OREGON
CIVIL RIGHTS
NEWSLETTER

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Gonzales v. Oregon: A Victory for Oregon

Eli D. Stutsman

On January 17, 2006, the United States Supreme Court issued its decision in *Gonzales v. Oregon*, 546 US ___, 126 S Ct 904 (2006), capping a decade-long struggle by Oregonians to allow terminally ill patients the right to control the time, place, and manner of their impending deaths. The Oregon Death with Dignity Act (DWDA), passed by voters in 1994, allows physicians to dispense controlled substances, in narrowly defined circumstances, to a competent, adult, terminally ill patient seeking to hasten his or her impending death. As detailed below, former Attorney General John Ashcroft sought to criminalize the conduct that Oregon voters had twice approved, and in its recent decision, the Supreme Court rejected the attorney general's claim of authority to do so.

The Case History

Oregon was the first state, and currently remains the only state, to decriminalize "physician-assisted suicide" in a clinical setting at the end of life. In November 1994, Oregon voters passed the Death with Dignity Act, a ballot initiative subsequently codified at ORS §§ 127.800–127.897. The DWDA allows state-licensed, DEA-registered physicians and pharmacists to prescribe and dispense controlled substances to an adult patient who is "suffering from a terminal disease" and has "voluntarily expressed his or her wish to die" upon a "written request for medication for the purpose of ending his or her life in a humane and dignified manner." ORS 127.805.

The DWDA contains a number of safeguards, including a requirement that the physician ensure that the patient is competent, has a terminal disease, and is making a voluntary and informed decision to obtain the drugs for the purpose of ending his or her life; the use of a second "consulting" physician to confirm those facts; and the imposition of a 15-day waiting period. *See, e.g.*, ORS 127.815 (attending physician responsibilities), ORS 127.820 (consulting physician confirmation), ORS 127.845 (right to rescind request), ORS 127.850 (waiting periods). A physician who prescribes or dispenses a lethal dose of controlled substances in accordance with the DWDA shall not "be subject to civil or criminal liability or professional disciplinary action for participating in good faith compliance with" the DWDA. ORS 127.885(1). In 1997, Oregon voters rejected a ballot measure that sought to repeal the DWDA.

Members of the United States Congress who were concerned about Oregon's DWDA, including then-Senator John Ashcroft, sent a letter in 1997 to the director of the Drug Enforcement Administration (DEA), in which they contended that hastening a patient's death was not a legitimate medical practice and therefore violated the Controlled Substances Act (CSA), and invited the DEA to prosecute Oregon physicians who aided patients under the DWDA.

Although the director of the DEA, Thomas Constantine, responded favorably, then–Attorney General Janet Reno concluded that the DEA could not prosecute Oregon physicians who acted in accordance with the DWDA, because the CSA did not authorize the DEA to "displace the states as the primary regulators of the medical profession, or to override a state's determination as to what constitutes legitimate medical practice." *See* Letter from Janet Reno to Sen. Orrin Hatch on Oregon's Death with Dignity Act (June 5, 1998), reprinted in Hearings on S. 2151 before the Senate Committee on the Judiciary, 105th Cong., 2d Sess., 5–6 (1999). Legislation was introduced in Congress in 1998, and again in 1999, to grant the explicit authority that Reno found lacking, but the amendments failed on both occasions.

In 2001, John Ashcroft was appointed U.S. attorney general. On February 2, 2001, Oregon Attorney General Hardy Myers wrote to Ashcroft to request a meeting should the U.S. Department of Justice choose to revisit the question of the application of the CSA to the DWDA. One of Ashcroft's assistants responded by letter, informing Myers that there was no pending

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Recent Decisions

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Ninth Circuit Court of Appeals

***Rivera v. Baker West, Inc.*, 430 F3d 1253 (9th Cir 2005)**

A settlement agreement stated that the settlement amount was "subject to withholding" but did not state whether the parties considered the payment to be either wages or payment for an injury. The employer made the appropriate statutory deductions for wages, and the employee claimed that no deductions should have been made. The Ninth Circuit pointed out that to avoid taxes on the settlement, the payment had to be for "physical injuries or sickness" and that even damages for "emotional distress" were included within taxable income. The court also found that the exclusion from taxable income required that there be a "direct causal link" between the damages and the personal injuries sustained. Finding also that damages awarded under Title VII were not per se excluded from taxable income, the court held that the deductions were appropriate.

