OREGON
CIVIL RIGHTS
NEWSLETTER

Published by the Oregon State Bar Civil Rights Section *September 2015*

Legal Framework for Use-of-Force Claims: A Defense Perspective

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Overview of Ninth Circuit Use-of-Force Analysis

All claims that law enforcement officers used excessive force, either deadly or non-deadly, in the course of an arrest, investigatory stop, or other seizure of a citizen are analyzed under the Fourth Amendment of the US Constitution and its standard of objective reasonableness.[1] The reasonableness inquiry turns on the circumstances confronting the officer.[2]

The Ninth Circuit has divided this fact-intensive analysis into three distinct steps.[3] First, the court evaluates the severity of the intrusion on an individual's Fourth Amendment rights by considering the type and amount of force used. Even where some force is justified, the amount actually used may be excessive. Second, the court identifies the government's interests that were furthered by the use of force. Third, the court balances these two interests against one another.

Courts measure the government's interest by considering factors including (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of the officers or others, (3) whether the suspect actively resisted arrest or attempted to escape, and (4) whether the arresting officers administered a warning, assuming that it was practicable to do so.[4] No factor is exclusive, as the factors are examined in the totality of the circumstances.[5] Nonetheless, the most important factor is whether the individual posed an immediate threat to the safety of the officers or others.

Moreover, police officers are not required to use the least intrusive degree of force possible, but are required to act within a reasonable range of conduct.[6] That is, a reasonable use of force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable.[7] Considering the parties' relative culpability may also be appropriate.[8]

Finally, courts balance the gravity of the intrusion against the government's justification for use of such force to determine whether it was reasonable under the circumstances.[9] When conducting this balancing, however, the court must bear in mind that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.[10] The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the twenty-twenty vision of hindsight.[11]

Since the use of even reasonable force creates an inherent risk of injury, the mere fact that a plaintiff is injured does not establish that the force used was excessive.[12]

Conversely, a plaintiff may prove excessive force even without a significant injury.[13]

Not Every Push or Shove Violates the Fourth Amendment

Because excessive-force claims generally present questions of fact for the jury to resolve, summary judgment in excessive-force cases "should be granted sparingly."[14] Under the right facts, however, summary judgment is achievable.

For example, in *Boedigheimer v. Opel*,[15] the court held that the reasonableness question was "not even a close call." Police officers investigating alleged threats of rape encountered a suspect who was under the influence of an intoxicant, reacted angrily and violently, and refused lawful orders. When told he was under arrest, the plaintiff resisted, and punched one of the officers in the face, breaking his glasses. The plaintiff was not "tased" until after he punched one of the officers in the face, and he continued to fight until he was successfully tased a second time.

Moreover, the plaintiff was convicted of resisting arrest and assaulting a public safety officer. Under these circumstances, the court found there was no material issue of fact that the plaintiff posed an immediate threat to

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Recent Decisions

Richard F. Liebman
Anthony Kuchulis
Barran Liebman LLP

Ninth Circuit Court of Appeals

***Dossat v. F. Hoffmann-La Roche LTD.*, 600 F.App'x 512 (9th Cir. 2015)**

The Ninth Circuit affirmed a jury verdict that a supervisor intentionally inflicted emotional distress on an employee after he filed an age-discrimination charge. The supervisor's conduct consisted of making a trigger-pulling gesture to indicate that the employee would be fired, yelling and cursing at him, and reprimanding him and docking his pay despite positive work reviews.

***Maliniak v. City of Tucson*, 607 F.App'x 626 (9th Cir. 2015)**

The Ninth Circuit held that a single incident within the 300-day statute of limitations could be combined with incidents occurring before the statute of limitations to constitute a hostile work environment under the totality of the circumstances. A female employee had complained about a sign she found at work that used the word "B!*tch" [sic]. In bringing gender-discrimination claims against her employer, she combined that incident with other incidents that predated the statute of limitations, relating to men at her work using the women's restroom.

