

Secretary of State
Certificate and Order for Filing
PERMANENT ADMINISTRATIVE RULES

I certify that the attached copies are true, full and correct copies of the PERMANENT Rule(s) adopted on Upon filing by the

Bureau of Labor and Industries	839
Agency and Division	Administrative Rules Chapter Number
Marcia Ohlemiller	(971) 673-0784
Rules Coordinator	Telephone
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Address
To become effective Upon filing, Rulemaking Notice was published in the November 2013 Oregon Bulletin.

RULE CAPTION

Amending, adopting 839-005 rules regarding career schools, social media, interns, substantial evidence, commissioner complaints

Not more than 15 words that reasonably identifies the subject matter of the agency's intended action.

RULEMAKING ACTION

Secure approval of new rule numbers with the Administrative Rules Unit prior to filing.

ADOPT:

839-005-0300, 839-005-0305, 839-005-0310, 839-005-0315, 839-005-0320, 839-005-0325, 839-005-0400

AMEND:

839-005-0003, 839-005-0011, 839-005-0030, 839-005-0060, 839-005-0065, 839-005-0070, 839-005-0075, 839-005-0080, 839-005-0085, 839-005-0160, 839-005-0170, 839-005-0200, 839-005-0206

REPEAL:

RENUMBER:

AMEND AND RENUMBER:

Statutory Authority:

ORS 659A.805

Other Authority:

Statutes Implemented:

ORS chapter 659A, H.B. 2669, 77th Leg., Reg. Session (Or. 2013), H.B. 2654, 77th Leg., Reg. Session (Or. 2013), H.B. 2111, 77th Leg., Reg. Session (Or. 2013), H.B. 3263, 77th Leg., Reg. Session (Or. 2013), ORS 345.240, ORS 659A.320

RULE SUMMARY

Amendments to 839-005-0003, 839-005-0011, 839-005-0030 replace the term "complainant" with "aggrieved person" because the Commissioner and Attorney General may bring complaints on behalf of aggrieved persons

Amendments to 839-005-0003 implement newly enacted legislation extending employee protections under ORS 695A.030, 695A.082, 695A.109, 695A.112, 695A.136, 695A.142, 695A.199, 695A.230, 695A.233, 695A.236, 695A.290, 695A.300, 695A.303, 695A.306, and 695A.315 to interns.

Amendments to 839-005-0206 make the definition of substantial evidence in the Housing Discrimination section internally consistent and consistent with Federal laws and necessary elements for proving discrimination.

Adoptions of 839-005-0300, 839-005-0305, 839-005-0310, 839-005-0315, 839-005-0320, 839-005-0325 address discrimination by Career Schools. These new rules reference the statutes prohibiting unlawful discrimination by career schools which are enforced by BOLI and clarify the BOLI's standards and procedures.

Adoption of 839-005-0400 addresses unlawful employment practices by an employer related to employee's social media accounts to be consistent with newly enacted legislation.

Amendments to 839-005-0060, 839-005-0065, 839-005-0070, 839-005-0075, 839-005-0080 and 839-005-0085 replace the Oregon Laws citation with ORS 659A.320, the statutory citation for limitations on the lawful use of credit history in employment.

BOLI 17-2013

Amendments to 839-005-0200 change the definition of substantially limits consistent with newly enacted legislation.

Amendments to 839-005-0160 make the definition of Victim of Harassment consistent with definitions of Victim of Domestic Violence, Victim of Sexual Assault, and Victim of Stalking.

Amendments to 839-005-0160 and 839-005-0170 implement newly enacted legislation.

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Rules Coordinator Name

Email Address

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PERMANENT ADMINISTRATIVE RULES

Bureau of Labor and Industries	839
Agency and Division	Administrative Rules Chapter Number
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Effective date	

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REPEAL:

RENUMBER:

AMEND & RENUMBER:

Stat. Auth.: ORS 659A.805

Other Auth.:

Stats. Implemented: ORS chapter 659A, H.B. 2669, 77th Leg., Reg. Session (Or. 2013), H.B. 2654, 77th Leg., Reg. Session (Or. 2013), H.B. 2111, 77th Leg., Reg. Session (Or. 2013), H.B. 3263, 77th Leg., Reg. Session (Or. 2013), ORS 345.240, ORS 659A.320

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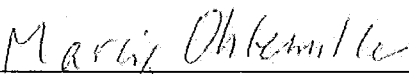
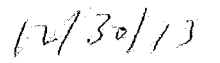
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Amendments to 839-005-0160 and 839-005-0170 implement newly enacted legislation.

