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RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action or proceeding may be dismissed by the plaintiff without order of court ~~(a)~~ by filing <sup>(a)</sup> a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (b) ~~by filing~~ a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action or proceeding against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action or proceeding shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon ~~the~~ such defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order; insufficiency of

Insert language  
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evidence. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or proceeding or of any claim against such defendant. After the plaintiff in an action or proceeding tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 62.

B.(2) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own <sup>initiative</sup> ~~motion~~, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that each such case will be dismissed by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall dismiss each such case. Nothing contained in this

*dismissal by the court*

subsection shall prevent the dismissing at any time, for want of prosecution, of any action or proceeding upon motion of any party thereto.

*Molles P. 18 recd.*

B.(3) Effect of dismissal. Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

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wise.  
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C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a) of subsection (1) of section A. of this rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

*Molles P. 18  
mistake  
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sentance*

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action or proceeding in any court commences an action or proceeding based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action or proceeding previously dismissed as it may deem proper and may stay the proceedings in the action or proceeding until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the ~~defendant~~ <sup>party against whom a claim is asserted</sup> may, at any time before trial, serve upon the ~~plaintiff~~ <sup>party against whom asserting a claim</sup> an offer to allow judgment to be given against him for the sum, or the property, or to the effect

therein specified. If the <sup>party Assenting the claim</sup> plaintiff accepts the offer, the <sup>party Assenting the claim</sup> plaintiff or the attorney for the <sup>party Assenting the claim</sup> plaintiff shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such <sup>party Assenting the claim</sup> plaintiff; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the <sup>party Assenting the claim</sup> plaintiff fails to obtain a more favorable judgment, the <sup>party Assenting the claim</sup> plaintiff shall not recover costs, but the <sup>party against whom the claim is assented.</sup> defendant shall recover of the <sup>party assenting the claim</sup> plaintiff costs and disbursements from the time of the service of the offer.

#### BACKGROUND NOTE

ORS sections superseded: 17.055, 18.210, 18.220, 18.230

#### COMMENT

This rule governs all dismissals, including dismissals for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

*Clarity  
By Robert*

Sections 54 A. and C. are based on the federal rule. They limit the right to take a non-prejudicial dismissal, without leave of court, to the period before a responsive pleading or summary judgment are filed. ORS 18.210 and 18.230 allow this until five days prior to trial, unless a counterclaim has been filed. The last sentence of subsection A.(1) is designed to prevent harassment by repeated filing and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

*to  
12.220*

Subsection B.(1) comes from the federal rules and covers both a dismissal for failure to comply with rules or court orders and a dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's

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case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a dismissal at the close of the plaintiff's case did not bar another suit; the dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision on the merits has prejudicial effect and a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(1) requires findings only when they would be required for a judgment on the merits under Rule 62. Subsection B.(2) is ORS 18.260. Subsection B.(3) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of dismissals covered by section 54 B. only, and not all dismissals.

Section 54 D. comes from the federal rule.

Section 54 E. is ORS 17.055; 17.065 to 17.085 and 17.990 are left as statutes because they are not true procedural rules.

#### RULE 55

#### SUBPOENA

*Public's  
PLS  
not process*

A. Defined; form. The process by which attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is



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RULE 54

DISMISSAL OF ACTIONS; COMPROMISE, ~~REVISION~~

A. Voluntary dismissal; effect thereof.

32 E  
12.57,

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E, 12.57, and of any statute of this state, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in paragraph (1) of this subdivision of this Rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal; effect thereof. (3) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the

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ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in ~~ORS 47.431~~ Rule ~~638~~.

~~unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision operates as an adjudication upon the merits.~~

B (2) ~~Effect and scope~~  
Section  
Insert - 19.260 as is

C. Dismissal of counterclaim, cross-claim, or third party claim. The

provisions of this Rule apply to the dismissal of any counterclaim, cross-claim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of ~~subdivision (a)~~ <sup>Section A</sup> of this Rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment to be given against him for the sum, or the property, or to the effect therein specified. If the plaintiff accepts the offer, he shall by himself or attorney endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon him; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time

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prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff <sup>23</sup> fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer.

