must be considered in determining if an individual meets the definition of



disabled person under ORS 659A.100.”

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state or federal law. If the employee does not have a disability, no reasonable accommodation is required under the ADA or Oregon statute.

- In determining whether an employee has a disability under state or federal law, obtain information regarding the employee's limitations and what effect mitigating measures (such as eyeglasses, prescription medication or other treatments) may have on those limitations. If the condition is not substantially limiting when mitigating measures are taken, the employee will not be considered disabled. It may be necessary to send the employee to an independent physician to obtain objective information about the employee's limitations and mitigating measures.
- If an employee has a disability and no mitigating measure other than medical marijuana will enable the employee to perform the essential functions of the job, employers will then need to determine whether it is a reasonable accommodation to allow the employee to come to work with some measurable amount of the drug in his or her system. In many cases, due to safety concerns or because complying with all laws (including the federal Controlled Substances Act) is a requirement of the job, this may not be a reasonable accommodation.
- If medical marijuana use is permitted as a reasonable accommodation, employers will need to work with a physician or a substance abuse professional to develop guidelines for determining when an employee using marijuana is under the influence and should not be allowed to continue working.
- Always consult the DOJ for advice before taking any action on personnel matters involving medical marijuana.

“Always consult the DOJ for advice before taking any action on personnel matters involving medical marijuana.”



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- [1] *Washburn v. Columbia Forest Products, Inc.*, 2006 Lexis 354, P3d (2006), *overruling* 197 Or App 104, 104 P3d 609 (2005).
- [2] 42 USC § 12101 *et seq.* (2006).
- [3] 42 USC § 12112(a).
- [4] 42 USC § 12112(b)(5)(A).
- [5] 42 USC § 12102(2).
- [6] See *Sutton v. United Air Lines, Inc.*, 527 US 471 (1999) (airline pilot applicants not “disabled” where they did not meet the airline’s 20/20 vision requirement without eyeglasses, however with eyeglasses no longer had an impairment which affected a major life activity, i.e. seeing); *Albertson’s, Inc. v. Kirkingburg*, 527 US 555 (1999) (driver who had monocular vision but whose body and brain had developed subconscious mechanisms to cope with his visual impairment, did not qualify as “disabled” because mitigating measures must be taken into account and there is no distinction between artificial aids and measures undertaken by one’s own body systems); *Murphy v. United Parcel Service*, 527 US 516 (1999) (driver who was fired because his high blood pressure did not meet Department of Transportation requirements did not qualify as “disabled” because with medication his condition did not substantially limit a major life activity).
- [7] *Id.*
- [8] ORS 659A.112(1).
- [9] ORS 659A.112(2)(e).
- [10] ORS 659A.100(1)(a).
- [11] ORS 659A.139.
- [12] See *Washburn v. Columbia Forest Products, Inc.*, 197 Or App 104, 109-10, 104 P3d 609 (2005), *overruled by Washburn v. Columbia Forest Products, Inc.*, 2006 Or Lexis 354.
- [13] See *Washburn v. Columbia Forest Products, Inc.*, 2006 Or Lexis 354.
- [14] *Washburn*, 2006 Or Lexis 354 (citing ORS 659A.100(2)(d)).
- [15] *Washburn*, 2006 Or Lexis 354.
- [16] *Id.*

“For represented employees the initial salary increase is generally effective on the first of the month following one year of employment .”



HRMC REMINDER: FIRST SALARY INCREASE AFTER HIRE

According to HRSD Statewide Policy 20.005.10, Pay Practices, and most Collective Bargaining Agreements (CBAs), an employee new to state service receives his/her first salary increase one year after his/her hire date (for represented employees, the initial salary increase is generally effective on the first of the month following one year of employment).

Historically, employees were given a salary increase after being employed with the state for six months *but* employees were also required to pay into their own Public Employees Retirement System (PERS) account. Then a change in the law occurred which allowed this topic to be a subject for collective bargaining. Negotiations between the state and public employee unions ensued, which resulted in an agreement in 1979 for the state to “pick up” PERS in lieu of a six-month salary increase. Management and unrepresented soon followed suit.

BARGAINING CONCEPTS DUE



All 2007-2009 bargaining concepts were due to be submitted to the Labor Relations Unit on Wednesday, May 31, 2006. The concept form is posted in both a Word version and a printable PDF on the HRSD website:

<http://www.das.state.or.us/DAS/HR/forms.shtml>



ABOUT HRSD'S SECTIONS:

Human Resource Management & Consultation

The HR Management and Consultation (HRMC) Section develops and implements the state's workforce management plan; develops and administers HRSD rules and policies; and provides consulting services and technical assistance to agency HR offices.

HR Systems, Services and Audits

The HR Services Unit is responsible for ongoing operation and security of the statewide computerized HR system. The HR Audits Unit provides administrative review of state agencies' human resource management practices to ensure compliance with personnel relations law, rules, and policies. The HR Services Unit administers the retirement benefit reporting and reconciliation process for all state employees.

Statewide Training & Development Services

Statewide Training and Development Services is committed to increasing the effectiveness of Oregon State Government by providing state and local government employees with high quality training that is accessible, affordable, and relevant.

Labor Relations Unit

The Labor Relations Unit represents the Governor on behalf of all executive branch agencies in collective bargaining. Currently the Labor Relations Unit administers 32 collective bargaining agreements. These cover approximately 26,000 employees who are represented by 11 different labor organizations and one SEIU bargaining unit of 25,000 home care workers.

Classification and Compensation

Classification and Compensation is responsible for maintaining the State's compensation plan for approximately 40,000 employees in classified, unclassified and management service positions, and is responsible for development and maintenance of the classification system.