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Appellate Court Records

IN THE SUPREME COURT OF THE STATE OF OREGON

JOHN MILLER, RANDY OLSON, HERBERT GOSS, DOUGLAS BABCOCK, HENRY JACKSON, AND MICHAEL PALIN, Petitioners on Review, v. CITY OF PORTLAND, an Oregon municipal corporation, Respondent on Review.	Supreme Court Case No.: S061421 Court of Appeals Case No.: A145318 Multnomah County Circuit Court Case No.: 0810-14715

BRIEF OF *AMICUS CURIAE* OREGON TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW (Corrected)

Petition for review of the decision of the Court of Appeals on appeal from a judgment of the Circuit Court for Multnomah County, Honorable Richards Maizels, Judge *pro tem*.

Opinion Filed March 27, 2013
Author of Opinion: Sercombe, J.
Concurring Judges: Ortega, P.J., Hadlock, J.

James S. Coon, OSB# 771450
Swanson Thomas & Coon
820 SW Second Ave., Suite 200
Portland, OR 97204
Phone: 503-228-5222
Email: jcoon@stc-law.com

Of Attorneys for *Amicus Curiae* Oregon Trial Lawyers Association

Montgomery W. Cobb, OSB# 831730
Montgomery W. Cobb, LLC
1001 SW 5th Ave., Suite 1100
Portland, OR 97204
Phone: 503-625-5888
Email: mwc@montycobb.com

Of Attorneys for Petitioners on Review

Continued on Reverse

October 2013

Franco Lucchin, OSB# 013310
Harry M. Auerbach, OSB# 821830
Office of City Attorney
1221 SW 4th Ave., Room 430
Portland, OR 97204
Phone: 503-523-4047
Emails: franco.lucchin@portlandoregon.gov
Harry.Auerbach@portlandoregon.gov

Of Attorneys for Respondent on Review

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I. Introduction

OTLA appears as *amicus curiae* on the merits, aligned with petitioner Olson, to address the Court of Appeals' holding that the trial court had no jurisdiction over Mr. Olson's claim because he failed to exhaust available administrative remedies. OTLA believes workers should be entitled to rely on the explicit language of notices they receive from their employers concerning their employment and that, when they do, their claims should be addressed on their merits. Mr. Olson did exactly what the City's notice to him required, and neither that notice nor any City Charter provision required more. His claim should be decided on its merits.

II. Questions Presented

Must a public employer's notice to an employee concerning employment rights and administrative remedies be construed according to its terms?

Is the judicial doctrine of exhaustion of administrative remedies satisfied by reasonable action by the petitioner in light of notice received and under the circumstances although some other action is possible?

III. Proposed Rules of Law

An employer's notice to an employee concerning employment rights should be construed according to its terms, with due regard for the employee's understanding in light of all the circumstances.

A petitioner satisfies the judicial doctrine of administrative remedies by taking reasonable action in light of the language of any notice he receives and under all the circumstances, although some other action was possible.

IV. Nature of the Action and Judgment

Petitioners, disabled Portland firefighters, brought an action in circuit court for breach of contract and breach of duty of good faith and fair dealing, because of the City's establishment of a return-to-work program that they allege violated the terms of their employment. The trial court granted summary judgment for the City – as to breach of contract on the merits and on the procedural ground that the firefighters had failed to exhaust their administrative remedies. The trial court denied summary judgment as to the claim for breach of duty of good faith and fair dealing. The court of appeals affirmed the grant of summary judgment on breach of contract and reversed the exhaustion holding as to all the firefighters except Mr. Olson, remanding for trial as

to breach of the duty of good faith and fair dealing. It affirmed summary judgment against Mr. Olson on exhaustion grounds, and Mr. Olson petitions for review.

V. Facts

As relevant to the exhaustion issue for Mr. Olson, the court of appeals correctly stated the facts as follows:

> [Mr. Olson] received written notice dated April 12, 2007, that his disability benefits were terminated effective April 5, 2007, because he was "no longer disabled or eligible." The notice advised Olson:
>
> > "You have 14 days from the date of this letter to provide a written response for the Director's consideration.
> >
> > "If the Director does not hear from you within the 14-day time frame, this denial is affirmed and you then have 60 days from April 26, 2007 to appeal to a hearings officer. * * * An untimely request for hearing may be accepted by the Director, upon a finding of good cause."
>
> (Boldface omitted.) In a letter dated April 26, 2007, Olson sought reconsideration of the termination of his benefits. However, he received no response to that request for reconsideration.

Miller v. City of Portland, 255 Or App 771, 774 (2013). There is no evidence in the record that Mr. Olson ever received any response to his timely request for reconsideration or any further notice of denial.

VI. Summary of Argument

The city's April 12, 2007 written notice should be construed to mean what it says. It told Mr. Olson he had 14 days to "provide a written response for the Director's consideration" and that "If the Director does not hear from you within the 14-day time frame", the denial would be affirmed, and he would "then" have 60 days to request a hearing. Mr. Olson did provide a written response within 14 days, so the condition – "if the Director does not hear from you" – was never met, the denial was never affirmed, and the 60 days that would "then" have run never ran.

