

**BRAD AVAKIAN**  
COMMISSIONER



**DOUG MCKEAN**  
DEPUTY COMMISSIONER

**BUREAU OF LABOR AND INDUSTRIES**

**BEFORE THE COMMISSIONER  
OF THE BUREAU OF LABOR AND INDUSTRIES  
OF THE STATE OF OREGON**

In the Matter of:

Case No. **38-11**

**ANDREW W. ENGEL, DMD, PC dba  
AWE DENTAL SPA and DR.  
ANDREW W. ENGEL individually as  
an Aider and Abettor,**

FINDINGS OF FACT  
ULTIMATE FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

Respondent.

**SYNOPSIS**

Respondent Awe Dental Spa employed Complainant as a dental assistant and subjected her to harassment based on her religion, failed to reasonably accommodate her religious beliefs, and constructively discharged her based on her religion. Respondent Dr. Andrew W. Engel aided and abetted Respondent Awe Dental Spa in the commission of the unlawful employment practices. The forum awarded Complainant \$12,000 in back pay, \$10,654 in out-of-pocket expenses attributable to the unlawful employment practices, and \$325,000 in damages for mental, emotional, and physical suffering, and found Respondents jointly and severally liable for these damages. The forum also required Respondent Dr. Engel and his staff to attend training on recognizing and preventing religious discrimination. ORS 659A.030(1)(a), ORS 659A.030(1)(b), ORS 659A.030(1)(g), ORS 659A.033, ORS 659A.850.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The evidentiary part of the hearing was held on December 13-15, 2011, in the Lyon Room of the Deschutes

1 Services Building, 1300 NW Wall St., Bend, Oregon. Closing arguments were held on  
2 February 16, 2012, at the Portland offices of the Bureau of Labor and Industries.

3 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by  
4 case presenters Chet Nakada and Patrick A. Plaza, both employees of the Agency.  
5 Complainant Susan Muhleman was present throughout the hearing and was not  
6 represented by counsel. Respondent Andrew W. Engel, DMD, PC (“AWEPC”) was  
7 represented by Jeffrey T. Eager, attorney at law. Respondent Andrew W. Engel,  
8 individually (“Dr. Engel”), was represented by Michael F. Gordon, attorney at law. Dr.  
9 Engel, Mr. Eager, and Mr. Gordon were present throughout the hearing. During closing  
10 arguments, Mr. Nakada, Mr. Plaza, and Mr. Gordon appeared in person, and  
11 Complainant, Mr. Eager, and Dr. Engel participated by telephone. Johanna  
12 Riemenschneider, Senior Assistant Attorney General, Oregon Department of Justice,  
13 was present and made legal argument on the Agency’s behalf.

14 The Agency called the following witnesses: Complainant; Brandy Pirtle, senior  
15 investigator, BOLI Civil Rights Division (telephonic); Lynne Georgia, Respondent  
16 AWEPC’s employee (telephonic); Pat Parkison, Complainant’s mother; Kailey  
17 Middaugh, Complainant’s friend and former co-worker (telephonic); Brent Dodrill,  
18 Complainant’s childhood pastor (telephonic); and Respondent Dr. Andrew Engel.

19 Respondents called Dr. Andrew Engel and Brianne Summers, Respondent  
20 AWEPC’s employee and Complainant’s former co-worker, as witnesses.

21 The forum received into evidence:

- 22 a) Administrative exhibits X-1 through X-22 (submitted or generated prior to  
23 hearing) and X-23 (created after the evidentiary portion of the hearing concluded);  
24 b) Agency exhibits A-1 through A-27 (submitted prior to hearing); and  
25

1 c) Respondents' exhibits R-1 (submitted or generated prior to hearing) and  
2 R-2 through R-4 (submitted at hearing).

3 Having fully considered the entire record in this matter, I, Brad Avakian,  
4 Commissioner of the Bureau of Labor and Industries, hereby make the following  
5 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions  
6 of Law, Opinion, and Order.

