

# Hot Topics: The Latest Interpretations of Current Employment Law

Susan K. Eggum  
Cosgrave Vergeer Kester LLP  
805 SW Broadway, 8th Fl.  
Portland, OR 97205

## EMPLOYMENT LAW UPDATE IN OREGON

Sterling Educational Services, Inc.

Presented by

Susan K. Eggum

Cosgrave Vergeer Kester, LLP

### I. OREGON LEGISLATIVE UPDATE

- A. **ORS 243.650, 653.077, 653.256.** Requires employers with **25 employees or more** to provide nursing mothers with 30 minutes unpaid rest time for every 4 hours worked, to express milk, and to provide, wherever possible, a private place to do so. \$1,000 fine for violation. Undue hardship exception applies.
- B. **ORS 659A.190-198, 270-285.** Requires employers with **6 employees or more** to allow eligible employees unpaid leave to address issues of domestic violence, sexual assault, or stalking. Eligibility requirements are the same as OFLA eligibility requirements (employee must have worked at least 180 days, average of 25 hours/week during that period of time). Undue hardship exception applies. Duty of confidentiality applies to employer.
- C. **ORS 652.750.** Employers must now provide a copy of a personnel file to the employee **within 45 days of receipt of the request**. \$1,000 fine for non-compliance.
- D. **ORS 36.620** now invalidates agreements to arbitrate employment disputes unless the prospective employee was notified, in writing, at least two weeks prior to beginning employment, that an arbitration agreement would be required as a condition of employment.
- E. **ORS 653.295** now invalidates non-competition agreements in the employment context unless:
- 1) At least two weeks before the employee begins work, the employee receives written notice that s/he must sign a non-competition agreement; and
  - 2) The non-competition agreement lasts for no more than two years after employment ends; and
  - 3) The position is “administrative, executive, or professional”; and
  - 4) The company articulates a “protectable interest,” which means the employee is going to have access to trade secrets, or other sensitive information, such as development plans, marketing strategies, etc.; and
  - 5) The employee will earn more than the “median family income for a four person family” (last assessed for 2007 at \$70,046).

F. **ORS 659A.030** amended to include sexual orientation as a protected class.

Since passage of the amendment to ORS 659A.030, BOLI has promulgated interpretive rule OAR 839-005-003(11), asserting that “sexual orientation” means an individual’s actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s assigned sex at birth.

## II. **SEXUAL AND OTHER FORMS OF HARASSMENT**

- Title VII of the Civil Rights Act of 1964: 42 USC §2000e
- ORS 659A.030
- OAR 839-005-0030

### A. **Definitions**

- Harassment is unlawful if it is based on any status or characteristic protected by law: race, gender, religion, use of medical leave, disability, age, national origin, use of the workers’ compensation system, whistleblowing activity, and—in Oregon—sexual orientation. Sexual harassment is a form of discrimination based on **gender**.
- Harassment based on any other characteristic is not necessarily illegal (although egregious behavior that results in severe emotional distress may give rise to a claim of “intentional infliction of severe emotional distress”).
- Harassment is defined as: “**Unwelcome** verbal or physical conduct that is sufficiently **severe or pervasive**” that it “unreasonably interfer[es] with work performance or creat[es] a hostile, intimidating or offensive working environment.”
- Sexual harassment may also take the form of “quid pro quo” harassment (“Sleep with me and I’ll promote you” or “I’ll fire you if you don’t sleep with me”).

### B. **“Unwelcome”**

If harassment is severe, even some “joining in” or “going along” may not demonstrate the behavior was “welcome” and so relieve the employer of liability. *See, e.g., Ballinger v. Klamath Pacific Corp.*, 135 Or App 438, 898 P2d 232 (1995) (even though plaintiff at one point distributed “anatomically correct candy,” the supervisors’ conduct in simulating oral sex, making jokes about plaintiff’s children having sex, and other conduct was clearly “unwelcome”).

### C. “Severe or pervasive”

In determining whether acts are severe or pervasive, courts look at frequency, “whether it is physically threatening or humiliating, or a mere offensive utterance,” and whether it actually interfered with a person’s work. *Clark County School. Dist. v. Breeden*, 532 U.S. 268, 270-71 (2001).