 *Marij Okkenille*  *Marij Okkenille*  *12/30/13*

Authorized Signer

Printed Name

Date

Authorization Page replaces the ink signature on paper filings. Have your authorized signer sign and date, then scan and attach it to your

839-005-0003

Definitions

As used in enforcing ORS chapter 659A, including housing discrimination under ORS 659A.145 or 659A.421 or federal housing law:

(1) "Aggrieved Person" means either:

(a) A person who is, or was at any time, eligible to file a complaint under ORS 659A.820 or who is otherwise similarly situated; or

(b) A person who files a complaint under ORS 659A.825.

(2) "Bureau" means the Bureau of Labor and Industries.

(3) "Complainant" means an individual who files a complaint with the division, personally or through the individual's attorney, pursuant to the guidelines provided in OAR 839-003-0025 or 839-003-0200 for complaints alleging housing discrimination filed under ORS 659A.145, 659A.421 or federal housing law.

(4) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.

(5) "Employee" does not include any individual employed by that individual's parents, spouse or child or in the domestic service of any person.

(6) "Employer" means any person in this state who, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed. Employer also includes any public body that, directly or through an agent, engages or utilizes the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed, including all officers, agencies, departments, divisions, bureaus, boards and commissions of the legislative, judicial and administrative branches of the state, all county and city governing bodies, school districts, special districts, municipal corporations and all other political subdivisions of the state. Employer also includes any person who is in an employment relationship with an intern as defined in subsection (10) of this rule.

(7) "Employment agency" includes any person undertaking to procure employees or opportunities to work.

(8) "Gender expression" means the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that expression is different from that traditionally associated with the individual's assigned sex at birth.

(9) "Gender identity" means an individual's gender-related identity, whether or not that identity is different from that traditionally associated with the individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous.

(10) "Intern" means a person who performs work for an employer for the purpose of training if:

(a) The employer is not committed to hire the person performing the work at the conclusion of the training period;

(b) The employer and the person performing the work agree in writing that the person performing the work is not entitled to wages for the work performed; and

(c) The work performed:

(A) Supplements training given in an education environment that may enhance employability of the intern;

(B) Provides experience for the benefit of the person performing the work;

(C) Does not displace regular employees;

(D) Is performed under the close supervision of existing staff; and

(E) Provides no immediate advantage to the employer providing the training and may occasionally impede the operations of the employer.

(d) An intern is considered to be in an employment relationship with an employer for the purposes of employee protections provided under ORS 659A.030, 659A.082, 659A.109, 659A.112, 659A.136, 659A.142, 659A.199, 659A.230, 659A.233, 659A.236, 659A.290, 659A.300, 659A.303, 659A.306, and 659A.315.

(e) "Intern" includes any person meeting the description set forth in this rule regardless of the title of the person's position or whether they are currently enrolled in an education or training program.

(11) "Labor organization" includes any organization that is constituted for the purpose, in whole or in part, of collective bargaining or in dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employees.

(12) "Person" includes one or more individuals, partnerships, associations, labor organizations, limited liability companies, joint-stock companies, corporations, legal representatives, trustees, and trustees in bankruptcy or receivers. "Person" also includes a public body as defined in ORS 30.260. For the purposes of ORS 659A.145 or 659A.421 or federal housing law, "person" also includes fiduciaries, mutual companies, trusts and unincorporated organizations.

(13) "Protected class" means a group of people protected by law from discrimination on the basis of a shared characteristic, such as race, sex, sexual orientation, disability, or other, or a perception of that characteristic.

(14) "Respondent" includes any person against whom a complaint or charge of unlawful practices is filed with the division or whose name has been added to such complaint or charge pursuant to ORS 659A.835(1).

(15) "Sex" means the anatomical, physiological and genetic characteristics associated with being male or female.

(16) "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.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS chapter 659A, H.B. 2669, 77th Leg., Reg. Session (Or. 2013)

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 individual's circumstances would have resigned because of them;
- (3) The employer desired to cause the 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 individual left employment as a result of the working conditions.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS chapter 659A

839-005-0030

Sexual Harassment

(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) 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.

(9) 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.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.030

839-005-0060

Purpose and Scope

(1) It is the policy of the State of Oregon to guarantee individuals the fullest possible participation in the social and economic life of the state, including employment. Obtainment or use by an employer of information in an applicant's credit history impacts the individual's privacy, and must relate only to the position for which the individual is being considered or holds. The people of Oregon have the right to employment without unlawful discrimination on the basis of credit history.

(2) Prohibited discrimination is a basis of unlawful practices described in ORS chapter 659A and other chapters of the Oregon statutes.