7 **FINDINGS OF FACT – PROCEDURAL**

8 1) On November 9, 2009, Complainant filed a verified complaint with the  
9 Agency's Civil Rights Division alleging that she was the victim of the unlawful  
10 employment practices of Respondent AWEPC in that she was required to go to  
11 Scientology management training or resign and she chose to resign based on her  
12 religion. On or about March 31, 2010, Complainant amended her complaint to include  
13 allegations that she was treated differently, harassed, denied reasonable  
14 accommodation, and forced to resign because of intolerable working conditions  
15 imposed by Respondents and that she was retaliated against for her opposition to the  
16 discrimination on the basis of religion. The amended complaint named Dr. Engel as an  
17 aider and abettor. On June 25, 2010, Complainant amended her complaint a second  
18 time to specifically describe acts of alleged aiding and abetting by Dr. Engel. After  
19 investigation, the Agency found substantial evidence of an unlawful employment  
20 practice and issued a Notice of Substantial Evidence Determination on October 4, 2010.  
21 (Exhibits A-1, A-15, A-16, A-19)

22 2) On September 14, 2011, the Agency issued Formal Charges alleging that:

23 (a) Respondents unlawfully discriminated against Complainant in terms  
24 and conditions of employment by harassing her based on her religion in  
25 that Respondents subjected her to a hostile work environment, in violation  
of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a) and (b);

(b) Respondents failed to reasonably accommodate Complainant's  
religious beliefs by denying her request to not attend a symposium that

1 Complainant believed was associated with the Church of Scientology, in  
2 violation of ORS 659A.030(1) and ORS 659A.033(1);

3 (c) Respondents retaliated against Complainant in terms and conditions of  
4 employment based on her opposition to attending the symposium, in  
5 violation of ORS 659A.030(1)(b), ORS 659A.030(1)(f) and OAR 839-005-  
6 0033;

7 (d) Respondents constructively discharged Complainant by intentionally  
8 creating or intentionally maintaining discriminatory working conditions  
9 related to Complainant's religion, thereby creating working conditions so  
10 intolerable that a reasonable person in Complainant's circumstances  
11 would have resigned because of them and Respondents desired to  
12 Complainant to leave her employment as a result of the intolerable  
13 working conditions or knew or should have known that Complainant was  
14 certain or substantially certain to leave Respondents' employment as a  
15 result of the working conditions created by Respondents, in violation of  
16 ORS 659A.030(1)(a) and OAR 839-005-0011;

17 (e) Dr. Engel aided and abetted AWEPC in the commission of the alleged  
18 unlawful employment practices and is an aider/abettor under ORS  
19 659A.030(1)(g);

20 (f) As a result of Respondents' alleged unlawful employment practices,  
21 Complainant is entitled to lost wages and out of pocket expenses of "at  
22 least \$35,000" and damages for "emotional, mental, and physical  
23 suffering" in the amount of "at least \$80,000."

24 (Exhibit X-2a)

25 3) On September 14, 2011, the forum served the Formal Charges on  
Respondents, accompanied by the following: a) a Notice of Hearing setting forth  
December 13, 2011, at 9:30 a.m., in Bend, Oregon, as the time and place of the hearing  
in this matter; b) a Summary of Contested Case Rights and Procedures containing the  
information required by ORS 183.413; c) a complete copy of the Agency's  
administrative rules regarding the contested case process; and d) a separate copy of  
the specific administrative rule regarding responsive pleadings. (Exhibit X-2)

4) On September 21, 2011, Respondents, through counsel Jeffrey T. Eager,  
filed an answer and affirmative defenses to the Formal Charges. Respondents'  
affirmative defenses included the following:

- 1 • Respondents' requirement that Complainant attend the symposium was a
- 2 bona fide occupational requirement;
- 3 • Complainant has failed to mitigate her alleged damages;
- 4 • Accommodating Complainant's alleged religious beliefs created an undue
- 5 hardship for Respondents;
- 6 • Complainant has failed to state a claim;
- 7 • Complainant failed to cooperate with Respondents' accommodation process;
- 8 • The alleged discriminatory conduct was privileged because it was part of
- 9 Respondents' efforts to engage with Complainant in the interactive process of
- 10 accommodation;
- 11 • Respondents did grant Complainant the reasonable accommodation of not
- 12 requiring her attendance at the symposium.

