

OREGON LAW UPDATE

Does Governmental Discretionary Immunity Apply when a Public Employee makes Facility Design Decisions?

case in point ...

From the desk of Jeff Eberhard: Under Oregon law, a public body cannot be held liable for damages caused by the negligence of an employee, officer or agent of the public body if the claimed negligence was based on the performance of a discretionary function. A discretionary function would generally include spending decisions based on balancing the allocation of scarce public resources with public safety concerns. This rule protects governments by preventing them from being exposed to liability for decisions made based on their view of the relative importance of public policy matters. Determining what qualifies as a discretionary function can be a difficult task.

Claims Pointer: Governmental discretionary immunity generally applies to choices involving public policy by a person or body who has the responsibility or authority to make such a choice. However, the immunity may not apply to choices a public employee makes as part of the employee's routine job duties.

Smith v. Bend Metropolitan Park and Recreation Dist., in the Court of Appeals of the State of Oregon (Case No. A146575, December 14, 2011).

Plaintiff sustained injuries when she slipped and fell onto a fountain fixture at a city-owned swimming pool. Plaintiff brought an action against the city's parks and recreation department alleging that the city was negligent in the choice and placement of the fountain fixture and in failing to warn about the fountain fixture. The fountains were added to the pool during a renovation. While the pool renovation project manager's decisions were reviewed by the city parks and recreation board of directors, the choice and placement of the fountain fixtures were ultimately determined by the project manager as part of his day-to-day job duties. The project manager testified that he did not consider safety precautions in making his choices regarding the fountains.

The city filed a motion for summary judgment arguing that Plaintiff's claims regarding the choice and placement of the fountain fixture were discretionary decisions subject to governmental immunity under former ORS 20.265(3)(c) (now renumbered ORS 30.265(6)(c)) and there was no evidence of causation connecting the city's failure to warn to Plaintiff's injuries. The trial court granted the city's motion. Plaintiff appealed the trial court's ruling.

The Court of Appeals affirmed the trial court's ruling as to the failure to warn claim because Plaintiff was fully aware of the danger presented by the fountain fixture. However, the Court of Appeals reversed the trial court's ruling that the choice and placement of the fountain fixture fell under the government's discretionary immunity because there was a question of fact as

to whether these decisions involved a discretionary function.

ORS 30.265(6)(c) provides:

Every public body and its officers, employees and agents acting within the scope of their employment or duties ..., are immune from liability for:

(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

In reaching its holding, the court noted that discretionary immunity requires a choice, or exercise of judgment, involving public policy, as opposed to routine operations, by a person or body who has the responsibility or authority to make the public policy choice. The court then explained that it was important to identify who had the authority to make the choice at issue in determining whether the choice involved public policy as opposed to routine operations. In this case, the court found that there was a question of fact as to whether the authority to make choices regarding the design and placement of the fountain fixtures was delegated to the project manager and whether his decisions involved public policy based on his testimony that he made the decisions as part of his routine job duties and that he did not consider safety precautions in making his decisions. The court further noted that some planning and design decisions, like choosing between two different safety features, do not involve public policy. Accordingly, the court remanded this case for a jury to determine whether discretionary immunity applied.

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