(3) Any individual claiming to be aggrieved by an unlawful practice including a violation of ORS 659A.320 may file a complaint under ORS 659A.820 or may bring a civil action under ORS 659A.885.

(4) The Civil Rights Division of the Bureau of Labor and Industries enforces ORS 659A.320. These rules implement and interpret.

Stat. Auth.: 659A.805

Stats. Implemented: ORS 659A.320

839-005-0065

Definitions

(1) "Applicant" means an individual who has submitted information for the purpose of gaining employment.

(2) "Credit history" means any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing or credit capacity.

(3) "Division" means the Civil Rights Division of the Bureau of Labor and Industries.

(4) "Employer" means any person who in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed.

(5) "Respondent" includes any person against whom a complaint or charge of unlawful practices is filed with the division or whose name has been added to such complaint or charge pursuant to ORS 659A.835(1).

(6) "Substantially job-related" is defined in OAR 839-005-0080.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.320

839-005-0070

Unlawful Discrimination

(1) It is an unlawful employment practice for an employer to obtain or use for employment purposes information contained in the credit history of an applicant for employment or an employee, or to refuse to hire, discharge, demote, suspend, retaliate or otherwise discriminate against an applicant or an employee with regard to promotion, compensation or the terms, conditions or privileges of employment based on information in the credit history of the applicant or employee.

(2) Obtainment or use of credit history information may not be conducted in a manner that results in adverse impact discrimination as prohibited by 42 U.S.C. § 2000e-2, ORS 659A.030 and OAR 839-005-0010. A finding of adverse impact discrimination does not require establishment of intentional discrimination.

(3) ORS 659A.320 permits an employer to obtain or use for employment purposes information contained in the credit history of an applicant or employee under circumstances described at ORS 659A.320(2). ORS 659A.320(2)(d) permits an employer to obtain or use information contained in the credit history of an applicant or employee if the credit history information is substantially job-related, and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing.

(4) The burden of proving the employer's disclosure to the employee of its reasons for the use of such information rests with the employer.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.320

839-005-0075

Exceptions

ORS 659A.320 does not apply to:

(1) Employers that are federally insured banks or credit unions;

(2) Employers that are required by state or federal law to use individual credit history for employment purposes;

(3) Employees in or applicants for positions responsible for enforcing the criminal laws of this state, including:

(a) A public safety officer who is a member of a law enforcement unit;

(b) A peace officer commissioned by a city, port, school district, mass transit district, county, Indian reservation, or the Criminal Justice Division of the Department of Justice, the Oregon State Lottery Commission, the Governor; or

(c) Employees in positions responsible for enforcing the criminal laws of this state or laws or ordinances related to airport security; or

(4)(a) The obtainment or use by an employer of information in the credit history of an applicant or employee because the information is substantially job-related, and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing.

(b) The burden of proving the employer's disclosure to the employee rests with the employer.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.320

839-005-0080

Substantially Job-Related

(1) The determination of whether credit history information is substantially job-related must be evaluated with respect to the position for which the individual is being considered or holds.

(2) Credit history information of an applicant or employee is substantially job-related if:

(a) An essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit. Financial information customarily provided in a retail transaction includes information related to the exchange of cash, checks and credit or debit card numbers; or

(b) The position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.320

839-005-0085

Enforcement and Retaliation

(1) An employer's duties and obligations under ORS 659A.320 extend to an employer that is a successor in interest as defined in OAR 839-005-0014.

(2) An applicant or employee claiming a violation of ORS 659A.320 or these rules may file a complaint with the Civil Rights Division of the Bureau of Labor and Industries in the manner provided by ORS 659A.820.

(3) An applicant or employee claiming a violation of ORS 659A.320 may bring a civil action under ORS 659A.885.

(4) Pursuant to ORS 659A.030(1)(f), it is an unlawful employment practice for an employer to discharge, expel or otherwise discriminate against any person because the person has filed a complaint, testified or assisted in any proceeding in connection with ORS 659A.320.

(5) Pursuant to ORS 659A.030(1)(g), it is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts in violation of ORS 659A.320 or to attempt to do so.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.320

839-005-0160

Protection from Discrimination and Safety Accommodation for Victims of Domestic Violence, Harassment, Sexual Assault or Stalking

(1) As provided in ORS 659A.290, it is an unlawful employment practice for an employer, because an individual is a victim of domestic violence, harassment, sexual assault or stalking, to:

(a) Refuse to hire an otherwise qualified individual; or

(b) Discharge, threaten to discharge, demote, suspend or in any way discriminate or retaliate against an individual with respect to promotion, compensation or any other terms, conditions or privileges of employment.