13 (Exhibit X-4)

14 5) On October 25, 2011, the forum ordered the Agency and Respondents

15 each to submit a case summary including: a list of all persons to be called as

16 witnesses; identification and copies of all documents to be offered into evidence; a

17 statement of any agreed or stipulated facts; and a brief statement of the elements of the

18 claim and any damage calculations (for the Agency only). The forum ordered the

19 participants to submit case summaries by January 29, 2010, and notified them of the

20 possible sanctions for failure to comply with the case summary order. (Exhibit X-5)

21 6) On November 15, 2011, the Agency moved for a Protective Order

22 regarding Complainant's medical information and records in response to Respondents'

23 informal discovery request in which Respondents requested Complainant's medical

24 records related to Complainant's claim for damages for emotional distress or mental or

25 physical suffering. The Agency attached four pages of medical records for the ALJ's

review and asked that the ALJ conduct an *in camera* review of all documents provided

by the Agency prior to their release to Respondents to determine if the Agency was

required to release them to Respondents. In response, the ALJ issued a Protective

Order governing the use and disposition of Complainant's medical records and testimony

at hearing related to those records. Based on the submitted records' immediate

1 proximity in time to the alleged unlawful actions and a specific reference to  
2 Complainant's former employment with AWEPC, the ALJ found that the records likely  
3 contained information generally relevant to the issue of Complainant's entitlement to  
4 damages for emotional, mental, and physical suffering. However, because the Agency  
5 did not specifically ask that the ALJ release these records to Respondents and  
6 Respondents had not filed a motion for discovery order, the ALJ declined to release the  
7 records to Respondents, finding that any such release remained within the Agency's  
8 discretion. (Exhibits X-7; X-8)

9 7) On November 23, 2011, Respondents filed a motion for a Discovery Order  
10 seeking more complete responses to Respondents' interrogatories and production of  
11 documents. On November 30, 2011, the Agency filed objections to Respondents'  
12 motion. (Exhibits X-9, X-10)

13 8) On December 2, 2011, the ALJ issued an interim order ruling on  
14 Respondents' motion for a discovery order. In pertinent part, the ALJ's order stated:

15 **"INTERROGATORIES**

16 "Respondents sought a discovery order regarding Respondents'  
17 interrogatories numbered 4, 6-9, and 15-17. Respondents argue that the  
18 Agency's responses were inadequate and that the Agency should be required to  
19 respond more completely.

20 "***Interrogatory 4*** asks for a description of 'Complainant's job duties while  
21 employed by Respondent, including but not limited to job duties of August 2009.'  
22 Whether or not Complainant's job duties included any managerial duties may be  
23 relevant to this case and appears to be in dispute. **The Agency and**  
24 **Complainant are ordered to respond specifically to this interrogatory.**<sup>1</sup>

25 "***Interrogatory 6*** seeks the 'name, phone number, and mailing address of  
each person with whom Complainant has communicated with regard to the  
substance of her complaint against Respondents, and the nature, substance, and  
details of the communication with each such person.' This request appears  
reasonably likely to produce information generally relevant to the case. **The**  
**Agency and Complainant are ordered to identify, to the extent it is [sic] not**

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<sup>1</sup> All bolded and underlined language is identically emphasized in the original order.

1 already done so in its initial response, persons of whom Complainant is  
2 aware who fit in this category.

3 "Interrogatory 7 requests information concerning persons who have  
4 'discoverable knowledge of the allegations contained in the Formal Charges or  
5 the Respondents' Affirmative Defenses.' This request is unduly vague and the  
6 Agency and Complainant are not required to respond.

7 "Interrogatory 8 asks for a description of 'the hours Complainant was  
8 scheduled to work the week following August 21, 2009, for an (sic) after her  
9 hours were "cut" for that week as alleged in paragraph 15 of the Formal charges.'  
10 The Agency and Complainant are ordered to respond more specifically to  
11 this interrogatory if the Complainant has any more specific knowledge of  
12 the information sought than was provided in the Agency's initial response  
13 to this interrogatory.

14 "Interrogatory 9 asks for a description of 'the nature and extent of  
15 Complainant's injuries resulting from Respondents' actions as alleged in  
16 paragraph 16 and 37 of the Formal Charges.' The Formal Charges seek 'at least  
17 \$80,000' in damages for these alleged injuries. The Agency's initial response  
18 provides no specific information whatsoever except to state that Complainant  
19 'lost her health insurance benefits and her physical and emotional health suffered  
20 after an unsuccessful job search where she and her family had to eventually  
21 relocate from Central Oregon.' The Agency and Complainant are ordered to  
22 provide a statement of the specific nature and extent of Complainant's  
23 alleged injuries.

