

Are Third Parties Excused From Liability for Aiding and Abetting Unlawful Employment Practices? Don't (A)bet on It...

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On May 5, 2021, the Oregon Court of Appeals determined that “any person”—not just employers or employees—can be subject to liability for aiding and abetting an unlawful employment practice under Oregon law. The Court’s ruling serves as a course correction to numerous federal court decisions holding that the aiding and abetting provisions of ORS 659A.030 apply only to conduct by employers and employees, not to conduct of third parties to the employment relationship. The case is *Hernandez v. Catholic Health Initiatives*, and can be found [here](#).

Oregon entities that provide third-party services to employers—such as providers of employee health plans, claims processing services, or other services—and their employees should take heed of this recent decision and ensure that they take appropriate steps to manage their risk of aid-and-abet claims.

What was the case about?

Hernandez involved a nurse who had been injured at work—she sought medical treatment for her injury, her treating physician filed a workers’ compensation claim on her behalf, and her claim was accepted. The nurse’s work restrictions kept her from her regular duties for several months.

At around the same time that her physician modified her work restrictions, the nurse became aware of several vacant positions that were consistent with her modified restrictions, and she requested to be placed in one of the positions. Her employer refused, and two months later, notified her that she would be “administratively separated” from employment for having exhausted her medical leave.

The nurse brought a lawsuit against (1) her employer—for denying reemployment, disability discrimination, and interfering with protected medical leave in violation of Oregon law—and (2) the third-party administrator (the TPA) for the employer’s employee-benefit programs for aiding and abetting unlawful employment practices under ORS 659A.030, namely, for mishandling her medical leave benefits. The TPA moved to dismiss the aid-and-abet claim, contending that claims for aiding and abetting unlawful employment practices do not extend to third parties to the employment relationship.

The trial court granted the TPA's motion to dismiss, but the Court reversed, concluding that Oregon law prohibits everyone—not just employers and employees—from aiding and abetting unlawful employment practices.

The Court went back in history to ascertain the legislature's intent.

As originally enacted in 1949, the statute that is now ORS 659A.030(1)(g) made it an “unlawful employment practice * * * [f]or any person, whether an employer or employe[e], *or not*, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act or to attempt to do so.” (Emphasis added.) That original language—and specifically the words “or not”—reflected the legislature's intent to unambiguously prohibit aiding and abetting unlawful employment practices by anyone, not just employers and employees.

The same year that the statute was enacted, the Oregon legislature created a statute revision council “to clarify, simplify, classify, arrange, coordinate, codify and revise the laws of this state.” The council was authorized to make only non-substantive revisions to statutory language—it did not have the authority to “alter the sense, meaning or effect of any act.” When the council presented its proposed revisions in 1953, it had deleted the words “or not” from what is now ORS 659A.030(1)(g), which, as the Court noted, “made what was once a clear statute unclear.” The Court's holding—that “any person,” and not just employers or employees, can be held liable for aiding and abetting unlawful employment practices—removes that ambiguity.

What does the Court's decision mean?

The Court's decision brings clarity to an issue that, in the past, had received inconsistent treatment by courts, but it does not dramatically alter the legal landscape for employers or TPAs. In fact, the Court pointed out that its decision “is consistent with how [the Oregon Bureau of Labor and Industries] has long interpreted and enforced ORS 659A.030(1)(g).”

In light of the Court's decision, employers may wish to consider the following:

- **Have a plan for addressing claims against individual supervisors or coworkers.** The Court's decision may result in an increase in claims asserted against individuals—including coworkers and supervisors—who are alleged to have aided or abetted unlawful employment practices. To the extent that the employer concludes (after an investigation) that any individuals named as defendants were acting in the course and scope of their employment—and that there are no conflicts of interest between the employer and individuals—the employer may wish to offer the employees joint defense and indemnity. Employers should give careful thought to any policy or practice of defending or indemnifying employees for aid-and-abet claims to ensure that they are applied consistently to all employees—doing so could help avoid disparate-treatment claims.
- **Review insurance policies to ensure that aid-and-abet claims are covered.** Although insurance policies are typically reviewed periodically, it's possible that aid-and-abet claims might not be at the top of mind during the review process. Entities should assess whether their general commercial liability or employment practices liability insurance policies (or EPLI) include (or exclude) aid-and-abet claims against them or their employees, and plan accordingly to avoid an unpleasant surprise when a claim is filed.

- **Public employees can likely rest easy.** The Court's decision likely will not impact public employees who might otherwise fall within the scope of "any person" under ORS 659A.030(1)(g). Under the Oregon Tort Claims Act, the sole cause of action for torts committed by public employees acting in the course and scope of their duties is an action against the public entity (not the public employee individually). Accordingly, even if an individual coworker or supervisor might otherwise be subject to liability for aiding and abetting an unlawful employment practice, any aid-and-abet claim would have to be asserted against the public entity itself, and not the public employee.

If you have questions about federal or state discrimination or retaliation laws, please contact an attorney on Miller Nash's employment law and labor relations team.

About the Author

As an employment attorney, Cody Elliott helps public and private employers resolve a wide variety of employment disputes involving Oregon's whistleblower statutes, federal and state discrimination statutes, and constitutional issues such as free speech, due process, and equal protection. Cody regularly represents clients in arbitrations, mediations, administrative proceedings with the Oregon Bureau of Labor and Industries (BOLI), and in state and federal court. Cody has also prevailed in appeals to both the Oregon Court of Appeals and the Ninth Circuit and has experience with a broad range of matters that impact public entities, including Oregon Public Records Law, Oregon's civil service statutes, and the Oregon Tort Claims Act.