U.S. District Court District of Oregon

***Lawrence v. Louis & Co.*, CV 05-1651-AA, 2006 WL 278194 (D Or February 2, 2006)**

The plaintiff brought an action under both Title VII and § 1981 for race discrimination, in addition to making a claim for wrongful discharge using the same set of facts. Judge Aiken dismissed the tort claim because § 1981 provides remedies equivalent to those available under common law.

Oregon State Courts

***Ewalt v. Coos-Curry Elec. Co-op., Inc.*, 202 Or App 257, 120 P3d 1288 (2005)**

The employee signed an initial "at will" employment agreement but claimed that it was abrogated by a policy later issued by the company that stated that the company would treat its employees in a "fair and objective" manner. Although the court found that the subsequent policy did not apply to the employee because he was a "supervisor," the court did hold that when a party to a contract is given discretion in some aspect of the contract, the parties contemplate that the discretion will be exercised in a manner that is reasonable and in good faith.

***Olsen v. Deschutes County*, 204 Or App 7 (2006)**

The court held that Oregon's public whistleblower law (ORS 659.010) is subject to a one-year statute of limitations rather than the 90-day statute of limitations provided in ORS 659.530. The court also held that an employee may bring a whistleblower claim under the whistleblower statute and a claim for wrongful discharge and violation of public policy under state tort law in the same court action. The whistleblower law does not preempt and does not supersede the common law tort by providing an "adequate remedy." ✦

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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.

Recycled/Recyclable

Supreme Court Update

Decided

Arbaugh v. Y & H Corp.,
No. 04-944 (February 22, 2006)

In this sexual harassment case arising out of the Fifth Circuit, the U.S. Supreme Court ruled 8–0 that the requirement under Title VII that an employer have 15 or more employees is not a jurisdictional issue, but an element of a plaintiff's claim for relief that may be waived.

Ash v. Tyson Foods, Inc.,
No. 05-379 (February 21, 2006)

In a per curium opinion involving two African American poultry-plant superintendents who alleged that they were denied promotions because of their race, the Supreme Court held that the Eleventh Circuit erred in determining that referring to the plaintiffs as "boy" alone could not be evidence of racial animus. The Supreme Court also rejected the Eleventh Circuit's standard that "pretext can be established through comparing qualifications only when 'the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face.'" In rejecting this standard, the Supreme Court did not suggest what the proper standard is.

Ayotte v. Planned Parenthood of Northern New England, et al.,
No. 04-1144 (January 18, 2006)

In a unanimous opinion, the Supreme Court vacated the First Circuit's judgment in favor of Planned Parenthood and remanded the case. New Hampshire's Parental Notification Prior to Abortion Act did not include a medical-emergency exception to its notification requirements, and the state had conceded that applying the act in a way that subjected minors to significant health risks would be unconstitutional. The Court held that rather than invalidating the statute entirely, the lower courts could prohibit the statute's unconstitutional application, as long as that remedy was consistent with legislative intent. The case was remanded so that lower courts could determine whether the legislature intended the statute to be susceptible to such a remedy.

Rachelle Hong Barton
Fisher & Phillips LLP

Matthew Duckworth
Busse & Hunt

***Domino's Pizza, Inc., et al. v. McDonald,* No. 04-0593 (February 22, 2006)**

The plaintiff, an African American man who was president and sole shareholder of a real estate company, sued Domino's under 42 USC § 1981, claiming that Domino's terminated its contracts with his company because of racial animus toward him. The Supreme Court reversed the Ninth Circuit, holding unanimously that the plaintiff had no civil rights claim because he had made and enforced the contracts for his company, not for himself.

Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal,
No. 04-1084 (February 21, 2006)

The Court ruled 8–0 in favor of a Brazil-based church that uses hallucinogenic tea in its religious ceremonies. In an opinion written by Chief Justice John Roberts, the Court held that the government failed to demonstrate a compelling interest for barring the sacramental use of the tea.

Gonzales v. Oregon, et al.,
No. 04-0623 (January 17, 2006)

By a 6–3 vote, the Court upheld a permanent injunction against the U.S. Drug Enforcement Administration and the U.S. attorney general, who, in 2001, sought to prosecute Oregon physicians and pharmacists practicing under Oregon's Death with Dignity Act. The Court disagreed with the attorney general's assertion that the federal Controlled Substances Act prohibited the distribution of controlled drugs for the purpose of facilitating a person's suicide in accordance with the Death with Dignity Act. Please see the article on page 1.

Oregon v. Guzek,
No. 04-0928 (February 22, 2006)

The Supreme Court ruled 8–0 in favor of Oregon, holding that the Eighth and Fourteenth Amendments do not provide a defendant facing the death penalty with the right to introduce "alibi evidence" during the sentencing phase of his trial. The Court held that it was constitutional to limit the innocence-related evidence to that which was introduced at trial.

***Rumsfeld, et al. v. Forum for Academic & Institutional Rights, Inc., et al.,* No. 04-1152 (March 6, 2006)**

The Supreme Court held that the Solomon Amendment, which requires that certain federal funds be withheld from colleges and universities that restrict the access of military recruiters to students, does not violate the First Amendment. The Court held that Congress may require schools to provide equal access to military recruiters without violating the schools' freedoms of speech and association.

***Scheidler, et al. v. National Organization for Women, Inc., et al.,* No. 04-1244 (February 28, 2006)**

The Supreme Court ruled 8–0 in favor of Joseph Scheidler and anti-abortion advocates in a legal battle initiated 20 years ago by the National Organization for Women (NOW). NOW argued that anti-abortion protestors ruled like mob bosses and therefore their protest techniques violated the Racketeering Influenced and Corrupt Organizations Act (RICO) by using extortion illegal under the federal Hobbs Act. Previously, the Supreme Court held that a RICO violation does not require an economic tie. On a separate occasion, the Court held that Hobbs Act extortion requires the obtaining of property, and the right to un-protested abortions is not property.

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In this ruling, the Court held that Congress did not intend for the Hobbs Act to create or include a cause of action for violent offenses unrelated to extortion or robbery.

Certiorari Granted

Gonzales v. Carhart, et al.,
No. 05-0380 (February 21, 2006)

The Court accepted review of a decision from the Eighth Circuit regarding whether the federal Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks an exception to protect the health of the mother or is otherwise unconstitutional on its face.

Certiorari Denied

Anderson v. Westinghouse Savannah River Co.,
No. 05-616 (February 27, 2006)

The Supreme Court declined to hear an employment discrimination case that would have decided whether a Title VII disparate-impact plaintiff, who has shown admissible statistical evidence of adverse impact, also must establish that her employer intended to discriminate. This leaves intact the Fourth Circuit's ruling that the plaintiff failed to show causation in her claim that her employer's promotion decisions were discriminatory.

Argument Held

Hudson v. Michigan,
No. 04-1360 (January 9, 2006)

The Supreme Court heard oral argument on whether the inevitable-discovery doctrine creates a per se exception to the exclusionary rule for evidence seized after a Fourth Amendment "knock and announce" violation. The Court's decision will resolve a split of opinion between circuit courts.