US District Court District of Oregon

***Dunlap v. Liberty Natural Prods., Inc.*, No. 3:12-cv-01635-SI, 2015 WL 1778477 (D. Or. April 20, 2015), appeal filed (9th Cir. May 15, 2015)**

The US District Court for the District of Oregon held that a former shipping clerk with a heavy-lifting restriction was able to perform essential job functions with reasonable accommodation and had been wrongfully terminated. The employee was able to show that the employer was aware of her need for an accommodation—although she had not expressly requested one—because she had filed a previous worker's compensation claim relating to the same injury. The court held that the employer's knowledge was enough to trigger its duty to engage in the interactive process.

***Monico v. City of Cornelius*, No. 03:13-cv-02129-HZ, 2015 WL 1538786 (D. Or. April 6, 2015)**

The district court held that a police chief's hanging "inspirational posters" could be interpreted as criticizing officers that raised corruption claims and might constitute unlawful retaliation based on the officers' exercise of a protected First Amendment right. The posters were placed in the restrooms and included messages of "don't second-guess the chain of command" and how to be "successful as followers." The court held that the posters could reasonably be understood as intended to shame the officers that had exercised their rights and therefore may deter employees from exercising their constitutionally protected rights in the future.

***Murphy v. Gross*, No. 3:14-cv-01135-SI, 2015 WL 1757182 (D. Or. April 16, 2015), appeal filed (9th Cir. May 18, 2015)**

The district court dismissed, on summary judgment, claims of an anesthesiologist who alleged that his due process rights had been violated after he had a glass of wine while on call and it was reported as potentially affecting the health or welfare of patients. The court found that the employee's civil rights claims failed to meet the "stigma plus" standard required to prevail on due process claims under the Fourteenth Amendment.

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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.

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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Oregon Legislative Efforts Address Issues Elevated by the Black Lives Matter Movement

J. Ashlee Albies
Creighton & Rose, PC

A year ago, our nation was in turmoil in the wake of the police shooting of an unarmed black[1] teenager, Michael Brown, in Ferguson, Missouri. The shooting set off a series of demonstrations and uprisings by black residents in Ferguson and the surrounding areas, calling renewed national attention to police use of force and racial disparities in policing. Prior to the killing of Michael Brown, community activists and victims of police violence had been desperately trying to focus public attention on these disparities and police violence in black communities. Ferguson ignited a powder keg of racial tensions between police and many communities of color, which had been smoldering for some time.[2]

The Black Lives Matter movement[3] started in 2012 after George Zimmerman was acquitted for killing an unarmed black teenager, Trayvon Martin. The following months and years brought forth a cascade of videos documenting deeply troubling incidents of police use of force against unarmed black people, including: Eric Garner, a father whom New York City police officers choked to death for illegally selling cigarettes;[4] Christian Taylor, a college football player shot to death in a car-dealership parking lot; Freddie Gray, who sustained a fatal spinal injury while in police custody;[5] Walter Scott, shot in the back while fleeing from a police officer; Tamir Rice, a twelve-year-old boy shot by Cleveland police in a playground while playing with a toy gun; and Sandra Bland, pulled over in Texas for failing to signal a lane change when moving out of the way for the police officer coming up quickly behind her, who then pulled her over, ordered her out of her car, and forcibly arrested her after she refused to put out her cigarette. Ms. Bland was found dead in a Harris County jail three days later. These are but a few recent examples; there are more.

The list of black people needlessly killed at the hands of law enforcement has garnered more critical attention in the past year than in the past several decades. Shockingly, no reliable national database of law-enforcement-related deaths exists.[6] Data do exist, however, regarding racial profiling. The US Department of Labor's Bureau of Justice Statistics reported a decade ago that black drivers were twice as likely as white drivers to be arrested during a traffic stop, and that black drivers were searched at higher rates than white drivers.[7]

Here in Oregon we are not immune, nor do we differ from the national patterns on racial disparities in policing. Oregon's checkered racial history has led to its status as one of the whitest states in the country.[8] To see our demographic makeup as mostly coincidental is naïve at best, and the legacy of Oregon's history has very real repercussions today. For example, although black residents make up 6.3% of the population of Portland,[9] a recent report by the Portland Police Bureau showed that black drivers in the city are more likely to be pulled over and searched than any other racial group and that 12.7% of black drivers stopped by police were searched compared to only 3.6% of white drivers.[10] Moreover, black people who were searched were *less* likely to have contraband than their white counterparts.[11]