COMMENT: Sections A. through D. are Rule 41 previously approved by the Council. See minutes of meeting held April 1, 1978. Section E. is ORS 17.055. ORS 17.065 through 17.085 were left as a statute. They really do not relate to any procedure but embody a legislative policy determination relating to employer-employee relations, and criminal penalties are provided by ORS 17.990.



Rule 54.

Background note.

ORS. sections Superseded.

17.055, 18.210, 18.220, 18.230, ~~18.230~~, ~~18.240~~, ~~18.250~~, 18.260.

This rule governs all dismissals including dismissals for insufficiency of evidence at the close of the plaintiffs case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Section A and C are based on the Federal Rule. They

~~Section A limits the right to take a dismissal without prejudice of a claim in a complaint, counterclaim, cross-claim or third party complaint, without leave of court, to the period before a responsive pleading or summary judgment motion are filed. Existing ORS provisions 18.210 and 18.230 allow this until five days prior to trial unless a counterclaim has been filed. The last sentence of Subsection A (1) is designed to prevent harassment by repeated filing and dismissals. The words "against the same party" were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.~~

non prejudicial

Sub Section B(1) comes from the federal rule and ~~both a dismissal for failure to comply with rules and a dismissal at the close of a claimants case for insufficiency of the evidence. Existing ORS sections deal with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiffs case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule for equity cases that a dismissal against the plaintiff did not bar another suit; the dismissal is with prejudice unless the court specifies otherwise. The language of the federal rule in the last sentence was changed to define prejudicial effect of dismissals covered by Section 54 B only, and not any dismissals. Subsection B(2) is ORS 18.260.~~

Covers

on court orders

SPILL Subsections

There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point no such motion is necessary. A decision on the merits has prejudicial effect and a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either have to reserve ruling on a motion to dismiss at the close of the plaintiffs case, if there was such a motion, or grant a nonprejudicial voluntary dismissal under Section 54A.

Subsection B(3) is from the Federal Rule but the language is in the rule

Section A comes from the Federal Rule.

Section B is ORS. 17.055.



RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action may be dismissed by the plaintiff without order of court <sup>(a)</sup> ~~(2)~~ by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or <sup>(b)</sup> ~~(3)~~ by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in <sup>subsection</sup> ~~paragraph~~ (1) of this <sup>section</sup> ~~subdivision of this Rule~~, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order; insufficiency of evidence. For failure of the plaintiff to prosecute or to comply

with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 63. ✓

B. (2) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own motion, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that each such case will be dismissed by the court for want of prosecution, unless on or before such first regular motion day application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall dismiss each such case. Nothing contained in this <sup>subsection</sup> ~~section~~ shall prevent the dismissing at any time, for want of prosecution, of any suit, action or proceeding upon motion of any party thereto.

B. (3) Effect of dismissal. Unless the court in its order for



dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this Rule apply to the dismissal of any counterclaim, crossclaim, or third party claim. A voluntary dismissal by the claimant alone pursuant to ~~Subsection~~ <sup>Paragraph (a) of subsection (1)</sup> ~~of section A.~~ <sup>of</sup> this Rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment to be given against him for the sum, or the property, or to the effect therein specified. If the plaintiff accepts the offer, he shall by himself or attorney endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon him; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff



fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer,

#### BACKGROUND NOTE

ORS sections superseded: 17.055, 18.210, 18.220, ~~18.250~~, 18.260.

#### COMMENT

This rule governs all dismissals, including dismissals for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Sections <sup>54</sup>A. and C. are based on the federal rule. They limit the right to take a non-prejudicial dismissal, without leave of court, to the period before a responsive pleading or summary judgment are filed. ORS 18.210 and 18.230 allow this until five days prior to trial, unless a counterclaim has been filed. The last sentence of subsection A.(1) is designed to prevent harassment by repeated filing and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

Subsection B.(1) comes from the federal rules and covers both a dismissal for failure to comply with rules or court orders and a dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a dismissal against the plaintiff did not bar another suit; the dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision on the merits has prejudicial effect and a judge who, for some reason, wished to grant a nonprejudicial dismissal at the close of all the evidence would either have to reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a nonprejudicial voluntary dismissal under section 54 A.

