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## [Oregon Court of Appeals Continues Debate About Status of Wrongful Discharge Claims In Oregon in \*Kemp v. Masterbrand Cabinets, Inc.\*](#)

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Last week the Oregon Court of Appeals issued its opinion in [Kemp v. Masterbrand Cabinets, Inc.](#), holding that the plaintiff's common law wrongful discharge claim was not precluded by the statutory remedies then available under Oregon or federal anti-discrimination laws, and that claim could properly be decided by a jury. The case is another wrinkle in the ever-evolving and complex body of case law trying to define the contours of claims for common law wrongful discharge in Oregon.



### **Oregon Wrongful Discharge 101: A Quick Primer On When Common Law Wrongful Discharge Claims Can Be Precluded By Statutory Remedies**

A claim for wrongful discharge is a common law tort claim developed by Oregon courts. Many states' courts have recognized the tort; Oregon's Supreme Court first did so in the 1970s in *Nees v. Hocks*. The specifics about what makes a discharge from employment "wrongful" and therefore tortious hinges on whether the employee's termination violates an important public policy, usually where an employee is fulfilling an important job-related right or public duty. [As we have blogged about previously](#), courts have had difficulty wrestling with defining "wrongfulness" in specific cases, and divergent results can make it difficult to clearly understand which public duties and job-related rights are covered by the tort. For example, being discharged for complaining about the employer's fire code and safety violations (*Love v. Polk County Fire Distr.*) has been found wrongful, but a car salesman being fired for complaining about the employer's allegedly deceptive sales tactics (*Lamson v. Crater Lake Motors*) or private security guards being fired for restraining or arresting concert-goers suspected of drug use and violent behavior (*Babick v. Oregon Arena Corporation*) was not. Further, some courts have held wrongful discharge usually covers only conduct-based discrimination (taking action against an employee because of what they do, commonly known as "retaliation"), not status-based discrimination (based on a protected personal characteristic such as race, gender, or age), although this distinction is often inconsistently applied.

Most importantly as it relates to the *Kemp* case, Oregon courts have held that the claim of wrongful discharge is an "interstitial" tort intended to fill the gaps where there is no other available remedy. At common law, for example, a successful plaintiff pursuing a wrongful discharge claim could have a trial by jury and could recover both his economic damages (lost wages, back pay, related expenses) and emotional distress damages. Where other adequate remedies exist, however, such as remedies provided under today's anti-discrimination statutes in ORS Chapter 659A, the wrongful discharge tort claim can be preempted by those other available remedies and no longer available. As the Oregon legislature has passed more and more employment discrimination statutes over recent years, those

interstitial gaps where wrongful discharge has survived have become fewer and smaller. In fact, at least since 2008 when the legislature amended Oregon's primary anti-discrimination statute ORS 659A.030 (prohibiting discrimination based on race, gender, age, disability, etc.), the statutory remedies available are typically better than what was available under common law. Those statutory remedies include not only the right to a jury trial and recovery of economic damages, but also uncapped compensatory and punitive damages and attorney fees.

Some Oregon courts have also required a second step in the adequate statutory remedy analysis: not only must the statutory remedy be adequate, but in enacting the statutory remedy the legislature must also have specifically intended to displace any pre-existing common law rights. The leading case cited for this requirement is the Oregon Court of Appeals' 2006 opinion in *Olsen v. Deschutes County*. This legislative intent is much harder to show, and as a result employers have a more difficult time getting wrongful discharge claims dismissed on this basis. Some recent statutes have even included express disclaimers stating that the statute is not intended to abrogate pre-existing common law remedies. See, e.g., [ORS 659A.199\(2\)](#). Oregon courts have not consistently applied *Olsen*, however, and some state trial courts have continued to dismiss wrongful discharge claims based on the adequacy of the available statutory remedy alone. Complicating things further still, Oregon's federal District Courts routinely ignore *Olsen's* second step, finding it contrary to Oregon Supreme Court authority defining wrongful discharge as a narrow, "interstitial" tort. (Federal district courts usually try to interpret state laws consistent with how the state supreme court would rule on the issue, and can ignore contrary cases from lower state courts). Federal district courts usually will dismiss wrongful discharge claims when the available statutory remedies are adequate irrespective of the legislative intent behind the statute in question.