In this context, facing renewed attention to racial profiling and police oversight, the 2015 Oregon legislature responded to community calls for action, passing several measures aimed at addressing racial profiling and police accountability. HB 2002, signed into law on July 13, 2015, creates a system for people to report incidents of profiling[12] and requires law enforcement agencies to pass formal profiling bans by January 1, 2016.[13] Two other bills directly bear on the issue of transparency. HB 2704 amends ORS 165.540 to make clear that people cannot face criminal charges for simply recording police officers publicly performing their official duties.[14] HB 2571 outlines a framework for law enforcement agencies that elect to use body cameras.[15] Setting aside concerns about constant government surveillance, recent movement towards additional police accountability is a direct result of the availability of video evidence, especially where such evidence conflicts with the narrative officers use to justify the use of force, as in the case of Thai Gurule[16] here in Portland or Walter Scott[17] in South Carolina. In both those instances, the video footage revealed a different set of circumstances from what the officers involved described.

Two distinct but interrelated civil rights issues, police excessive force and its disparate impact on communities of color, converge dramatically in places like Ferguson. Of course *all* lives matter. But to frame these issues that way only considers the easier half of the problem highlighted by Ferguson—law enforcement practices—and intentionally avoids discussion of the harder part—its disparate impact on people of color. This hijacking of the conversation dilutes the meaning and impact of Ferguson and is itself a manifestation of that same pernicious race-based disparate treatment.

Across the nation, the emerging movement, led by those most affected by police violence, has been gaining ground by keeping the spotlight on racial-justice issues, forcing those in power to engage with the very real racial disparities that affect our nation, but also encouraging non-black people who believe in racial

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the safety of the officers or others and that the defendants' use of force was reasonable and justified and therefore not excessive.

Assuming that the arrest in question was lawful, summary judgment may also be granted if the amount of force the officers used was objectively reasonable under the circumstances, even when many of the factors in the use-of-force evaluation favor the plaintiff. In that regard, *Hadley v. City of Beaverton* is instructive. In that case, a Beaverton police officer removed Mr. Hadley from a Tri-Met MAX train stopped at a transit center for allegedly interfering with public transportation and interfering with a peace officer.[16]

Although multiple elements of the use-of-force analysis favored Mr. Hadley, an additional factor was the availability of alternative methods of capturing or subduing a suspect. Assuming the officer's order was lawful, then some use of force was necessary to compel Mr. Hadley to comply because he refused to voluntarily exit the MAX train.

Despite an injury to Mr. Hadley's shoulder, the record did not reflect that the officer applied any more force than was reasonably necessary to secure him in handcuffs and remove him from the train. There was no evidence that the officer continued to use any force on Mr. Hadley other than the brief control hold when removing him from the train or that the conduct complained of resulted in permanent injury. Because the ultimate purpose was to make Mr. Hadley exit the MAX train, the force used, although it inflicted some pain requiring subsequent medical treatment, directly accomplished that purpose.[17]

Moreover, at the summary judgment stage, the Ninth Circuit has held more aggressive police conduct than that used by the officer in *Hadley* to be objectively reasonable.[18]

Comparing the quantum of force used against the governmental interest at stake in light of Ninth Circuit precedent, the *Hadley* court held that the balance tipped in favor of the officer. Accordingly, assuming that the officer issued a lawful order, the *Hadley* court found that the amount of force he used to remove Mr. Hadley from the MAX train, while unfortunate and perhaps avoidable based on hindsight, was nonetheless objectively reasonable under the circumstances.

Qualified immunity is another avenue by which excessive-force claims against individual officers may be dismissed prior to trial. Qualified immunity shields government officials from liability for damages when they make decisions that, even if constitutionally deficient, reasonably misapprehend the law governing the circumstances they confronted.[19] With respect to qualified immunity in use-of-force cases, the issue is whether a reasonable officer would have known that the force was excessive.[20]

In *Boedigheimer*, even if the defendant officers' actions had impinged on the plaintiff's rights, the court also found that they were entitled to qualified immunity from liability.[21] Similarly, the *Hadley* court held that, even if the force used was excessive, the officer was entitled to qualified immunity because it would not have been clear to a reasonable officer that his conduct was unlawful in that situation.[22]

Additionally, in *Dunklin v. Mallinger*,[23] the Ninth Circuit upheld the district court's granting of qualified immunity to police officers involved in the shooting of Mr. Dunklin, who stabbed an officer in the arm with a knife while behaving in a deranged manner. Given the refusal of Mr. Dunklin to surrender his weapon and the threatening manner in which he was moving just before the shots were fired, the Ninth Circuit agreed with the district court that a reasonable officer could have believed that Mr. Dunklin constituted a threat.