24 "Interrogatory 15 asks for the identification of 'any medical or  
25 psychological professionals seen by Complainant for any injury or emotional,  
26 mental or physical suffering Complainant alleges she suffered as a result of  
27 Respondents' actions as alleged in paragraph 37 of the Charges.' The Agency  
28 provided no information in response to this interrogatory and the Agency's  
29 response to Respondents' motion was to state '[t]his information will be provided  
30 by the Forum when it releases Complainant's medical records to Respondents.'  
31 The forum is not responsible for releasing any medical records to Respondents,  
32 and made that clear in the Protective order I issued on November 15, 2011, at  
33 page 2, lines 21-22, and page 3 lines 1-4. If there are any other medical or  
34 psychological professionals who fit the category described in this  
35 interrogatory, the Agency and Complainant are ordered to identify them.

36 "Interrogatory 16 asks for 'the amount and method of calculating  
37 Complainant's lost wages and lost benefits allegedly suffered as a result of  
38 Respondent's actions, including but not limited to salary or wages assumed,  
39 benefits assumed, duration of wages and benefits lost.' In its response to  
40 Respondents' motion, the Agency set out specific calculations of lost wages, but  
41 did not refer to any benefits lost or assumed. The Formal Charges seek damages  
42 for 'loss benefits and out-of-pocket medical expenses and other out-of-pocket  
43 expenses.' The Agency and Complainant are ordered to provide specific  
44 information regarding benefits assumed and benefits lost.

1           **"Interrogatory 16** asks for 'the recipient, amount, and source of all out-of-  
2 pocket medical and other expenses allegedly incurred by Complainant as a result  
3 of Respondents' actions, including the name, phone number and mailing address  
4 of each medical provider or other recipient of the payment, the amount incurred  
5 or charged by each provider or other recipient, whether the amounts charged or  
6 incurred have been paid, and, if so, by whom the amounts were paid.' The  
7 Agency responded by stating 'Complainant cannot recall the specific amount and  
8 source of all out-of-pocket medical expenses. The Agency and Complainant will  
9 provide this information if she is able to locate it.' **The Agency and  
10 Complainant are ordered to attempt to locate any such existing information  
11 and provide any to Respondents that can be located.**

12           **"The Agency and Complainant are to respond as directed to the  
13 above-referenced interrogatories as ordered no later than noon, December  
14 9, 2011, and to provide responses directly to Respondents' attorney by that  
15 time.**

16           **"REQUESTS FOR DOCUMENTS**

17           **A. "Request for Production of Documents Nos. 1-6, 10-11, 13-15, 17-18, 22-  
18 23, and 25.**

19           "Respondents contend that the Agency's responses to Respondents' informal  
20 Request for Production of Documents Nos. 1-6, 10-11, and 13-15, are  
21 inadequate in that they 'contain variations on the following: "Responsive  
22 documents, if they exist, will be provided to Respondents if they can be found by  
23 Complainant.'" The Agency and Complainant are only required to produce  
24 documents that exist. Requests 1-6, 10-11, 13-15, 17-18, 22-23, and 25 appear  
25 reasonably likely to produce information that is generally relevant to the case.  
**With one exception, the Agency is required to produce any documents  
responsive to these requests at its earliest opportunity, up to the time the  
hearing begins.** The exception is Request 14, in that the Agency is not required  
to produce any communications between the Complainant and the Agency case  
presenter.

**"B. Request for Production of Documents No. 16.**

          "This request asks for Complainant's 2007-2010 tax returns. Based on the  
Agency's response to Respondents' motion, the forum presumes that the 2009  
and 2010 tax returns have been provided. If not, the Agency and Complainant  
are ordered to provide them to Respondents' attorney no later than noon,  
December 9, 2011. The forum fails to see the potential relevance of  
Complainant's 2007 and 2008 tax returns and the Agency and Complainant need  
not provide them.

          "\* \* \* \* \*

**"D. Request for Production of Documents No. 24.**

          "Respondents seek '[r]ecords of Complainant's treatment or diagnosis by any  
medical provider for any reason whatsoever from January 1, 2004 to present.'

1 Respondents justify the broadness of the request based on 'the highly general  
2 nature of Complaint's allegations of injury, and the Agency's failure to specify the  
3 nature and extent of injuries in its response to Interrogatory 9[.]' The forum  
4 orders the Agency and Complainant to produce all medical records from January  
5 1, 2007, to the present that reflect any treatment for any condition similar to or  
6 the same as the specific emotional, mental and physical distress Complainant  
7 alleges she experienced as a result of Respondents' alleged unlawful conduct.  
8 This order includes the medical records provided to the forum by the Agency for  
9 an *in camera* inspection pursuant to its motion for a Protective Order dated  
10 November 15, 2011. Any such medical records provided will be considered  
11 'subject records' under the terms of the Protective Order I issued on November  
12 15, 2011.