VII. Argument

The requirement for exhaustion of administrative remedies is, where not provided by statute[1], a judicial doctrine intended to "further orderly procedure and good administration". *Application of Portland General Electric Co.*, 277 Or 447 (1977). "Orderly procedure and good administration" require, at a minimum, that notices the city sends employees about decisions concerning their rights be clearly written and that they be construed fairly, according to their ordinary meaning.

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[1] Statutory exhaustion requirements apply, for example, to land use litigation. ORS 197.825(2)(a)*; Lyke v. Lane County*, 70 Or App 82 (1984).

The city's April 12 notice gave Mr. Olson two options: (1) "provide a written response for the Director's consideration" within 14 days or (2) do not respond within 14 days. If he chose the second – not to respond in 14 days – the notice told him he would then have 60 further days to request a hearing – a total of 74 days from the date of the notice.

The notice did not specify the procedural consequence of responding in 14 days, but a fair reading certainly suggests that the consequence of *responding* in 14 days would be different than the consequence of *not* responding in 14 days. "If you do not respond ... then 'x' will happen" ordinarily means that if one *does* respond, something other than "x" will happen. This is especially true where the response is a request for reconsideration. The reasonable inference is that the request will trigger some sort of consideration and decision. The notice itself said Mr. Olson's response would be "for the Director's consideration."

The meaning of the notice cannot have been, as the city argued below[2] that the same consequence would follow from a response as from a lack of response. That is, the city argued that Mr. Olson would

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[2] The city argues that its notice "in effect allowed Olson more than 60 days to request a hearing." 255 Or App at 782.

have had 74 days from the date of the April 12 notice to request a hearing, whether he provided a written response to the Director or not. The court of appeals seems to have adopted this view, construing the April 12 notice to indicate that Mr. Olson "had additional time before he would need to file a request for a hearing to come within the 60-day time limit." 255 Or App at 785. The court did not say how much additional time: If he had not responded, presumably the 60 days would have begun running at the end of the 14 days, so Mr. Olson would have had 14 extra days. However, since he did request reconsideration, the most reasonable construction of the notice is that he would have 60 days to request a hearing from the time of the city's response to his request. The city never responded, so that 60 days never began to run.

The court of appeals held below that Mr. Olson "was required to complete the administrative review process before seeking judicial review". 255 Or App at 782. How was he to have done that? What did he need to do, and when? He knew that, if he had not written the director in response to the April 12 notice, he would have until June 25 (14 days plus 60 days) to file a request for hearing. Having written the director on April 26, however, he had not triggered the 60 day limit. When would it begin to run?

The wording of the April 12 notice to Mr. Olson was based on an administrative rule, which the court of appeals quoted as follows:

> [i]f the Director obtains evidence that * * * the Member is no longer disabled or eligible * * * the Director shall notify the Member of the Director's decision to suspend, reduce or terminate benefits. A summary of the evidence and the decision shall be provided to the Member. * * * The Member will have 14 days to provide a written response for the Director's consideration. The Member shall also be notified of the rights under Charter Section 5-202(h) and the right to appeal for a Hearing as provided for in Section IV [of the administrative rules]. Any such written request must be filed with the Director within 60 days after the date of the decision being appealed.

255 Or App at 780, *quoting* Fire and Police Disability, Retirement (FPDR) and Death Benefit Plan, Administrative Rules § III(G)(7)(2007).[3] Unlike the April 12, 2007 notice to Mr. Olson, the administrative rule does not make the conditional nature of the 60-day deadline so clear. One can infer that there ought to be some sort of decision on the 14-day "written response" before the 60-day period begins to run. After all, the

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[3] The City Charter provides for a 60-day limit on the time to request a hearing on a decision of the Fund Administrator. Fire & Police Disability, Retirement & Death Benefit Plan, Section 5-202(h). The FPDR administrative rules now provide a 60-day deadline to appeal the denial of a claim. The 14-day interim response to the director has been eliminated from the administrative rules. Fire & Police Disability, Retirement & Death Benefit Plan Administrative rules, section 5.4.08(B). Available at: http://www.portlandonline.com/auditor/index.cfm?c=60175&a=196415.

"Director's consideration" provided in the rule must have some object. As above, the April 12 notice told Mr. Olson that

> You have 14 days from the date of this letter to provide a written response *for the Director's consideration*.
>
> *If the Director does not hear from you* within the 14-day time frame, this denial is affirmed and *you then have* 60 days from April 26, 2007 to appeal to a hearings officer.

255 Or App at 774(emphasis added). Thus the notice made clear what can be inferred from the administrative rule – that the 14-day response time is, as the court of appeals put it, an "interim" step in the review process:

> Thus, both the administrative rule and the notice sent to Olson provide for a step in the administrative review process in addition to that set forth in the charter; they provide an interim review step by which a member may seek reconsideration by the director of the director's decision to suspend, reduce, or terminate benefits.

