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CHAPTER 839

BUREAU OF LABOR AND INDUSTRIES

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FILING CAPTION: Amends rules related to workplace harassment to add substantive definitions.

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RULES:

839-005-0010, 839-005-0030

AMEND: 839-005-0010

NOTICE FILED DATE: 10/24/2024

RULE SUMMARY: Amends discrimination rule to define scope of "appropriate corrective action" and "promptly correcting harassing behavior."

CHANGES TO RULE:

839-005-0010

Discrimination Theories: Employment ¶¶

(1) Substantial evidence of intentional unlawful discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:¶¶

(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR 839-005-0003(14) of these rules;¶¶

(b) The aggrieved person is a member of a protected class;¶¶

(c) The aggrieved person was harmed by an action of the respondent; and¶¶

(d) The aggrieved person's protected class was the motivating factor for the respondent's action. In determining whether the aggrieved person's protected class was the reason for the respondent's action, the division uses whichever of the following theories applies:¶¶

(A) Specific Intent Theory: The respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class, unless the respondent can show that a bona fide occupational qualification or a bona fide voluntary, court-ordered affirmative action plan (OAR 839-005-0013) allows the action.¶¶

(B) Different or Unequal Treatment Theory: The respondent treats members of a protected class differently than others who are not members of that protected class. When the respondent makes this differentiation because of the individual's protected class and not because of legitimate, non-discriminatory reasons, unlawful discrimination exists. In establishing a case of different or unequal treatment:¶¶

(i) There must be substantial evidence that the aggrieved person was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the aggrieved person differently than comparably situated individuals who were not members of the aggrieved person's protected class. Substantial evidence of discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as

sufficient to support that protected class membership was a motivating factor for the respondent's alleged unlawful action. If the respondent fails to rebut this evidence with evidence of a legitimate non-discriminatory reason, the division will conclude that substantial evidence of unlawful discrimination exists.¶

(I) Pretext: If the respondent rebuts the evidence with evidence of a legitimate non-discriminatory reason, but there is substantial evidence that the respondent's reason is a pretext for discrimination, the division will conclude there is substantial evidence of unlawful discrimination.¶

(II) Mixed Motive: If the respondent presents substantial evidence that a legitimate, non-discriminatory reason contributed to the respondent's action, but the division finds the individual's protected class membership was also a motivating factor in the respondent's action, the division will determine there is substantial evidence of discrimination.¶

(ii) The aggrieved person at all times has the burden of proving that the aggrieved person's protected class was the reason for the respondent's unlawful action.¶

(2) Adverse Impact Discrimination: Substantial evidence of adverse impact discrimination does not require establishment of intentional discrimination as provided in (1) of this rule. Adverse impact discrimination exists if the division's investigation reveals evidence that a reasonable person would accept as sufficient to support the following elements:¶

(a) The respondent is a respondent as defined by ORS 659A.001~~(10)~~ and OAR 839-005-0003~~(14)~~ of these rules;¶

(b) The respondent has a standard or policy that is applied equally.¶

(c) The standard or policy has the effect of screening out or otherwise affecting members of a protected class at a significantly higher rate than others who are not members of that protected class; and¶

(d) The aggrieved person is a member of the protected class adversely affected by the respondent's standard or policy and has been harmed by the respondent's application of the standard or policy.¶

(3) An employer must reasonably accommodate an employee or applicant's religious belief, observance or practice unless the employer can demonstrate that such accommodation would cause undue hardship on the employer's business (see OAR 839-005-0140).¶

(4) Harassment: Harassment based on an individual's protected class is a type of intentional unlawful discrimination. In cases of alleged unlawful sexual harassment in employment see OAR 839-005-0030.¶

(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:¶

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment;¶

(B) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or¶

(C) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.¶

(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.¶

(c) Employer Proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the employer's president, owner, partner or corporate officer.¶

(d) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against the individual. A tangible employment action includes, but is not limited to, any of the following:¶

(A) Terminating employment, including constructive discharge;¶

(B) Failing to hire;¶

(C) Failing to promote; or¶

(D) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.¶

(e) Harassment by Supervisor, No Tangible Employment Action: When harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:¶

(A) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.¶

(B) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:¶

(i) That the employer exercised reasonable care to prevent and promptly correct any harassing behavior; and¶