Because the reasonableness of the use of force is necessarily fact specific, it is often a question that cannot be resolved at summary judgment. As these cases illustrate, however, under the right facts, summary judgment and qualified immunity may be granted to defendants in the District of Oregon and Ninth Circuit. ✦

Mark Sherman is an associate attorney at Hart Wagner, LLP. His firm represented the defendant in *Hadley v. City of Beaverton*.

Endnotes

1. *See Scott v. Harris*, 550 U.S. 372, 381–83 (2007).

2. *Price v. Sery*, 513 F.3d 962, 967 (9th Cir. 2008).

3. *Glenn v. Wash. County*, 673 F.3d 864, 871 (9th Cir. 2011).

4. *Id.* at 872.

5. *Id.*

6. *See, e.g.*, *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (noting that "[r]equiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment.").

7. *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010).

8. *Espinosa v. City and County of San Francisco*, 598 F.3d 528, 537 (9th Cir. 2010).

9. *Id.*

10. *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Wilkinson*, 610 F.3d at 550.

11. *Graham*, 490 U.S. at 396.

12. *Hadley v. City of Beaverton*, No. CV-09-022-ST, 2010 WL 1257609, at *10 (D. Or. Feb. 16, 2010), *report and recommendation adopted*, No. CV 09-022-ST, 2010 WL 1257610 (D. Or. Mar. 25, 2010).

13. *See Wilks v. Reyes*, 5 F.3d 412, 416 n.1 (9th Cir. 1993) (noting that a plaintiff may obtain an award of nominal damages even if he or she suffered no actual damage).

14. *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th Cir. 2003).

15. No. 6:14-CV-01250-CL, 2015 WL 3821041, at *2 (D. Or. June 17, 2015).

16. *Hadley*, 2010 WL 1257609, at *1.

17. *Id.* at *11.

18. *Id.* at *12. *See Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1096 (9th Cir. 2006) (finding that positioning the plaintiff's arm behind his back in a bar-arm control, placing him against a wall, and then forcing him to the ground was not excessive force where he ignored the officer's commands and spun around, partially escaping the officer's grasp, even though the plaintiff died from a cocaine overdose); *Jackson v. City of*

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justice to take action to combat and interrupt systemic racism. Locally and nationally, communities are stepping forward to demand that their elected representatives take measurable and concrete action to address serious concerns about over-policing and bias-based policing.

These recent laws enacted by the Oregon legislature represent some significant movement in the direction of addressing disparities in policing and are in large measure a result of this process. Similarly, at the federal level, the US Department of Justice has turned a critical eye towards policies and practices that result in patterns of excessive use of force, and continues to use its authority to investigate and require change in law enforcement agencies in more than twenty states to date.[18]

To continue on the path to greater accountability and reducing profiling and excessive use of force, people must continue to know their rights and to exercise them without fear, and those harmed by police misconduct must be encouraged to continue to pursue their remedies at the policy level, at the legislative level, and in the courts of law.[19]

As Black Lives Matter has said of its purpose, "#BlackLivesMatter is working for a world where Black lives are no longer systematically and intentionally targeted for demise. We affirm our contributions to this society, our humanity, and our resilience in the face of deadly oppression."[20] As must we all. ✦

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Endnotes

1. The author disagrees with the editorial style of using a lowercase letter b when referring to black people.

2. The US Department of Justice found a pattern of intentional racial discrimination against African Americans by the Ferguson Police Department. *See* U.S. Dep't of Justice, "Investigation of the Ferguson Police Department," 1 (Mar. 4, 2015), *available at* www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report_1.pdf.

3. The movement began with and is often denoted by the hashtag #BlackLivesMatter.

4. New York City recently settled the case for $5.9 million, before the family filed suit. *See* David Goodman, N.Y. Times, "Eric Garner Case Is Settled by New York City for $5.9 Million," July 13, 2015, www.nytimes.com/2015/07/14/nyregion/eric-garner-case-is-settled-by-new-york-city-for-5-9-million.html?_r=0.