(2) ORS 659A.290 requires employers to provide safety accommodation for victims of domestic violence, harassment, sexual assault or stalking.

(3) The Civil Rights Division ("division") of the Bureau of Labor and Industries enforces ORS 659A.290.

(4) Leave from employment is available for victims of domestic violence, harassment, sexual assault or stalking for purposes including but not limited to: seeking legal or law enforcement remedies, seeking medical care or counseling, and for relocating or other safety measures. The division enforces ORS 659A.270 to 659A.285, which require leave for victims of domestic violence, harassment, sexual assault or stalking. OAR 839-009-0321 to 839-009-0365 implement and interpret ORS 659A.270 to 659A.285.

(5) Paid leave is available for an eligible employee of a public employer as provided in OAR 839-009-0363 and H.B. 3263, 77th Leg., Reg. Session (Or. 2013).

(6) OAR 839-005-0160 to 839-005-0170 implement and interpret ORS 659A.290.

(7) Definitions for OAR 839-005-0160 to 839-005-0170:

(a) "Victim of domestic violence" means:

(A) An individual who has been threatened with abuse or is a victim of abuse, as defined in ORS 107.705; or

(B) Any other person who has suffered financial, social, psychological or physical harm as a result of domestic violence committed against the victim as defined in subsection (a), including a member of the victim's immediate family.

(b) "Victim of harassment" means:

(A) An individual against whom harassment has been committed as described in Oregon's criminal code at ORS 166.065; or

(B) Any other person who has suffered financial, social, psychological or physical harm as a result of harassment committed against the victim as defined in subsection (a), including a member of the victim's immediate family.

(C) In no event will the alleged perpetrator of the harassment be considered a victim for the purposes of these rules.

(c) "Victim of sexual assault" means:

(A) An individual against whom a sexual offense has been threatened or committed as described in ORS 163.305 to 163.467 or 163.525; or

(B) Any other person who has suffered financial, social, psychological or physical harm as a result of a sexual assault committed against the victim as defined in subsection (a), including a member of the victim's immediate family.

(d) "Victim of Stalking" means:

(A) An individual against whom stalking has been threatened or committed as described in ORS 163.732; or

(B) Any other person who has suffered financial, social, psychological or physical harm as a result of a stalking committed against the victim as defined in subsection (a), including a member of the victim's immediate family; or

(C) An individual who has obtained a court's stalking protective order or a temporary court's stalking protective order under ORS 30.866.

(e) In no event will an alleged perpetrator of domestic violence, harassment, sexual assault or stalking be considered a victim for the purposes of ORS 659A.290 or these rules.

Stat. Auth.: ORS 659A.805, 659A.270

Stats. Implemented: ORS 659A.290; H.B. 3263, 77th Leg., Reg. Session (Or. 2013)

839-005-0170

Reasonable Safety Accommodation for Victims of Domestic Violence, Harassment, Sexual Assault or Stalking

- (1) It is an unlawful employment practice to refuse to make a reasonable safety accommodation requested by an individual who is a victim of or under threat of domestic violence, harassment, sexual assault, or stalking, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.
- (2) "Reasonable safety accommodation" may include, but is not limited to, a transfer, reassignment, modified schedule, use of available paid leave from employment, unpaid leave from employment, changed work telephone number, changed work station, installed lock, implemented safety procedure or any other adjustment to a job structure, workplace facility or work requirement in response to actual or threatened domestic violence, harassment, sexual assault or stalking.
- (3) Undue hardship means a significant difficulty and expense to an employer's business and includes consideration of the size of the employer's business. Other factors to consider in determining whether granting a safety accommodation will cause an undue hardship on an employer's business include, but are not limited to:
- (a) The safety accommodation requested and the relative cost to an employer's business;
 - (b) The overall financial resources of the employer's facility or facilities, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility if the safety accommodation were granted;
 - (c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of its employees and the number, type and location of the employer's facilities;
 - (d) The type of operations conducted by the employer, including the composition, structure and functions of the employer's workforce.
- (4) Prior to making a reasonable safety accommodation, an employer may require an individual to provide certification that the individual is a victim of domestic violence, harassment, sexual assault, or stalking.
- (a) An individual must provide a certification permitted under OAR 839-009-0362(5) within a reasonable time after receiving the employer's request for certification.
 - (b) Any of the following constitutes sufficient certification:
 - (A) A copy of a police report indicating that the individual was or is a victim of domestic violence, harassment, sexual assault or stalking.
 - (B) A copy of a protective order or other evidence from a court or attorney that the individual appeared in or is preparing for a civil or criminal proceeding related to domestic violence, harassment, sexual assault or stalking.
 - (C) Documentation from an attorney, law enforcement officer, health care professional, licensed mental health professional or counselor, member of the clergy or victim services provider that the individual was or is undergoing treatment or counseling, obtaining services or relocating as a result of domestic violence, harassment, sexual assault or stalking.
 - (D) All records and information kept by an employer regarding a reasonable safety accommodation made for an individual are confidential and may not be released without the express permission of the individual, unless otherwise required by law.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.290, H.B. 3263, 77th Leg., Reg. Session (Or. 2013)