“Offhand comments” and “simple teasing” are not harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Title VII is not “a general civility code.” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

Isolated instances of poor behavior, “unless extremely serious,” are not sufficiently severe or pervasive. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

Circumstances matter, because it is the norms and the expectations of a “reasonable person” in a specific situation that define harassment. As the United States Supreme Court noted, a coach smacking a player on the buttocks on the football field is a very different thing from that same coach doing the same thing to his secretary in the office. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

*See also Hubbard v. Bimbo Bakeries USA, Inc.*, 2006 WL 2863222 (D. Or. 2006), *aff’d* 270 Fed. Appx. 607 (9<sup>th</sup> Cir. 2008) (Explicit comments about “sexploitations,” questions about body parts, and “kissing noises,” were not actionable, because the co-workers “never touched plaintiff, attempted to touch plaintiff, physically threatened plaintiff, or subjected plaintiff to conduct that was objectively humiliating. . . . [the conduct] simply was not severe or pervasive enough to create an objectively hostile work environment.”)

### D. Failure to Conform to Gender Stereotypes

Even before the amendment to ORS 659A.030 and the Oregon Bureau of Labor & Industries’ interpreting rules, the Ninth Circuit asserted federal law includes protection from harassment based on gender stereotypes under federal law. *See, e.g., Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9<sup>th</sup> Cir. 2001) (finding employer liable where supervisor referred to male employee as “she” and “faggot,” made fun the way he walked and ridiculed him for not having sex with a female friend, and otherwise subjected him to “relentless verbal affronts”).

### E. Repeat Offenders

Actions that might not otherwise meet the legal definition of harassment may result in liability where the employer has been the subject of prior complaints. *See, e.g., Mains v. II Morrow, Inc.*, 128 Or. App. 625, 877 P.2d 88 (1984).

## F. Defenses

Under both state and federal law, if the harassment involves a co-worker or even a supervisor—if no tangible employment action took place (such as demotion or pay cut)—it is a defense that:

- 1) The employer exercised reasonable care to prevent harassment (an anti-harassment policy that all employees are made aware of);
- 2) The employer took appropriate action to correct harassment, if/when it was reported or the company otherwise became aware of the harassment; and
- 3) The employee unreasonably failed to use the anti-harassment reporting procedure.

NOTE: Even if the employee does not request remedial action, the employer may have an obligation to take action. *Hardage v. CBS Broadcasting, Inc.*, 427 F3d 1177 (9<sup>th</sup> Cir. 2005), *as amended on den of reh* by 436 F.3d 1050 (9<sup>th</sup> Cir 2006).

REMINDER: An employee may complain about something that is not truly harassment, but may still succeed in litigation on a claim of retaliation for reporting the alleged harassment. All that is necessary is a “good faith belief” that the behavior complained of is harassment. *See below.*

## III. RETALIATION CLAIMS

The seminal case is *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, (2006).

In *Burlington Northern*, the Court asserted that “a plaintiff must show that a reasonable employee would have found the challenged action **materially adverse**, which in this context means it well **might have dissuaded a reasonable worker from making or supporting a charge of discrimination.**” *Burlington Northern*, 548 U.S. at 68.

The Court went on to caution that not every act is “materially adverse,” noting that “[a]n employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights and minor annoyances that often take place at work and that all employees experience.” *Id.*

However, the Court gave examples of “materially adverse” actions that significantly broadened the scope of the claim, noting that “the significance of any given act of retaliation will often depend on the particular circumstances.” *Id.* at 69. “A schedule change . . . may make little difference to many workers, but may matter enormously to a young mother with school age children. . . . A supervisor’s refusal to invite an employee

to lunch is normally trivial, a nonactionable petty slight. But to retaliate by excluding an employee from a weekly training lunch that contributes significantly to the employee's professional advancement might well deter a reasonable employee from complaining about discrimination." *Id.*

Oregon has followed *Burlington Northern* when analyzing retaliation claims not only under Title VII but also under state law. *See, e.g., Hoffman v. Winco Holdings, Inc.*, 2008 WL 5255902 (D.Or. 2008).

In *Hoffman*, an employee alleged that, in retaliation for complaining about racial harassment, her supervisor instructed co-workers to follow her everywhere, even into the restroom, to "keep an eye on her." *Hoffman* at \*1. Historically, this might not have been actionable, however the court in *Hoffman* denied the defendant's motion for summary judgment, based on the standard announced in *Burlington Northern*, and stated: "It is this court's opinion that being repeatedly followed into the bathroom is not one of the 'petty slights' or 'minor annoyances' that all employees experience." *Id.* at \*5.

UPDATE: In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, \_\_\_ U.S. \_\_\_ (1/26/09), the Supreme Court held unanimously that Title VII protects employees from retaliation not only when they come forward to actively oppose unlawful actions, but also when they simply answer questions in the course of an internal investigation that was not initiated by the employee.