(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.¶

(f) Harassment by Coworkers or Agents: An employer is liable for harassment by the employer's employees or

agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.¶¶

(g) Harassment by Non-Employees: An employer is liable for harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.¶¶

(h)(A) As used in this rule, "appropriate corrective action" and "promptly correcting any harassing behavior" means that an employer:¶¶

(i) Intervenes immediately with actions reasonably designed to effectively halt harassing behavior;¶¶

(ii) Conducts a prompt and adequate investigation and ascertains the extent of harassing behavior;¶¶

(iii) Takes appropriate remedial measures proportionate to the seriousness of the harassing behavior;¶¶

(iv) Places no burden, or makes every reasonable effort to minimize any burden placed, on the reporting employee or aggrieved party;¶¶

(v) Does not retaliate against the reporting employee, the aggrieved party or a participant in the investigation; and¶¶

(vi) Takes steps that are reasonably calculated to prevent retaliation and future harassment.¶¶

(B) The success or failure of corrective action in stopping future harassment is relevant, but not dispositive, as to employer liability.¶¶

(C) The reasonableness of an employer's actions under this subsection depends on the particular facts and circumstances at the time the actions are taken.¶¶

(i) Withdrawn Consent: An employer may be liable for harassment by the employer's supervisory or non-supervisory employees, agents or non-employees even if the acts complained of were of a kind previously consented to by the complaining individual, if the employer knew or should have known that the complaining individual had withdrawn consent to the offensive conduct.¶¶

(ii) When employment opportunities or benefits are granted because of an individual's submission to an employer's harassment, the employer is liable for unlawful discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Statutory/Other Authority: ORS 651.060, ORS 659A.805

Statutes/Other Implemented: ORS 659A.030

AMEND: 839-005-0030

NOTICE FILED DATE: 10/24/2024

RULE SUMMARY: Amends discrimination rule to define scope of "appropriate corrective action" and "promptly correcting harassing behavior."

CHANGES TO RULE:

839-005-0030

Sexual Harassment in Employment ¶¶

(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:¶¶

(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:¶¶

(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or¶¶

(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.¶¶

(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.¶¶

(2) The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.¶¶

(3) Employer proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer.¶¶

(4) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against that individual. A tangible employment action includes but is not limited to the following:¶¶

(a) Terminating employment, including constructive discharge;¶¶

(b) Failing to hire;¶¶

(c) Failing to promote; or¶¶

(d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.¶¶

(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:¶¶

(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.¶¶

(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:¶¶

(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and¶¶

(B) That the aggrieved person unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.¶¶

(6) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by the employer's employees or agents who do not have immediate or successively higher authority over the aggrieved person when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.¶¶

(7) Harassment by Non-Employees: An employer is liable for sexual harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.¶¶

(8)(a) As used in this rule, "appropriate corrective action" and "promptly correcting any harassing behavior" means that an employer:¶¶

(A) Intervenes immediately with actions reasonably designed to effectively halt harassing behavior;¶¶

(B) Conducts a prompt and adequate investigation and ascertains the extent of harassing behavior;¶¶

(C) Takes appropriate remedial measures proportionate to the seriousness of the harassing behavior;¶¶

(D) Places no burden, or makes every reasonable effort to minimize any burden placed, on the reporting employee or aggrieved party.¶

(E) Does not retaliate against the reporting employee, the aggrieved party or a participant in the investigation; and¶

(F) Takes steps that are reasonably calculated to prevent retaliation and future harassment.¶

(b) The success or failure of corrective action in stopping future harassment is relevant, but not dispositive, as to employer liability.¶

(c) The reasonableness of an employer's actions under this subsection depends on the particular facts and circumstances at the time the actions are taken.¶

(9) Withdrawn Consent: An employer is liable for sexual harassment of an individual by the employer's supervisory or non-supervisory employees, agents or non-employees, even if the acts complained of were of a kind previously consented to by the aggrieved person, if the employer knew or should have known that the aggrieved person had withdrawn consent to the offensive conduct.¶

(910) When employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, the employer is liable for unlawful sex discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Statutory/Other Authority: ORS 651.060, ORS 659A.805

Statutes/Other Implemented: ORS 659A.030