The last sentence of <sup>subsection</sup> VB(1) requires Findings only when they would be required for a judgment on the merits under Rule 63.

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order; insufficiency of evidence. For failure of the plaintiff to prosecute or to comply



with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 63.

B.(2) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own motion, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that each such case will be dismissed by the court for want of prosecution, unless on or before such first regular motion day application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall dismiss each such case. Nothing contained in this subsection shall prevent the dismissing at any time, for want of prosecution, of any suit, action or proceeding upon motion of any party thereto.

B.(3) Effect of dismissal. Unless the court in its order for

dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a) of subsection (1) of section A. of this rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment to be given against him for the sum, or the property, or to the effect therein specified. If the plaintiff accepts the offer, he shall by himself or attorney endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon him; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff

fails to obtain a more favorable judgment or decree, he shall not recover costs, but the defendant shall recover of him costs and disbursements from the time of the service of the offer.

#### BACKGROUND NOTE

ORS sections superseded: 17.055, 18.210, 18.220.

#### COMMENT

This rule governs all dismissals, including dismissals for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Sections 54 A. and C. are based on the federal rule. They limit the right to take a non-prejudicial dismissal, without leave of court, to the period before a responsive pleading or summary judgment are filed. ORS 18.210 and 18.230 allow this until five days prior to trial, unless a counterclaim has been filed. The last sentence of subsection A.(1) is designed to prevent harassment by repeated filing and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

Subsection B.(1) comes from the federal rules and covers both a dismissal for failure to comply with rules or court orders and a dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a dismissal against the plaintiff did not bar another suit; the dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision on the merits has prejudicial effect and a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(1) requires findings only when they would be required for a judgment on the merits under Rule 63. Subsection B.(2) is ORS 18.260. Subsection B.(3) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of dismissals covered by section 54 B. only, and not all dismissals.

Section 54 D. comes from the federal rule.

Section 54 E. is ORS 17.055; 17.065 to 17.085 and 17.990 are left as statutes because they are not true procedural rules.

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action or proceeding may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (b) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action or proceeding against the same parties on or including the same claim.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action or proceeding shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon such defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order; insufficiency of

evidence. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or proceeding or of any claim against such defendant. After the plaintiff in an action or proceeding tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 62.

B.(2) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own motion, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that each such case will be dismissed by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall dismiss each such case. Nothing contained in this



subsection shall prevent the dismissing at any time, for want of prosecution, of any action or proceeding upon motion of any party thereto.

B.(3) Effect of dismissal. Unless the court in its order for dismissal otherwise specifies, a dismissal under this section operates as an adjudication upon the merits.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, crossclaim, or third party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (a) of subsection (1) of section A. of this rule shall be made before a responsive pleading or a motion for summary judgment by an opponent is served or, if there is none, before the introduction of evidence at the trial or hearing.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action or proceeding in any court commences an action or proceeding based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action or proceeding previously dismissed as it may deem proper and may stay the proceedings in the action or proceeding until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the defendant may, at any time before trial, serve upon the plaintiff an offer to allow judgment to be given against him for the sum, or the property, or to the effect

therein specified. If the plaintiff accepts the offer, the plaintiff or the attorney for the plaintiff shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such plaintiff; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the plaintiff fails to obtain a more favorable judgment, the plaintiff shall not recover costs, but the defendant shall recover of the plaintiff costs and disbursements from the time of the service of the offer.

#### BACKGROUND NOTE

ORS sections superseded: 17.055, 18.210, 18.220.