839-005-0200

Definitions

- (1) "Aggrieved person" includes a person who believes that the person:
 - (a) Has been injured by an unlawful practice or discriminatory housing practice; or
 - (b) Will be injured by an unlawful practice or discriminatory housing practice that is about to occur.
- (2) "Complainant" means an individual who files a complaint with the division, personally or through the individual's attorney, pursuant to the guidelines provided under OAR 839-003-0200 for complaints alleging housing discrimination filed under ORS 659A.145, 659A.421 or federal housing law.
- (3) "Disability" means:
 - (a) A physical or mental impairment that substantially limits one or more major life activities of the individual.
 - (b) A record of having a physical or mental impairment that substantially limits one or more major life activities of the individual. An individual has a record of having a physical or mental impairment if the individual has a history of, or has been misclassified as having, a physical or mental impairment that substantially limits one or more major life activities of the individual.
 - (c) A physical or mental impairment that the individual is regarded as having.
 - (A) An individual is regarded as having a physical or mental impairment if the individual has been subjected to an action prohibited under ORS 659A.112 to 659A.139 because of an actual or perceived physical or mental impairment, whether or not the impairment limits or is perceived to limit a major life activity of the individual.
 - (B) An individual is not regarded as having a physical or mental impairment if the individual has an impairment that is minor and that has an actual or expected duration of six months or less.

- (4) "Dwelling" means any building, structure, or portion of a building or structure that is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land that is offered for sale or lease for the construction or location of any such building, structure, or portion of such a building or structure. "Family" includes a single individual.
- (5) "Familial status" means the relationship between one or more individuals who have not attained 18 years of age and the individual with whom they are domiciled who is:
- (a) A parent or another person having legal custody of the individual; or
 - (b) The designee of the parent or other person having such custody, with the written permission of the parent or other person.
- (c) "Familial status" includes any individual, regardless of age or domicile, who is pregnant or is in the process of securing legal custody of an individual who has not attained 18 years of age.
- (d) "Domiciled" includes but is not limited to part-time residence in a dwelling where an individual has a reasonable expectation of a continuing right to return.
- (6) "Federal Housing Law" means The Fair Housing Act (42 U.S.C. 3601 et seq.) for which the U.S. Department of Housing And Urban Development has jurisdiction.
- (7) "Major life activity" includes, but is not limited to:
- (a) Caring for oneself;
 - (b) Performing manual tasks;
 - (c) Seeing;
 - (d) Hearing;
 - (e) Eating;
 - (f) Drinking;
 - (g) Sleeping;
 - (h) Walking;
 - (i) Standing;
 - (j) Lifting;
 - (k) Bending;
 - (L) Twisting;
 - (m) Speaking;
 - (n) Breathing;
 - (o) Cognitive functioning;
 - (p) Learning;
 - (q) Education;
 - (r) Reading;
 - (s) Concentrating;
 - (t) Remembering;
 - (u) Thinking;
 - (v) Communicating;
 - (w) Working;
- (A) To be substantially limited in the major life activity of working, an individual must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes as compared to the ability of an average person with comparable skill, experience, education or other job-related requirements needed to perform those same positions;
- (x) Socialization;
 - (y) Sitting;
 - (z) Reaching;
 - (aa) Interacting with others;
 - (bb) Sexual relations;
 - (cc) Employment;
 - (dd) Ambulation;
 - (ee) Transportation;
 - (ff) Operation of a major bodily function, including but not limited to:
 - (A) Functions of the immune system;
 - (B) Normal cell growth; and
 - (C) Digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine and reproductive functions; and
 - (gg) Ability to acquire, rent or maintain property.
- (8) "Misclassified," as used in ORS 659A.100(2)(b), means an erroneous or unsupported medical diagnosis, report, certificate or evaluation.

(9) "Person" includes one or more individuals, partnerships, associations, labor organizations, limited liability companies, joint stock companies, corporations, legal representatives, trustees, trustees in bankruptcy or receivers, fiduciaries, mutual companies, trusts and unincorporated organizations and public bodies as defined in ORS 30.260 that have the primary purpose of serving, representing or otherwise benefiting the protected class.