U.S. v. Grubbs,
No. 04-1414 (January 18, 2006)

The Court heard oral argument in a Fourth Amendment case involving a search pursuant to an anticipatory warrant. The issue is whether evidence seized must be suppressed because although the triggering condition for the warrant was satisfied, it was not set forth either in the warrant itself or in an affidavit that was both incorporated into the warrant and shown to the person whose property was being searched. ✦

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Articles Needed

Have you recently done some research or written a memo that you could easily transform into a newsletter article? Do you need an incentive to brush up on a recent development in the law? If you or someone in your office would like to contribute an article to this newsletter, please contact our editor at elise.gautier@comcast.net.

legislation that would prompt a review, and that if a review was commenced in the future, the Department would include his views in that review. That letter was sent in April 2001.

Meanwhile, Ashcroft sought an opinion from the U.S. Department of Justice's Office of Legal Counsel on whether a prescription issued to assist in a person's suicide, as contemplated in Oregon's DWDA, is a valid prescription under the CSA and its implementing regulation. On June 27, 2001, the Office of Legal Counsel issued a memorandum concluding that "assisting in suicide is not a 'legitimate medical purpose' that would justify a physician's dispensing controlled substances consistent with the CSA."

On November 6, 2001, Ashcroft released an Interpretive Rule, published in the *Federal Register* on November 9, 2001, that adopted the analysis of that memorandum and declared that "assisting suicide is not a 'legitimate medical purpose' within the meaning of 21 CFR § 1306.04 (2001) and that prescribing, dispensing, or administering federally controlled substances to assist suicide violates the CSA." 66 Fed Reg 56608 (2001). The Interpretive Rule further provided that the "Attorney General's conclusion applies regardless of whether state law authorizes or permits such conduct by practitioners or others and regardless of the condition of the person whose suicide is assisted." As the Supreme Court observed, Ashcroft did not consult Oregon (including Attorney General Hardy Myers) or anyone outside the U.S. Department of Justice before issuing his Interpretive Rule.

In response, the state of Oregon, a physician and a pharmacist, and several terminally ill patients challenged the Interpretive Rule in federal court. On November 8, 2001, the U.S. District Court for the District of Oregon granted their request for a temporary restraining order, enjoining the attorney general from enforcing his Interpretive Rule. On April 17, 2002, the district court, with the Honorable Robert E. Jones presiding, issued a permanent injunction against the Interpretive Rule's enforcement, reasoning as follows:

> I conclude that Congress did not intend the CSA to override a state's decisions concerning what constitutes legitimate medical practice, at least in the absence of an express federal law prohibiting that practice. Similarly, I conclude that Congress never intended, through the CSA or through any other current federal law, to grant blanket authority to the Attorney General or the DEA to define, as a matter of federal policy, what constitutes the legitimate practice of medicine.

Oregon v. Ashcroft, 192 F Supp 2d 1077, 1084 (D Or 2002).

On May 26, 2004, the Ninth Circuit affirmed the district court's analysis and judgment. *Oregon v. Ashcroft*, 368 F3d 1118 (2004). In holding the Interpretive Rule unlawful and unenforceable, the court held that it:

> violates the plain language of the CSA, contravenes Congress' express legislative intent, and oversteps the bounds of the Attorney General's statutory authority.

Id. at 1120.

The court concluded:

> In sum, the CSA was enacted to combat drug abuse. To the extent that it authorizes the federal government to make decisions regarding the practice of medicine, those decisions are delegated to the Secretary of Health and Human Services, not to the Attorney General. The Attorney General's unilateral attempt to regulate general medical practices historically entrusted to state lawmakers interferes with the democratic debate about physician assisted suicide and far exceeds the scope of his authority under federal law. We therefore hold that the Ashcroft Directive [i.e., the Interpretive Rule] is invalid and may not be enforced.

Id. at 1131.

The government petitioned for a writ of certiorari, and the United States Supreme Court allowed review.