255 Or App at 783. If the "interim review" the court describes is an additional "step" in the process, the court does not explain how that "step" can consist only of a request for reconsideration but no actual consideration of or decision on that request. If the doctrine of exhaustion of administrative remedies is intended to "further orderly procedure and good administration"[4], it is hard to see how an open-

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[4] *Application of Portland General Electric Co.*, 277 Or 447, 456 (1977).

ended “interim step” consisting only of a meaningless request for reconsideration advances that goal. And, as above, the notice itself said Mr. Olson’s request would be “for the Director’s consideration”.

The court of appeals agreed below that, because Mr. Olson responded to the April 12 notice, “the director’s decision may not have been final”. 255 Or App at 784. The court reasoned as follows:

> However, the fact that, by virtue of Olson's written response, the director's decision may not have been final does not suggest that Olson was excused from the need to follow the administrative review process. Instead, it means that he began the administrative review process when he sought reconsideration.

Id. Mr. Olson is not contending here that he is excused from following the administrative process. One can agree with the court of appeals that he “began the administrative review process when he sought reconsideration” without reaching the conclusion that, on the same day he filed his request, the 60-day clock began running on a request for hearing to appeal a decision from the director that could not yet have been made. The question is “What is the process that Mr. Olson began with his request for reconsideration?” The answer is that, as defined by the notice, the process required that the director reconsider and make a decision in response to Mr. Olson’s request, either reversing or affirming the denial. At that point the director’s decision would be final, and the

60 days in which to request a hearing should start to run. That never happened because the director never responded.[5]

Mr. Olson took the administrative process as far as he could under any reasonable reading of the April 12, 2007 notice. His April 26 request for reconsideration sent the ball into the city's court where it bounced several times, rolled to a stop and sat for nearly a year and a half.[6] It was not up to Mr. Olson to put another ball in play.

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[5] The court of appeals discussed *Taylor v. Board of Parole*, 200 Or App 514, rev. den. 339 Or 475 (2005), in which the petitioner filed his complaint for judicial review six months after requesting reconsideration of a decision by the parole board. The Taylor panel held that, while extended administrative inaction could make a process "futile" such that the court would have jurisdiction in spite of petitioner's failure to complete the administrative process, six months wasn't long enough under the circumstances. 200 Or App at 522. In this case, Mr. Olson requested review April 26, 2007 and finally filed his judicial complaint October 15, 2008, after almost 18 months of city inaction. However, the court of appeals declined to apply Taylor to this case by limiting its rationale to "futility" caused by delay, which Mr. Olson does not argue in this case. 255 Or App at 784 n.7. But the problem created by the April 12 notice in this case was not simply delay. It was that the notice gave Mr. Olson an option which he pursued in good faith, and the administrator's delay in responding then made it impossible to tell what was the proper administrative process.

[6] Mr. Olson filed his complaint for judicial review October 15, 2008.

VIII. Conclusion

The court should reverse the court of appeals' decision as to Mr. Olson's exhaustion of administrative remedies and remand the case for trial at least on his claim for breach of the duty of good faith and fair dealing.

SWANSON THOMAS, COON & NEWTON

____/s/ James S. Coon_____
James S. Coon, OSB No. 771450
jcoon@stc-law.com
Of Attorneys for *Amicus Curiae* OTLA

CERTIFICATE OF COMPLIANCE
WITH ORAP 5.05(2)(d) & ORAP 8.15(3)

Brief length:

I certify that (1) this *Amicus Curiae* brief filed on behalf of the Oregon Trial Lawyers' Association complies with the word-count limitation in ORAP 5.05(2)(b)(I) & ORAP 8.15(3) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 2,390 words.

Type size:

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Dated October 1, 2013.

SWANSON THOMAS, COON & NEWTON

____/s/James S. Coon_____
James S. Coon, OSB No. 771450
jcoon@stc-law.com
Of Attorneys for *Amicus Curiae* OTLA

CERTIFICATE OF FILING

I certify that on October 1, 2013, I filed the original of the foregoing **Brief on the Merits of *Amici Curiae* Oregon Trial Lawyers Association** along with the required filing fee, with the State Court Administrator at the following address:

ATTN: Records Section
State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

by the following method of filing: e-file.

CERTIFICATE OF SERVICE

I also certify that on October 1, 2013, participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system as follows:

Montgomery W. Cobb, OSB# 831730 Montgomery W. Cobb, LLC 1001 SW 5th Ave., Suite 1100 Portland, OR 97204 Phone: 503-625-5888 mwc@montycobb.com	Franco Lucchin, OSB# 013310 Harry M. Auerbach, OSB# 821830 Office of City Attorney 1221 SW 4th Ave., Room 430 Portland, OR 97204 Phone: 503-523-4047 franco.lucchin@portlandoregon.gov harry.Auerbach@portlandoregon.gov
Of Attorneys for Petitioners on Review	**Of Attorneys for Respondent on Review**

Dated October 1, 2013.

SWANSON THOMAS, COON & NEWTON

____/s/James S. Coon_____
James S. Coon, OSB No. 771450
jcoon@stc-law.com
Of Attorneys for *Amicus Curiae* OTLA