(10) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, traumatic brain injury, emotional or mental illness, and specific learning disabilities.

(11) "Property" and "real property" means property used or intended for commercial, business or residential purposes including, but not limited to a dwelling.

(12) "Purchaser" includes an occupant, prospective occupant, renter, prospective renter, lessee, prospective lessee, buyer or prospective buyer.

(13) "Receipt or alleged receipt of treatment for a mental disorder," as used in ORS 659A.142(5), means actual treatment of an individual for a mental condition or an assertion that the person received such treatment.

(14) "Regarded as having an impairment," as used in ORS 659A.100(2)(c), means:

(a) An individual having a physical or mental impairment that does not substantially limit a major life activity but who has been treated as having an impairment by a seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real estate broker or salesperson;

(b) An individual having a physical or mental impairment that substantially limits a major life activity only as a result of the attitude of others toward such impairment; or

(c) An individual having no physical or mental impairment but who is treated as having an impairment by a seller, lessor, advertiser, real estate broker or salesperson, or the agent of any seller, lessor, advertiser, real estate broker or salesperson.

(15) "Residential real estate related transaction" means any of the following:

(a) The making or purchasing of loans or providing other financial assistance:

(A) For purchasing, constructing, improving, repairing or maintaining a dwelling; or

(B) Secured by residential real estate; or

(b) The selling, brokering or appraising of residential real property.

(16) "Substantially limits" means that an individual has an impairment, had an impairment or is perceived as having an impairment that restricts one or more major life activities of the individual as compared to most people in the general population.

(a) An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.

(b) An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual.

(c) To have a disability (or to have a record of a disability) an individual must be substantially limited in performing a major life activity as compared to most people in the general population.

(d) An impairment that is episodic or in remission is considered to substantially limit a major life activity of the individual if the impairment would substantially limit a major life activity of the individual when the impairment is active. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(e) The term "substantially limits" shall be construed in favor of broad coverage of individuals to the maximum extent permitted by the terms of ORS 659A.100 to 659A.145 and 659A.400 to 659A.425, and should not require extensive analysis.

(17) "To rent" includes to lease, to sublease, to let and otherwise to grant for a consideration the right to occupy premises not owned by the occupant.

(18) "Treatment" includes examination, evaluation, diagnosis and therapy by a health professional within the scope of the professional's applicable license.

Stat. Auth.: ORS 659A.805

Stats. Implemented: ORS 659A.103 – 659A.142; 659A.145, 659A.421, H.B. 2111, 77th Leg., Reg. Session (Or. 2013)

839-005-0206

Discrimination Theories: Housing

(1) For the purposes of housing discrimination complaints under ORS 659A.145 or 659A.421 or discrimination complaints under federal housing law, a complainant need not be a member of a protected class. An aggrieved person may file a complaint of housing discrimination.

(2) Substantial evidence of intentional unlawful discrimination exists if the division's investigation reveals reasonable cause for the Commissioner to believe the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in circuit court under one of the following theories:

(a) Specific Intent Theory: The respondent knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class.

(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:

(A) There must be substantial evidence that the individual was harmed or was about to be harmed by the action of the respondent under circumstances that make it appear that the respondent treated the individual differently than comparably situated individuals who were not members of the individual'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 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 substantial factor in the respondent's action, the division will determine there is substantial evidence of unlawful discrimination.

(B) The complainant at all times has the burden of proving that the individual's protected class was the motivating factor for the respondent's unlawful action.

(3) Adverse Impact Discrimination in Housing:

(a) For the purposes of interpreting ORS 90.390, a court or the commissioner may find that a person has violated or is going to violate ORS 659A.145 or 659A.421 if:

(A) The person applies a facially neutral housing policy to a member of a protected class;

(B) Application of the policy adversely impacts members of the protected class to a greater extent than the policy impacts persons generally.

(b) In determining under subsection (a) of this section whether a violation has occurred or will occur and, if it is determined that a violation has occurred or will occur, what relief should be granted, a court or the commissioner will consider:

(A) The significance of the adverse impact on the protected class;

(B) The importance and necessity of any business purpose for the facially neutral housing policy; and

(C) The availability of less discriminatory alternatives for achieving the business purpose for the facially neutral housing policy.

(4) As used in enforcing ORS 659A.145 or 659A.421 or federal housing law, harassment on the basis of a protected class is an unlawful practice in housing when:

(a) Conduct of a verbal or physical nature relating to protected classes is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (2) of this rule is shown; and

(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect of creating an intimidating, hostile, or offensive environment; or

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

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

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

(5) Tenant-on-tenant harassment: A housing provider is liable for a resident's harassment of another resident when the housing provider knew or should have known of the conduct, unless the housing provider took immediate and appropriate corrective action.