13 "The Agency is ordered to provide the forum with a copy of any additional  
14 medical records it provides to Respondents based on this Discovery Order.

15 **"If it has not already done so, the Agency is ordered to produce the medical  
16 records provided to the forum by the Agency for an *in camera* inspection to  
17 Respondents by 5:00 p.m. on December 5, 2011. To the extent of its ability  
18 to acquire these records, the Agency is required to produce any additional  
19 documents responsive to these requests at its earliest opportunity, up to  
20 the time the hearing begins."**

21 (Exhibit X-11)

22 9) On December 2, 2011 Respondents filed a motion to extend the case  
23 summary deadline to December 7, 2011. The Agency did not object and the ALJ  
24 granted Respondents' motion. The Agency and Respondents timely filed case  
25 summaries. The Agency filed an addendum to its case summary on December 9, 2011.

(Exhibits X-13, X-14, X-16, X-19)

10) On December 8, 2011, the Agency moved to amend the Formal Charges  
to incorporate Complainant's amended civil rights complaint<sup>2</sup> on page 2, line 4 of those  
Charges. The ALJ granted the Agency's motion at hearing. (Exhibit X-18)

11) On December 8, 2011, attorney Michael F. Gordon filed a Notice of  
Change of Counsel for Respondent Dr. Engel, stating that Gordon was now  
representing Respondent Dr. Engel. (Exhibit X-21)

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<sup>2</sup> Exhibit A-15.

1           12)    At hearing, prior to opening statements, the Agency moved to amend the  
2 Formal Charges at page 6, line 18, to substitute "OAR 839-005-0010(4)(c)" for "OAR  
3 839-005-0010(4)(a) & (b)." Respondents did not object and ALJ granted the Agency's  
4 motion. (Statements of ALJ, Nakada, Gordon, Eager)

5           13)    At hearing, prior to opening statements, Respondents moved to amend  
6 paragraph 42 of their Answer to substitute "5" for "X." The Agency did not object and  
7 ALJ granted Respondents' motion. (Statements of ALJ, Nakada, Gordon, Eager)

8           14)    At hearing, prior to opening statements, the Agency requested permission  
9 to file a post-hearing brief to address the legal arguments Respondents raised in their  
10 case summary. The ALJ deferred ruling on the Agency's motion until the conclusion of  
11 the evidentiary portion of the hearing. At the conclusion of the evidentiary portion of the  
12 hearing, the ALJ granted the Agency's motion and Respondents' request to file a reply  
13 brief. The ALJ also granted the Agency's and Respondents' requests that closing  
14 arguments be made after the briefs were filed. (Statements of ALJ, Nakada, Gordon,  
15 Eager)

16           15)    During the hearing, the ALJ required Dr. Engel to read the ALJ's  
17 Protective Order and sign a statement agreeing to be bound by the terms of that Order  
18 as a prerequisite to being allowed to read any of Complainant's medical records  
19 proffered as evidence. (Statement of ALJ; Exhibit X-22)

20           16)    Exhibit A-23, pp. 1, 3, 5, and 7 in the Agency's case summary consisted of  
21 black and white copies of color photographs taken by the Complainant in Respondents'  
22 office. Those copies contained partially illegible text. In response to the ALJ's inquiry,  
23 the Agency provided the original color photographs on which the text could clearly be  
24 read. The ALJ ordered the Agency to either substitute the original photographs for the  
25 copies provided in its case summary or to provide equally legible color copies. The

1 Agency chose the latter option and the ALJ substituted the color copies of Exhibit A-23,  
2 pp. 1, 3, 5, and 7 for the black and white copies provided in the Agency's case  
3 summary. (Exhibit A-23; Statement of ALJ)

4 17) At the start of the hearing, the ALJ orally advised the Agency and  
5 Respondents of the issues to be addressed, the matters to be proved, and the  
6 procedures governing the conduct of the hearing. (Statement of ALJ)