5. The City of Baltimore recently settled the case for $6.4 million, before the family filed suit. *See* Sheryl Gay Stolberg, N.Y. Times, "Baltimore Announces $6.4 Settlement in the Death of Freddie Gray" (Sept. 8, 2015), www.nytimes.com/2015/09/09/us/freddie-gray-baltimore-police-death.html.

6. "The F.B.I.'s Uniform Crime Reporting Program tabulates deaths at the hands of police officers. So does the National Center for Health Statistics. So does the Bureau of Justice Statistics. But the totals can vary wildly." Michael Wines, N.Y. Times, "Are Police Bigoted? Race and Police Shootings: Are Blacks Targeted More?" (Aug. 30, 2014), www.nytimes.com/2014/08/31/sunday-review/race-and-police-shootings-are-blacks-targeted-more.html.

7. U.S. Dep't of Justice, "Contacts Between Police and the Public, 2005," (Apr. 26, 2007), *available at* www.bjs.ojp.usdoj.gov/content/pub/ascii/cpp05.txt.

8. *See* Walidah Imarasha, "Why Aren't There More Black People in Oregon? A Hidden History," YouTube (May 6, 2014), https://www.youtube.com/watch?v=DWC-8hvP7aY.

9. U.S. Census Bureau, State & County Quick Facts, (Aug. 6, 2015), quickfacts.census.gov/qfd/states/41/4159000.html.

10. Greg Stewart & Emily Covelli, Portland Police Bureau, "Stops Data Collection: The Portland Police Bureau's Response to the Criminal Justice Policy and Research Institute's Recommendations," at p. 13, 16 (Feb. 13, 2014), *available at* https://www.portlandoregon.gov/police/article/481668.

11. *Id.*

12. "Profiling" is defined in the legislation as "a law enforcement agency or a law enforcement officer targets an individual for suspicion of violating a provision of law based solely on the real or perceived factor of the individual's age, race, ethnicity, color, national origin, language, gender, gender identity, sexual orientation, political affiliation, religion, homelessness or disability, unless the agency or officer is acting on a suspect description or information related to an identified or suspected violation of a provision of law." H.B. 2002, § 1(3), 78th Or. Legis. Assemb., 2015 Reg. Sess. (Or. 2015), *available at* https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2002.

13. *Id.* at § 3. *See also* Ian Kullgren, The Oregonian, "Kate Brown Signs Bill Aimed at Stopping Police Profiling" (July 13, 2015). www.oregonlive.com/politics/index.ssf/2015/07/kate_brown_signs_bill_aimed_at.html.

14. *See* Or. Rev. Stat. § 165.540(5)(b) (2015).

15. H.B. 2571, 78th Or. Legis. Assemb., 2015 Reg. Sess. (Or. 2015), *available at* https://olis.leg.state.or.us/liz/2015R1/Measures/Overview/HB2571.

16. Aimee Green, The Oregonian, "Judge Rules Portland Teen Not Guilty of Resisting Arrest, Has Stern Words for Police" (Mar. 12, 2015), www.oregonlive.com/portland/index.ssf/2015/03/judge_rules_portland_teen_xxxx.html.

17. Michael S. Schmidt & Matt Apuzzo, N.Y. Times, "South Carolina Officer Is Charged with Murder of Walter Scott" (Apr. 7, 2015), www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html?_r=0.

18. *See* U.S. Dep't of Justice, "Special Litigation Section Cases and Matters," www.justice.gov/crt/special-litigation-section-cases-and-matters0#police (last visited Aug. 26, 2015) (listing docket under "Law Enforcement Agencies" subheading).

19. The barriers in the civil legal system, in police accountability cases in particular, are the subject for a different article.

20. *See* Black Lives Matter, About Us, blacklivesmatter.com/about/ (last visited Aug. 12, 2015); new website forthcoming September 30, 2015.

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Bremerton, 268 F.3d 646, 652–53 (9th Cir. 2001) (concluding that spraying the plaintiff's hair with a chemical irritant prior to her arrest, pushing her to the ground to handcuff her, and roughly pulling her to her feet during her arrest was not excessive force when she interfered with the officer's attempt to maintain order of a rowdy group).