(6) Harassment by Employees or Agents: A housing provider is liable for harassment of a resident by the housing provider's employees or agents when the housing provider knew or should have known of the conduct, unless the housing provider took immediate and appropriate corrective action.

(7) Discrimination based on disability may involve intentional discrimination, including harassment, or discrimination that need not be intentional, including adverse impact, or the failure to permit reasonable modifications, the refusal to make reasonable accommodations or the failure to design and construct covered buildings under applicable rules. To be protected

from discrimination based on disability, an individual must have a disability, as described in ORS 659A.104 and the relevant rules. Reasonable accommodation in real property transactions is covered by ORS 659A.145 and OAR 839-005-0220. Reasonable modifications in housing and the design and construction of covered buildings are covered by ORS 659A.145. Claims of disability discrimination brought under federal housing law are defined under that law.
Stat. Auth.: ORS chapter 659A.805
Stats. Implemented: ORS 659A.103 – 659A.142; 659A.145, 659A.421

Discrimination by Career Schools

839-005-0300

Purpose and Scope

- (1) ORS 345.240 prohibits unlawful discrimination by career schools licensed under ORS 345.010 to 345.450.
 - (2) A violation of ORS 345.240 is an unlawful practice under ORS chapter 659A. The provisions of ORS chapter 659A that apply to unlawful practices, apply to alleged violations of ORS 345.240, including but not limited to ORS 659A.030 (1)(f) and ORS 659A.800 through ORS 659A.865.
 - (3) Any individual claiming to be aggrieved by an unlawful practice including a violation of ORS 345.240 may file a complaint with the Commissioner of the Bureau of Labor and Industries under ORS 659A.820.
 - (4) The Civil Rights Division of the Bureau of Labor and Industries enforces ORS 345.240. These rules implement and interpret ORS 345.240.
- Stat. Auth.: ORS 651.060
Stats. Implemented: ORS 345.240

839-005-0305

Definitions

For purposes of ORS 345.240 and these rules:

- (1) "Agent" means a person employed by or for a career school for the purpose of procuring students, enrollees or subscribers by solicitation in any form, made at a place or places other than the school office or place of business of such school.
 - (2) "Career school" includes any private proprietary professional, technical, home study, correspondence, business or other school instruction, organization or person that offers any instruction or training for the purpose or purported purpose of instructing, training or preparing persons for any profession. "Career school" includes those required to be licensed under ORS 345.010 to 345.450, and excludes entities described in ORS 345.015. Entities excluded by ORS 345.015 but receiving state funds, may be subject to ORS 659.850, which is under the jurisdiction of the State Board of Higher Education.
 - (3) "Discrimination" means any act that unreasonably differentiates treatment, intended or unintended, or any act that is fair in form but discriminatory in operation, either of which is based on age, disability, national origin, race, color, marital status, religion, sex or sexual orientation.
 - (4) "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 sex at birth.
- Stat. Auth.: ORS 651.060
Stats. Implemented: ORS 345.240, ORS 345.010, ORS 659.850

839-005-0310

Unlawful Discrimination

- (1) No career school or its agent may, based on the protected classes of age, disability, national origin, race, color, marital status, religion, sex or sexual orientation of an individual or any other individual with whom that individual associates:
 - (a) Refuse admission to any individual;
 - (b) Discriminate in any aspect of admission or enrollment against any individual;
 - (c) Discriminate in giving instruction to any individual;
 - (d) Discriminate in requirements for or the provision of aid, benefits, or services;
 - (e) Discriminate in application of rules of behavior, sanctions, or any other treatment; or
 - (f) Otherwise limit any individual in the enjoyment of any right, privilege, advantage, or opportunity.
- (2) No career school may aid or perpetuate discrimination by joining or remaining a member of any organization that discriminates, based on the protected classes in subsection (1) of this rule, in providing any aid, benefit, or service to students or employees.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 345.240, ORS 659.850

839-005-0315

Discrimination Theories for Career Schools

(1) Intentional Unlawful Discrimination: 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(12) of these rules;
- (b) The complainant is a member of a protected class;
- (c) The complainant was harmed by an action of the respondent; and
- (d) The complainant's protected class was the motivating factor for the respondent's action. In determining whether the complainant'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 voluntary, court-ordered affirmative action plan (OAR 839-005-0013(3)) 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 complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant differently than comparably situated individuals who were not members of the complainant'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 substantial factor in the respondent's action, the division will determine there is substantial evidence of discrimination.