7 18) On December 20, 2011,<sup>3</sup> the ALJ issued an interim order that required the  
8 Agency to file its written brief no later than January 20, 2012, and Respondents to file  
9 reply briefs no later than February 6, 2012. (Exhibit X-23)

10 19) On January 5, 2012, the ALJ scheduled closing argument for February 16,  
11 2012, at the W.W. Gregg Hearings Room at BOLI's Portland office located at 1045  
12 State Office Building, 800 NE Oregon Street, Portland, Oregon, with the Complainant,  
13 Mr. Eager, and Dr. Engel scheduled to participate by telephone. This arrangement was  
14 based on the mutual agreement of the participants. (Statements of Nakada, Plaza,  
15 Eager, Gordon, ALJ; Exhibit X-29)

16 20) On December 19, 2011, and January 4, 2012, Mr. Gordon and Mr.  
17 Nakada respectively requested a copy of the audio digital recording of the December  
18 13-15, 2011, hearing. The ALJ mailed a compact disc containing a digital recording of  
19 the hearing to Mr. Gordon and Mr. Nakada on January 6, 2012. (Exhibit X-30)

20 21) Closing arguments were made by Agency and Respondents on February  
21 16, 2012, and the record closed at their conclusion. (Statement of ALJ)

22 22) On June 20, 2012, the ALJ issued a proposed order that notified the  
23 participants they were entitled to file exceptions to the proposed order within ten days of  
24 its issuance. On June 27, 2012, Respondents filed a motion for an extension of time to  
25 \_\_\_\_\_

<sup>3</sup> The actual order is misdated "December 2, 2011."

1 file exceptions that was GRANTED. Respondents timely filed exceptions on August 20,  
2 2012.

3 **FINDINGS OF FACT – THE MERITS**

4 1) At all times material, AWEPC was a domestic professional corporation  
5 that employed Complainant and Dr. Engel was the sole owner and president of  
6 AWEPC. AWEPC consisted of Dr. Engel's dental practice and a health spa located in  
7 the same building and adjacent to the dental practice. (Stipulation of Agency,  
8 Respondents; Exhibit A-3)

9 2) At times material, Dr. Engel was a member of the Church of Scientology.  
10 (Testimony of Engel; Exhibit A-8)

11 3) Scientology is a religion and its members are referred to as Scientologists.  
12 (Judicial notice)<sup>4</sup>

13 4) In October 2005, Dr. Engel contracted with Hollander management group  
14 to obtain Hollander's business consulting services. The contract included a clause that  
15 stated:

16 "Doctor understands and acknowledges that Hollander uses secular  
17 administrative technology developed by L. Ron Hubbard, author, educator, and  
18 founder of the religion of Scientology, in Hollander's program of business  
consulting and training. Hollander is, however, a privately owned company,  
separate from and not part of any Church of Scientology."

19 Dr. Engel used Hollander's services until Hollander changed its name to Silkin  
20 Management Group in October 2008. Hollander, then Silkin, provided a business  
21 consultant to help Dr. Engel with "some functions and decisions" in Engel's business,  
22 including helping him to look at statistics associated with his business, how to improve  
23 those statistics, and helping with the organization of the staff and efficiency. After  
24 Hollander changed its name to Silkin, Dr. Engel continued working with Silkin under the  
25

1 Hollander contract, consulting with the same persons Hollander used as consultants.  
2 The Silkin consultant who worked with Dr. Engel in August 2009 is a Scientologist.  
3 (Testimony of Engel; Exhibits A-2, A-4, A-7)

4 5) Silkin is a nationwide company that “consults business objectives with  
5 Dentists, Chiropractors, Veterinarians, and Ophthalmologists practices.” It uses the  
6 same tools and technology as the WISE<sup>5</sup> and Sterling management groups. (Testimony  
7 of Engel; Exhibit A-4)

8 6) In early 2008, AWEPC had an opening for a dental assistant.  
9 Complainant, who had been working as a dental assistant since 1996, applied for and  
10 was hired as Dr. Engel’s dental assistant in mid-February 2008. (Testimony of  
11 Complainant, Summer; Exhibit X-2)

12 7) Complainant was baptized as a Christian in 1993 and had Christian beliefs  
13 while employed by AWEPC. Based on her Christian beliefs, she was opposed to  
14 “Scientology itself” and believes that her Christian beliefs are “contradicted by the  
15 Church of Scientology.” (Testimony of Complainant, Dodrill; Exhibit A-14)