The Issue on Review

The issue before the Supreme Court was whether the CSA authorized the attorney general to prohibit physicians from prescribing or dispensing controlled substances, as narrowly permitted under Oregon law, to hasten an impending death. The question was one of statutory interpretation, "to determine whether Executive action is authorized by, or otherwise consistent with, the [CSA]." *Gonzales v. Oregon*, 126 S Ct at 911.[1]

The Source of the Attorney General's Claimed Authority

Under the CSA, it is a crime to (1) knowingly or intentionally (2) distribute or dispense a controlled substance (3) unless "authorized" by the CSA. 21 USC § 841(a). Authorization is obtained by "registering" with the attorney general. *See* 21 USC § 822(a)(2). Persons registered with the attorney general are authorized to possess, manufacture, distribute, or dispense controlled substances to the extent authorized by their registrations. *See* 21 USC § 822(b).

Physicians and pharmacists licensed by a state and registered with the attorney general are "practitioners" and are authorized to dispense controlled substances (*see* 21 USC § 829(a)&(b)) in "the course of [their] professional practice." *See* 21 USC § 802(21); *see also United States v. Moore*, 423 US 122, 140 (1975). The "course of professional practice" requirement means that a physician may prescribe controlled substances only to act as a physician. *Moore*, 423 US at 141. When a physician abandons his role as a physician and acts as a mere "drug pusher," he violates the CSA. Thus, a violation of the CSA "was intended to turn on whether the 'transaction' falls within or without legitimate channels." *Id.* at 135.

The attorney general claimed authority to declare physician-assisted suicide a violation of the CSA under 21 CFR § 1304.06. That regulation,

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promulgated in 1971 by Attorney General Mitchell, provides in relevant part:

> § 1306.04. Purpose of issue of prescription
> (a) *A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice*. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person using it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 CFR § 1304.06 (emphasis added).

The attorney general has authority to promulgate regulations under 21 USC § 821 of the CSA, which provides as follows:

> § 821. Rules and regulations
> The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to the registration and control of regulated persons and of regulated transactions.

21 USC § 821.

The Supreme Court's Holding in *Gonzales v. Oregon*

As noted in the introduction to this article, the Supreme Court rejected the attorney general's claim of authority. The Court began by observing that an agency's interpretation may be entitled to substantial deference if the agency is interpreting its own ambiguous regulation, or if the agency is interpreting a statute and Congress delegated authority to the agency to make rules carrying the force of law.

Here, however, the interpretation (the Interpretive Rule) of the agency's regulation (21 CFR § 1306.04) was not entitled to such deference, because the regulation did nothing more than parrot the statute, and Congress did not delegate to the attorney general authority to declare that prescribing controlled substances, as permitted under Oregon's one-of-a-kind law, is a crime under the federal statute. The Court went further than the Ninth Circuit, which had invoked principles of federalism and stated that the attorney general could not criminalize an action that a state had authorized. Indeed, the Supreme Court held that the attorney general did not have authority under the CSA to criminalize anything at all.

The Court first noted that 21 CFR §1306.04 (the legitimate-medical-purpose regulation) "just repeats two statutory phrases and attempts to summarize the others." 126 S Ct at 915. The Court stated:

> [T]he existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute. An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.

Id. at 916.

The Court then stated that the Interpretive Rule was entitled to no deference because the attorney general had no authority to promulgate it:

> [The Attorney General] is not authorized to make a rule declaring illegitimate a medical standard for care and treatment of patients that is specifically authorized under state law.

Id. That is so because the "CSA gives the Attorney General limited powers, to be exercised in specific ways." *Id.*

The Court described the attorney general's claim of authority as "extraordinary" and "unrestrained."

at 917. In the CSA, Congress delegated to the attorney general the authority to "promulgate rules relating only to 'registration' and 'control,'[2] and 'for the efficient execution of his functions' under the statute." *Id.*, quoting 21 USC §§ 821 and 871. Even that authority is constrained by a detailed set of procedures. *Id.* The CSA does not give the attorney general "the greater power to criminalize even the actions of registered physicians, whenever they engage in conduct he deems illegitimate." *Id.* at 917–918. Consequently, the legitimate-medical-purpose regulation—promulgated by the attorney general—cannot and does not define what activity violates the CSA.