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

(2) Harassment based on an individual's protected class is a type of intentional unlawful discrimination.

(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 performance or creating an intimidating, hostile or offensive environment;

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

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

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

(3) 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(10) 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 complainant 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.

(4) Reasonable Accommodation of Religion: A career school must reasonably accommodate a student's or applicant's religious belief, observance or practice unless the career school can demonstrate that such accommodation would cause it undue hardship.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 345.240, ORS 345.120, ORS 345.060

839-005-0320

Authority of Superintendent of Public Instruction Related to Complaints Under ORS 345.240

(1) Pursuant to ORS 345.120, the Superintendent of Public Instruction of the State of Oregon has authority to suspend or revoke licenses of career schools violating ORS 345.010 to 345.450 or any applicable rule. A certified copy of a finding by the Commissioner of the Bureau of Labor and Industries in a contested case proceeding under ORS 659A.850 that the school has violated ORS 345.240 is adequate proof of the violation.

(2) Pursuant to ORS 345.060, the Superintendent of Public Instruction may accept service of all actions or proceedings brought against a career school not domiciled in Oregon.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 345.240, ORS 345.120, ORS 345.060

839-005-0325

Retaliation or Discrimination Prohibited

Pursuant to ORS 659A.030(1)(f), it is an unlawful practice for a career school or its agent to retaliate or discriminate against any individual because the individual has filed a complaint, testified or assisted in any proceeding in connection with ORS 345.240 or ORS chapter 659A.

Stat. Auth.: ORS 651.060

Stats. Implemented: ORS 345.240, ORS 659A.030

Compelled Access to Social Media Accounts

839-005-0400

Unlawful Employment Practice

(1) It is an unlawful employment practice for an employer to:

(a) Require or request an employee or an applicant for employment to disclose or to provide access through the employee's or applicant's user name and password, password or other means of authentication that provides access to a personal social media account;

(b) Compel an employee or applicant for employment to add the employer or an employment agency to the employee's or applicant's list of contacts associated with a social media website;

(c) Except as provided in subsection (4)(b) of this section, compel an employee or applicant for employment to access a personal social media account in the presence of the employer and in a manner that enables the employer to view the contents of the personal social media account that are visible only when the personal social media account is accessed by the account holder's user name and password, password or other means of authentication;

(d) Take, or threaten to take, any action to discharge, discipline or otherwise penalize an employee for the employee's refusal to disclose, or to provide access through, the employee's user name and password, password or other means of authentication that is associated with a personal social media account, to add the employer to the employee's list of contacts associated with a social media website or to access a personal social media account as described in paragraph (c) of this subsection; or

(e) Fail or refuse to hire an applicant for employment because the applicant refused to disclose, or to provide access through, the applicant's user name and password, password or other means of authentication that is associated with a personal social media account, to add the employer to the applicant's list of contacts associated with a social media website or to access a personal social media account as described in paragraph (c) of this subsection.

(2) An employer may require an employee to disclose any username and password, password or other means for accessing an account provided by, or on behalf of, the employer or to be used on behalf of the employer.

(3) An employer may not be held liable for the failure to request or require an employee or applicant to disclose the information specified in subsection (1)(a) of this section.

(4) Nothing in this section prevents an employer from:

(a) Conducting an investigation, without requiring an employee to provide a user name and password, password or other means of authentication that provides access to a personal social media account of the employee, for the purpose of ensuring

compliance with applicable laws, regulatory requirements or prohibitions against work-related employee misconduct based on receipt by the employer of specific information about activity of the employee on a personal online account or service.

(b) Conducting an investigation permitted under this subsection that requires an employee, without providing a user name and password, password or other means of authentication that provides access to a personal social media account of the employee, to share content that has been reported to the employer that is necessary for the employer to make a factual determination about the matter.

(c) Complying with state and federal laws, rules and regulations and the rules of self-regulatory organizations.

(5) Nothing in this section prohibits an employer from accessing information available to the public about the employee or applicant that is accessible through an online account.

(6) If an employer inadvertently receives the user name and password, password or other means of authentication that provides access to a personal social media account of an employee through the use of an electronic device or program that monitors usage of the employer's network or employer-provided devices, the employer is not liable for having the information but may not use the information to access the personal social media account of the employee.

(7) As used in this section, "social media" means an electronic medium that allows users to create, share and view user-generated content, including, but not limited to, uploading or downloading videos, still photographs, blogs, video blogs, podcasts, instant messages, electronic mail or Internet website profiles or locations.

Stat. Auth.: ORS 659A.805

Stats. Implemented: H.B. 2654, 77th Leg., Reg. Session (Or. 2013)