#### COMMENT

This rule governs all dismissals, including dismissals for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Sections 54 A. and C. are based on the federal rule. They limit the right to take a non-prejudicial dismissal, without leave of court, to the period before a responsive pleading or summary judgment are filed. ORS 18.210 and 18.230 allow this until five days prior to trial, unless a counterclaim has been filed. The last sentence of subsection A.(1) is designed to prevent harassment by repeated filing and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

Subsection B.(1) comes from the federal rules and covers both a dismissal for failure to comply with rules or court orders and a dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's

case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a dismissal at the close of the plaintiff's case did not bar another suit; the dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision on the merits has prejudicial effect and a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(1) requires findings only when they would be required for a judgment on the merits under Rule 62. Subsection B.(2) is ORS 18.260. Subsection B.(3) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of dismissals covered by section 54 B. only, and not all dismissals.

Section 54 D. comes from the federal rule.

Section 54 E. is ORS 17.055; 17.065 to 17.085 and 17.990 are left as statutes because they are not true procedural rules.

## RULE 55

### SUBPOENA

A. Defined; form. The process by which attendance of a witness is required is a subpoena. It is a writ or order directed to a person and requires the attendance of such person at a particular time and place to testify as a witness on behalf of a particular party therein mentioned. Every subpoena shall state the name of the court and the title of the action.

B. For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is

RULE 54

DISMISSAL OF ACTIONS; COMPROMISE

A. Voluntary dismissal; effect thereof.

A.(1) By plaintiff; by stipulation. Subject to the provisions of Rule 32 E., and of any statute of this state, an action may be dismissed by the plaintiff without order of court (a) by filing a notice of dismissal with the court and serving such motion on the defendant not less than five days prior to the day of trial if no counterclaim has been pleaded, or (b) by filing a stipulation of dismissal signed by all adverse parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action against the same parties on or including the same claim. Upon notice of dismissal or stipulation under this section, the court shall enter a judgment of dismissal.

A.(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless otherwise specified in the judgment of dismissal, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B.(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment or dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

B.(3) Dismissal for want of prosecution; notice. Not less than 60 days prior to the first regular motion day in each calendar year, unless the court has sent an earlier notice on its own initiative, the clerk of the court shall mail notice to the attorneys of record in each pending case in which no action has been taken for one year immediately prior to the mailing of such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why

it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution, of any action upon motion of any party thereto.

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication with prejudice.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 to 17.085, the party against whom a claim is asserted may, at any time before trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the



property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

#### COMMENT

This rule governs all dismissals, including judgments of dismissal for insufficiency of evidence at the close of the plaintiff's case in an action tried to the court. It is a combination of Federal Rule 41 and existing ORS provisions.

Sections 54 A. and C. are based on the federal rule but preserve the right to take a non-prejudicial dismissal until 5 days before trial unless a counterclaim is filed as specified in ORS 18.210 and 18.230. The next to the last sentence of subsection 54 A.(1) is designed to prevent harassment by repeated filings and dismissals. The words, "against the same party", were added to the language of the federal rule to make clear this only applied to repeated filings against the same person.

Subsection 54 B.(1) comes from the federal rules and covers a judgment of dismissal for failure to comply with rules or court orders. Subsection 54 B.(2) covers a judgment of dismissal at the close of a claimant's case for insufficiency of the evidence. Existing ORS sections speak in terms of equity cases. This rule deals with sufficiency of evidence in cases tried without a jury. The former equity rule that a party could move for dismissal, at the close of the plaintiff's case, only at the price

of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a judgment of dismissal at the close of the plaintiff's case did not bar another suit; the judgment of dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision of the case at the close of all the evidence would have prejudicial effect; a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(1) requires findings only when they would be required for a judgment under Rule 62. Subsection 54 B.(3) is ORS 18.260 Note, that by virtue of subsection 54 B.(4), a dismissal for failure to prosecute is with prejudice, unless the judgment of dismissal specifies otherwise. Subsection B.(4) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of judgments of dismissal covered by section 54 B. only, and not all judgments of dismissal.

Section 54 D. comes from the federal rule.

Section 54 E. is ORS 17.055; 17.065 through 17.085 and 17.990 are left as statutes because they are not procedural rules.

