

## EMPLOYMENT LAW UPDATE

Jennifer A. Becker

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### Federal Law

***Ostad v. Oregon Health Science University*** (9<sup>th</sup> Cir. 4/28/03) 03 C.D.O.S. 3538

***The Ninth Circuit holds that a plaintiff must prove that the “protected activity” was a “substantial” or “significant” factor in the employer’s decision to terminate.***

*By Jessica B. Rudin and Jason A. Geller*

Dr. Ostad was a surgery resident with the Oregon Health Sciences University. He lodged numerous complaints regarding the billing practices of his supervisor, Dr. Seyfer. At about the same time as Dr. Ostad began lodging complaints, Dr. Seyfer began issuing formal written warnings about Dr. Ostad’s performance. Dr. Ostad was ultimately terminated from the residence program.

He sued Dr. Seyfer and the University, alleging that his termination was illegal retaliation for the exercise of the First Amendment right of free speech. The University contended it fired Dr. Ostad because his performance was inadequate. Dr. Ostad prevailed at trial.

On appeal, Dr. Seyfer and the University argued that the court provided the jury with an improper instruction on what constitutes a “substantial or motivating factor” for the purposes of determining whether Dr. Ostad’s termination was retaliatory. They argued that the court

should have instructed the jury that it could find retaliation only if they found that Dr. Ostad would not have been terminated in the absence of his criticism. Instead, the lower court instructed the jury that a “substantial or motivating factor” is a “significant factor,” i.e., that it could find retaliation even if it determines that Dr. Ostad’s criticism was only a “significant factor” in his termination.

The U.S. Court of Appeal for the Ninth Circuit rejected the employer’s arguments and affirmed the lower court’s ruling. It held that the jury instruction was consistent with evidentiary burdens on employers in “mixed-motive” cases such as this. In such cases, once an employee proves that retaliation was a “substantial” factor in the adverse employment action, the employer has the burden of proving that it would have taken the challenged employment action in the absence of the “protected activity.”

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