19. *Brosseau v. Haucren*, 543 U.S. 194, 202 (2004).

20. *Plumhoff v. Richard*, 134 S. Ct. 2012, 2023 (2014); *see Lal v. California*, 746 F.3d 1112 (9th Cir. 2014) (holding that officers were entitled to qualified immunity after shooting a man holding a large rock over his head because the officers reasonably believed he posed an immediate threat).

21. *Boedigheimer*, 2015 WL 3821041, at *2–3.

22. *Id.* at *13.

23. No. 13-15728, 2015 WL 4605456, at *1–2 (9th Cir. Aug. 3, 2015).

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Driving While Black—the App

Mariann Hyland

Last spring, after Trayvon Martin's death, I began thinking about a vow that I had made in 2003 to help youths stay safe during interactions with law enforcement. After learning about an app for people stopped for drunk driving, I thought about creating an app to help black people during traffic stops.

I approached Melvin Oden-Orr, a business lawyer, with the idea, and he and I explored the possibility of moving forward with the project. We formed an LLC and retained an app developer in the summer of 2014. We launched the Android version of Driving While Black—the App in January 2015 and the iOS (iPhone operating system) version in February.

App Features

The purpose of the app is to give black people, people of color, and others who may be targeted for traffic stops helpful information and tools to improve traffic-stop experiences, safety, accountability, and justice.

The app features:

- information about individuals' legal rights, traffic-stop best practices, and how to be safe;
- the ability to send text alerts to contacts indicating the time and location of the traffic stop;
- tips on recording a traffic stop;
- tips for parents to help their children stay safe during traffic stops;
- an opportunity to "test drive" one's knowledge using video simulations and quizzes;
- the ability to record and submit law enforcement complaints and commendations;
- a lawyer directory to help find legal assistance; and
- news, information, and other resources.

The app is free. Our business model includes populating a lawyer directory for all fifty states. We want to help people who need legal assistance (whether related to civil rights, personal injury, or criminal law) quickly and easily find lawyers by using the app. In addition, we hope to reduce traffic-stop fatalities and promote safety, justice, and accountability for all.

To learn more about the app, visit our website, dwbtheapp.com, or follow us on Twitter, @DWB_TheApp.

App Creation Background

I began practicing law in 1991, the year Rodney King was brutally beaten by four police officers after a high-speed car chase in Los Angeles. Several other officers stood by and watched the beating. This occurred before social media, cell phones, and the ability to readily film anything. Nevertheless, a witness filmed the incident from his balcony and shared it with the media. The footage was shown around the world and sparked outrage concerning police brutality toward African Americans. When the officers responsible for savagely beating King were acquitted, riots ensued and resulted in fifty-three deaths, thousands of injuries, and the deployment of the US military. The riots in Ferguson, Missouri, triggered by a decision not to charge the officer responsible for killing an unarmed black teenager, Michael Brown, paled in comparison to what happened in Los Angeles.

As a bi-racial person who was born at a time when it was a felony in at least sixteen states for a black person and a white person to marry each other, I experienced a fair amount of racism growing up, including being surrounded by mobs of white children who would chase me, spit on me, and call me nigger during recess at school every day while the teachers stood by and watched. In hindsight, maybe that is why I related to Rodney King on such a deep, personal level.

The King incident had a profound, negative impact on the way I viewed police. Fortunately, several subsequent professional and volunteer experiences allowed me to rid myself of blanket stereotypes and see police officers in a more positive, balanced light. Nevertheless, I maintained a heightened interest in how black people experienced traffic stops. In 2003, when Kendra James, a young, unarmed black woman was killed by a Portland police officer during a traffic stop, I vowed that I would do something to teach youths how to stay safe during traffic stops.

I have not had personal difficulties with the police. I was raised by white parents and have lived my entire life in predominantly white communities. Because I am bi-racial and bi-cultural, however, I have listened to a lot of black people describe their experiences during traffic stops. This subject comes up fairly often, regardless of the age or educational level of the person describing his or her experiences. The expression "driving while black" is cultural: black people commonly use the expression to describe their perceptions of being racially profiled during traffic stops.