All this legal wrangling may seem esoteric, but it has practical effects. Until a few years ago, the remedies available for wrongful discharge claims were better than those available under Oregon's anti-discrimination statutes. Since 2008, however, the remedies under those statutes have been roughly the same. In addition, the statute of limitations period is longer for wrongful discharge claims (2 years) than for claims under Oregon's ORS chapter 659A (1 year) or Title VII (300 days). Finally, plaintiffs asserting wrongful discharge claims do not need to first file a charge with the Oregon Bureau of Labor and Industries ("BOLI") or Equal Employment Opportunity Commission ("EEOC"). Such "administrative exhaustion" is required for Title VII claims, and while optional under Oregon law, most plaintiffs asserting state discrimination claims file administrative charges before filing a lawsuit.

### **What *Kemp v. Masterbrand* Adds To the Wrongful Discharge Debate**

The plaintiff in *Kemp* worked for Masterbrand in its warehouse until 2005 when her employment was terminated. She alleged she was terminated because she was pregnant at the time, and also because she complained to her employer about how her supervisor treated her due to her pregnancy. Kemp sued, asserting both statutory claims for discrimination and retaliation under ORS 659A.030 and common law wrongful discharge. The case ultimately went to a trial where Kemp prevailed on all claims (because the pre-2008 version of ORS 659A.030 did not provide for a jury trial those claims were tried to the judge; the common law wrongful discharge claim was tried to the jury).

The primary issue on appeal was whether the remedies then-available under ORS chapter 659A and Title VII were sufficiently adequate to preclude Kemp's common law wrongful discharge claim, which would have required the trial court to dismiss that claim before trial. The Court first found that under the first step of the *Olsen* test the pre-2008 remedies available under ORS 659A.030 were not adequate to preclude wrongful discharge claims. This outcome is fairly unsurprising and largely consistent with other cases analyzing the adequacy of the pre-2008 statutory remedies. Then,

regarding Title VII, the Court specifically declined to find whether the remedies were adequate but found that, even if they were, Title VII did not preclude the common law wrongful discharge claim under the second step of the *Olsen* test because the relevant Title VII damages provision expressly stated it was not intended to replace any preexisting state law remedies. *See* 42 U.S.C. § 2000e-7.

It is not clear how much *Kemp* will affect how courts analyze wrongful discharge claims going forward. First, it is a bit of an anachronism since it dealt with the pre-2008 remedies available under ORS 659A.030, and it is now fairly well-settled that the today's remedies under that statute are sufficiently comparable to those available under common law. The court's reliance on the second step of the *Olsen* test (whether the legislature intended a statutory remedy to abrogate a common law tort cause of action) may make it more likely that Oregon state trial courts follow that two-step analysis, and therefore less likely that wrongful discharge claims will be dismissed on that purely legal basis before trial. On the other hand, *Kemp* does not elaborate much on *Olsen*, and courts that were unlikely to follow *Olsen* in the past may not be any more likely to do so now. In particular, the federal district courts in Oregon may continue to ignore the second step (legislative intent) in both *Kemp* and *Olsen* finding that requirement is contrary to Oregon Supreme Court authority that narrows the application of wrongful discharge to only situations where there is no statutory remedy.

Finally, *Kemp* held that the plaintiff was entitled to recover attorney fees related to her wrongful discharge claim under ORS § 20.107. (Usually recovery of attorney fees is not available in tort causes of action absent some statutory or contractual provision). That statute provides for attorney fees in claims for "unlawful discrimination," defined to mean "discrimination based upon personal characteristics including, but not limited to, race, religion, sex, sexual orientation, national origin, alienage, marital status or age." ORS § 20.107(4). Despite the fact that many cases hold wrongful discharge generally encompasses only conduct-based discrimination (retaliation) and not personal status-based discrimination, the court held that because the plaintiff's wrongful discharge claim included allegations of retaliation related to her complaints about sex- and pregnancy-based discrimination, it was sufficiently related to "unlawful discrimination" to be covered by ORS § 20.107.

While *Kemp* does not dramatically change the legal landscape, the case serves as a useful reminder of some of the nuances regarding wrongful discharge claims in Oregon. We will continue to monitor developments in this always-evolving area of law.

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