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A.(2) By order of court. Except as provided in subsection (1) of this section, an action shall not be dismissed at the plaintiff's instance save upon judgment of dismissal ordered by the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiff's motion to dismiss, the defendant may proceed with the counterclaim. Unless

otherwise specified in the judgment of dismissal, a dismissal under this subsection is without prejudice.

B. Involuntary dismissal.

B.(1) Failure to comply with rule or order. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for a judgment of dismissal of an action or of any claim against such defendant.

B.(2) Insufficiency of evidence. After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a judgment of dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment of dismissal against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment of dismissal with prejudice against the plaintiff, the court shall make findings as provided in Rule 62.

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such notice, that a judgment of dismissal will be entered in each such case by the court for want of prosecution, unless on or before such first regular motion day, application, either oral or written, is made to the court and good cause shown why it should be continued as a pending case. If such application is not made or good cause shown, the court shall enter a judgment of dismissal in each such case. Nothing contained in this subsection shall prevent the dismissal by the court at any time, for want of prosecution of any action upon motion of any party thereto.

B.(4) Effect of judgment of dismissal. Unless the court in its judgment of dismissal otherwise specifies, a dismissal under this section operates as an adjudication with prejudice.

C. Dismissal of counterclaim, cross-claim, or third party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third party claim.

D. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

E. Compromise; effect of acceptance or rejection. Except as provided in ORS 17.065 through 17.085, the party against whom

a claim is asserted may, at any time before trial, serve upon the party asserting the claim an offer to allow judgment to be given against the party making the offer for the sum, or the property, or to the effect therein specified. If the party asserting the claim accepts the offer, the party asserting the claim or such party's attorney shall endorse such acceptance thereon, and file the same with the clerk before trial, and within three days from the time it was served upon such party asserting the claim; and thereupon judgment shall be given accordingly, as in case of a confession. If the offer is not accepted and filed within the time prescribed, it shall be deemed withdrawn, and shall not be given in evidence on the trial; and if the party asserting the claim fails to obtain a more favorable judgment, the party asserting the claim shall not recover costs, but the party against whom the claim was asserted shall recover of the party asserting the claim costs and disbursements from the time of the service of the offer.

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Subsection 54 B.(1) comes from the federal rule and covers a judgment of dismissal for failure to comply with rules or court orders. Subsection 54 B.(2) is also from the federal rule and covers a judgment of dismissal at the close of a claimant's case for insufficiency of the evidence in cases tried without a jury. Existing ORS 18.210 and 18.220 refer to equity cases. The former equity rule that a party could move for dismissal at the close of the plaintiff's case, only at the price of waiving the right to present evidence, is specifically changed. This rule also changes the former rule that a judgment of dismissal at the close of the plaintiff's case did not bar another suit; under subsection B.(4) the judgment of dismissal is with prejudice unless the court specifies otherwise. There is no provision in the rule for a motion to dismiss in a non-jury case at the close of all the evidence. Since the judge decides the case at that point, no such motion is necessary. A decision of the case at the close of all the evidence would have prejudicial effect; a judge who, for some reason, wished to grant a non-prejudicial dismissal at the close of all the evidence would either reserve ruling on a motion to dismiss at the close of the plaintiff's case, if there was such a motion, or grant a non-prejudicial voluntary dismissal under section 54 A. The last sentence of subsection B.(2) requires findings only when they would be required for a judgment under Rule 62. Subsection 54 B.(3) is based on ORS 18.260. Note that under subsection 54 B.(4), a dismissal for failure to prosecute is with prejudice unless the judgment of dismissal specifies otherwise. Subsection B.(4) is from the federal rule, but the language of the federal rule in the last sentence was changed to define prejudicial effect of judgments of dismissal covered by section 54 B. only, and not all judgments of dismissal.

Section 54 D. comes from the federal rule.

Section 54 E. is based on ORS 17.055. ORS 17.065 through 17.085 and 17.990 are left as statutes because they are not procedural rules.