These commonly shared anecdotal experiences are backed by quantifiable data. According to a recent national traffic-stop study, black people are more than thirty percent more likely to be stopped and almost three times more likely to be searched than white people.[1]

The app provides tools and resources to address one of our nation's most perplexing problems: a system that does not provide justice equally to all. ✦

Mariann Hyland is the co-creator of Driving While Black—the App. She is also the director of diversity and inclusion for the Oregon State Bar.

1. Lynn Langton & Matthew Durose, U.S. Dep't of Justice, "Special Report: Police Behavior During Traffic and Street Stops, 2011" (2013), *available at* www.bjs.gov/content/pub/pdf/pbtss11.pdf.

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Oregon Follows the Growing Trend with New Statewide Mandatory Sick-Leave Law

Dan Grinfas
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The Sick Leave Trend (It's Catching)

On January 1, 2016, Oregon will become the fourth state—after Connecticut, California, and Massachusetts—to implement a statewide mandatory sick-leave law. Senate Bill 454, signed by Governor Kate Brown on June 22, 2015, will entitle almost all Oregon employees to accrue and use up to forty hours of protected sick leave annually for a wide scope of covered purposes, and will protect employees from discrimination for inquiring about or using sick time.

San Francisco was the first US jurisdiction to implement a mandatory paid sick-leave ordinance in 2007, followed by Washington, DC, Seattle, Portland, and New York City. The proliferation of paid and protected sick-time laws shows no sign of abating, with at least sixteen cities adding such laws just since 2014 and similar measures under consideration in various other states and local jurisdictions. The proposed federal Healthy Families Act, pending in the current session of Congress, would allow workers at businesses with fifteen or more employees to accrue at least one hour of paid sick time for every thirty hours worked.[1]

Proponents of the statewide legislation argued the bill was necessary to reduce health disparities by socioeconomic status in Oregon, to improve public health, and to reduce risks of contagion. They noted that forty-seven percent of Oregonians working in the private sector lack access to any paid sick time—even after passage of the Portland and Eugene sick-time ordinances—and that seventy-one percent of low-wage workers in Oregon lack paid sick time.[2]

Key Provisions of the Oregon Law

The new Oregon sick-leave law preempts the authority of local governments to set sick-leave requirements, and it will therefore trump the Portland and Eugene sick-leave ordinances once effective. The law requires employers that have ten or more employees—or six or more employees if located in a city with a population of more than five hundred thousand (meaning Portland)—to provide protected paid sick time for employees. Employers with fewer than ten employees (or fewer than six employees if located in Portland) must provide protected unpaid sick time for employees.

The sick time, if accrued on a pro rata basis, must accrue at a rate of at least one hour for every thirty hours the employee works, or one and one-third hours for every forty hours the employee works, and accrual must begin immediately on January 1, 2016, or on the date of the employee's hire. For leave-accrual purposes, salaried exempt employees are generally presumed to work forty hours per week.

The employee is eligible to use the accrued sick time beginning on the ninety-first calendar day of employment, though an employer may authorize the employee to access the accrued leave earlier. The employer may require reasonable advance notice of the employee's intention to use sick time if the need for time off is foreseeable, or notice as soon as practicable in other cases. The employer may also require the employee to comply with the employer's usual and customary notice and procedural requirements for absences or requesting time off.

Employers who use the pro rata accrual method must allow the employee to carry over up to forty hours of unused sick leave to the following benefit year. An employer may adopt a policy limiting the employee to accruing no more than eighty hours of sick time in their leave "bank," and may also by policy limit the employee's use of that time to forty hours maximum per year.

Alternatively, employers may choose to "frontload" the full forty hours of sick leave at the start of each benefit year. Employers who select this frontloading option have a lower administrative burden, since they need not track any pro rata accrual and also need not allow any carryover of unused sick leave to the following year.

Employers are not required to cash out unused sick leave upon an employee's termination, resignation, or retirement, but employees are entitled to restoration of their sick leave accrual if they resume employment with the employer within 180 days of separation.