The Court described the attorney general's claim of authority as "extraordinary" and "unrestrained." *Id.* at 918. In rejecting the claim, the Court stated:

> It would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity outside "the course of professional practice," and therefore a criminal violation of the CSA.

Id.

Having held that the attorney general's interpretation was not entitled to "the force of law," the Court next considered whether the interpretation was nevertheless "correct." *Id.* at 922. The Court noted the attorney general's "lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment." *Id.* The Court

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declined to follow the attorney general's rule because "we do not find the Attorney General's opinion persuasive." *Id.*

In so holding, the Court observed that Congress enacted the CSA to "conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances." *Id.*, quoting *Gonzales v. Raich*, 545 US ___, 125 S Ct 2195 (2005). The Court continued:

> In deciding whether the CSA can be read as prohibiting physician-assisted suicide, we look to the statute's text and design. The statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.

Id. at 922–923 (internal quotation marks and citations omitted). Thus, "[t]he structure and operation of the CSA presume and rely upon a functioning medical profession regulated under the States' police powers." *Id.* at 923. The DWDA "is an example of the state regulation of medical practice that the CSA presupposes." *Id.*

Moreover, the Court held that the Interpretive Rule rests on a reading of 21 USC § 829(a)—which requires that every Schedule II drug be dispensed pursuant to a "written prescription of a practitioner"—that is "persuasive only to the extent" that it is read "without the illumination of the rest of the statute." *Id.* at 925. The Court explained:

> Viewed in its context, the prescription requirement is better understood as a provision that ensures patients use controlled substances under the supervision of a doctor so as to prevent addiction and recreational abuse. As a corollary, the provision also bars doctors from peddling to patients who crave the drug for those prohibited uses. See *Moore*, 423 U.S., at 135, 143. To read prescriptions for assisted suicide as constituting "drug abuse" under the CSA is discordant with the phrase's consistent use throughout the statute, not to mention its ordinary meaning.

Id. And, the Court reiterated, "[t]he Government's interpretation of the prescription requirement also fails under the objection that the Attorney General is an unlikely recipient of such broad authority[.]" *Id.*

Furthermore, "the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Id.* The Court concluded that the CSA does not authorize the attorney general to bar dispensing controlled substances to hasten an impending death in the face of a state medical regulation permitting such conduct. *Id.* The Court stated:

> The Government, in the end, maintains that the prescription requirement delegates to a single Executive officer the power to effect a radical shift of authority from the States to the Federal Government to define general standards of medical practice in every locality. The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.

Id. ✦

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Endnotes

1. The case name was changed to reflect the fact that Alberto Gonzales replaced John Ashcroft as attorney general.

2. "Control" is a term of art in the CSA, and refers to the scheduling of controlled substances. 21 USC § 802(5).

Save the Date: CLE Seminar on May 12

The Civil Rights Section and the Oregon State Bar will present a CLE seminar on May 12 entitled "Employment Discrimination: Civil Rights Actions under Title VII and the ADA." This full-day seminar will take place at the Oregon Convention Center in Portland.

The CLE seminar will provide an in-depth view of employment discrimination actions under Title VII and the ADA. Nuts-and-bolts advice on litigating these issues will be offered, as well as a discussion of cutting-edge trends. Learn how to advise employers and employees on handling disability-related issues. Valuable to both new and experienced lawyers, sample pleadings will be provided for plaintiff and defense counsel.

Registration information will be posted soon on the CLE Seminars section of the OSB website, www.osbar.org.

Please join us on May 12. ✦

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