

839-005-0011

Constructive Discharge

Constructive discharge occurs when an individual leaves employment because of unlawful discrimination. The elements of a constructive discharge are:

- (1) The employer intentionally created or intentionally maintained discriminatory working conditions related to the individual's protected class status;
- (2) The working conditions were so intolerable that a reasonable person in the complaining individual's circumstances would have resigned because of them;
- (3) The employer desired to cause the complaining individual to leave employment as a result of those working conditions, or knew or should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions; and
- (4) The complaining individual left employment as a result of the working conditions.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A

839-005-0013

Bona Fide Occupational Qualification (BFOQ) and Affirmative Action Plan Exceptions

(1) Discrimination is not unlawful if it is based on a bona fide occupational qualification (BFOQ), as provided in ORS 659A.030(1)(a). To prove a BFOQ, the employer must show that the BFOQ is reasonably necessary to the normal operation of the business. If so, the employer must then show:

(a) A factual basis exists for believing that all or substantially all individuals in the protected class adversely affected by the BFOQ would be unable to perform safely and efficiently the tasks required in the job; or

(b) It is impossible or highly impractical to screen applicants on an individual basis.

(2) An employer may not claim a BFOQ for such reasons as:

(a) Customer, co-worker or employer preference;

(b) Stereotypes or assumed characteristics of a protected class.

(3) When discrimination is based on a bona fide voluntary affirmative action plan, it is not unlawful if the plan:

(a) Is a temporary measure;

(b) Has the purpose of eliminating the effects of past discrimination; and

(c) Does not unnecessarily trammel the interests of other protected classes.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.030

839-005-0014

Successors in Interest

An employer's liability for unlawful discrimination under ORS 659A.030 and OAR 839-005-0010 to 839-005-0045 extends to a successor employer. Determining whether a respondent is a successor employer involves a nine-part test. Not every element of the test need be present to find an employer to be a successor; the facts must be considered together to reach a determination:

- (1) Whether respondent had notice of the charge at the time of acquiring or taking over the business;
- (2) The ability of the predecessor to provide relief;
- (3) Whether there has been a substantial continuity of business operations;
- (4) Whether the respondent uses the same plant as the predecessor;
- (5) Whether respondent uses the same or substantially the same work force as the predecessor;
- (6) Whether respondent uses the same or substantially the same supervisory personnel as the predecessor;
- (7) Whether under respondent the same jobs exist under substantially the same working conditions as under the predecessor;
- (8) Whether respondent uses the same machinery, equipment and methods of production as the predecessor;
- (9) Whether respondent produces the same product as the predecessor.

Stat. Auth.: ORS 659A.805

Stats. Implemented: 659A

839-005-0031

Exceptions to Discrimination Based on Sexual Orientation

(1) The following actions are not unlawful practices under ORS chapter 659A, including housing discrimination under ORS 659A.145 or 659A.421 or federal housing law:

- (a) Housing and the use of facilities. It is not an unlawful practice for a bona fide church or other religious institution to take any action with respect to housing or the use of facilities when:

(A) The action taken is based on a bona fide religious belief about sexual orientation; and

(B) The housing or the use of facilities involved is closely connected with or related to the primary purpose of the church or institution; and

(C) The housing or the use of facilities involved is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(b) Employment Preference. It is not an unlawful employment practice for a bona fide church or other religious institution, including but not limited to a school, hospital or church camp, to prefer an employee, or an applicant for employment, of one religious sect or persuasion over another if:

(A) The employee or applicant belongs to the same religious sect or persuasion as the church or institution; and

(B) In the opinion of the church or institution, the preference will best serve the purposes of the church or institution; and

(C) The employment involved is closely connected with or related to the primary purposes of the church or institution; and

(D) The employment involved is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(c) Employment Actions. It is not an unlawful employment practice for a bona fide church or other religious institution to take any employment action based on a bona fide religious belief about sexual orientation when:

(A) The employment position involved is directly related to the operation of the church or other place of worship, such as clergy, religious instructors and support staff;

(B) The employment position involved is in a nonprofit religious school, nonprofit religious camp, nonprofit religious day care center, nonprofit religious thrift store, nonprofit religious bookstore, non profit religious radio station or nonprofit religious shelter; or

(C) The employment position involves religious activities, as long as the employment position:

(i) Is closely connected with or related to the primary purpose of the church or institution; and

(ii) Is not connected with a commercial or business activity that has no necessary relationship to the church or institution.

(d) Dress Code. An employer is not prohibited from enforcing an otherwise valid dress code or policy, as long as the employer provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual.

(2) The above exceptions do not excuse a failure to provide reasonable and appropriate accommodations permitting all persons access to restrooms consistent with their expressed gender.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A, OL 2007 Ch 100