Permissible Uses of Sick Leave

Employees may use their protected sick time for any of the following purposes:

- The employee's mental or physical illness, injury, or health condition; need for medical diagnosis, care, or treatment of a mental or physical illness, injury, or health condition; or need for preventive medical care;
- Care of a family member for the above reasons;
- For any of the purposes covered under the Oregon Family Leave Act (OFLA),[3] even if the employer has fewer than twenty-five employees in Oregon as required for OFLA coverage;[4]
- Leave related to domestic violence, harassment, sexual assault, or stalking of the employee or dependent child of the employee,[5] even if the employer has fewer than six employees as required for

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MANDATORY SICK LEAVE CONTINUED FROM PAGE 7

coverage under the domestic-violence-leave law;[6]

- Donating accrued sick time to another employee if the other employee uses the donated sick time for a purpose under this law and the employer has a policy allowing sick-leave donations for such purposes;
- Public-health emergencies, including business and school closures, and determinations by authorities that the presence of the employee or the family member of the employee in the community would jeopardize the health of others; or
- Exclusion of the employee from the workplace under any law or rule that requires the employer to exclude the employee from the workplace for health reasons.

The Challenge for Oregon Employers

The new Oregon sick-leave law is complex, and employers should work with employment counsel to assess the best strategy for compliance depending on their existing paid-leave policies. Although an employer's existing paid-time-off (PTO) or sick-leave policy may be used to comply with the new law, it must comply in all respects, including the timing of and rate of leave accrual, leave carryover standards, required notices of leave rights to employees, and required quarterly notifications to employees on leave availability. Union employees subject to collective bargaining agreements are not exempt from the law's provisions, with a narrow exception for certain workers employed through hiring halls.

Even large employers with relatively rich PTO programs offering far more than forty hours of paid leave may have to make substantial policy changes to comply with the new law. For example, employer leave policies commonly apply only to full-time, regular employees, but the Oregon sick-leave law makes no such distinction and applies equally to part-time and temporary workers.

The law authorizes the Bureau of Labor and Industries (BOLI) to issue regulations necessary for implementation and enforcement. Employees asserting violations may file BOLI complaints or civil actions. Although BOLI is empowered to assess penalties of up to $1,000 for various violations, the agency may do so only for violations occurring on or after January 1, 2017, unless the employer retaliates against or disciplines an employee during 2016 for inquiring about or using sick leave. ✦

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Endnotes

1. A 2007 study by the Institute for Health and Social Policy at McGill University reported that at least 145 countries, including most European countries, require employers to provide some form of paid sick-leave for short- or long-term illnesses, with 127 providing a week or more annually and 79 providing benefits for at least 26 weeks or until recovery.

2. Oregon Advocacy Commissions Office, "Testimony in Support of SB 454" (May 7, 2015) (reporting that nationally, "one in six workers reports having been fired for taking time off work to care for a sick child or family member, or for their own illnesses, and the fear of job loss for taking sick time affects well over half of Hispanic workers and three out of four African-American workers").

3. *See* Or. Rev. Stat. § 659A.159 (specifying uses of OFLA leave).

4. *See* Or. Rev. Stat. § 659A.153 (specifying the thresholds for employers to be subject to OFLA).

5. *See* Or. Rev. Stat. § 659A.272 (providing domestic-violence-related leave).

6. *See* Or. Rev. Stat. § 659A.270(1) (specifying the thresholds for employers to be subject to the domestic-violence-related-leave law).

Oregon State Bar
Civil Rights Section
P.O. Box 231935
Tigard, OR 97281-1935

RECENT DECISIONS CONTINUED FROM PAGE 2

Oregon Court of Appeals

***McManus v. Auchincloss*,**
353 P.3d 17 (Or. App. 2015)

The Court of Appeals overturned the dismissal of an employee's claims for common-law wrongful discharge and intentional infliction of emotional distress. The employee had been discharged for reporting his employer's possession and display of child pornography. The court noted that a new exception to the at-will employment rule was warranted based on the public's special interest in reporting crimes of child abuse.

***Teegarden v. State ex rel. Or. Youth Auth.*,**
348 P.3d 273 (Or. App. 2015)

The parties settled a pending court action with a release of all claims. Afterwards, the defendant proceeded with new claims and actions. The Court of Appeals found that the newly claimed "intentional" torts could not have been blocked by the release, although the underlying facts supporting the employer's actions had already occurred. ✦

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