16 8) Complainant’s job duties as a dental assistant for Respondent involved  
17 assisting Dr. Engel in “chair side procedures.” Her primary duties included maintaining  
18 dental equipment, sterilizing instruments, taking x-rays, making impressions, pouring up  
19 impressions, making bleach trays, giving post-op instructions, sending out lab work,  
20 answering the phone, bringing patients back to the dental chair, scheduling  
21 appointments, charting notes, and using the computer. Dr. Engel also expected her to  
22 obtain referrals to potential new patients from current patients. (Testimony of  
23 Complainant, Engel)

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24  
25 <sup>4</sup> See *Christofferson v. Church of Scientology of Portland*, 57 Or App 203, 241, 644 P2d 577 (1982),  
*reconsideration denied*.

1           9)     In or around July 2009, Dr. Engel attended a Scientology conference.  
2 After his return, he held a staff meeting that Complainant attended in which he talked  
3 about his staff working together more effectively. At the end of the meeting, Dr. Engel  
4 asked the staff if they were all tolerant of each other's religious beliefs and said he had  
5 Scientology books in his office that were available for staff to check out. Dr. Engel and  
6 his wife Francie told the staff that they "didn't use the Scientology as a religion; they  
7 were only using it for knowledge reasons, so that these books would help us to be able  
8 to market ourself or the business better." Although Dr. Engel had used methodology  
9 developed by L. Ron Hubbard in his business practice since first contracting with  
10 Hollander, Complainant had previously been unaware that Engel's business practices  
11 were related in any way to Scientology. (Testimony of Complainant, Middaugh; Exhibit  
12 A-7)

13           10)    In early August 2009 Dr. Engel asked AWEPC's staff, including  
14 Complainant, if they were available to attend a three-day symposium scheduled for  
15 October 8-10, 2009.<sup>6</sup> Complainant responded that she did not think she had any  
16 obligations on those dates. Soon afterwards, Dr. Engel gave Complainant and the rest  
17 of his staff an outline of the contents of the symposium. The outline included some  
18 terms Complainant was unfamiliar with, including "tone scale." The symposium cost  
19 AWEPC the flat fee of \$3500, regardless of how many staff members attended.  
20 (Testimony of Complainant, Engel)

21           11)    After receiving the outline, Complainant discussed the symposium with her  
22 co-workers Brianne, Kailey, and Kay. Kay said she had been to a symposium, but had  
23  
24

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25 <sup>5</sup> Dr. Engel testified that "WISE" is an acronym for "World Institute of Scientology Enterprises."

<sup>6</sup> The forum takes judicial notice that October 8-10, 2009, fell on a Thursday, Friday, and Saturday.

1 no opinion about it. Kailey and Brianne said they had never attended one. (Testimony  
2 of Complainant)

3 12) Prior to receiving the symposium outline, Complainant knew nothing about  
4 Scientology except that Tom Cruise and John Travolta "claimed to be members."  
5 (Testimony of Complainant)

6 13) After receiving the outline, Complainant did internet research on some of  
7 the phrases it contained, including the "tone scale," and learned from the Church of  
8 Scientology's website that the "tone scale" is a "fundamental part of the Church of  
9 Scientology." After work on Tuesday, August 18, Complainant asked Dr. Engel if the  
10 conference was mandatory. He told her it was because he had already paid for it.  
11 Complainant told Dr. Engel she would not attend "due to ties to the Church of  
12 Scientology." (Testimony of Complainant, Engel)

13 14) On Wednesday, August 19, 2009, two new posters were posted in  
14 Respondent's lunchroom. (Testimony of Complainant; Exhibit A-23)

15 15) One of the posters was captioned "The Illustrated Tone Scale in Full, And  
16 the Know to Mystery Scale, L. RON HUBBARD." It contained a list of numbers, each  
17 accompanied by a word or words describing an attitude or state of being, e.g. "1.8 pain,"  
18 "-0.1 pity," and a corresponding illustration. The second poster was captioned "The  
19 Condition Formulas by L. RON HUBBARD" and contained eight "boxes" of text with the  
20 following respective headings: "The Formula for the Condition of Non-Existence," "The  
21 Formula for the Condition of Danger," "The Formula for the Condition of Normal," "The  
22 Formula for the Condition of Power," "The Junior Danger Formula," "The Formula for the  
23 Condition of Emergency," "The Formula for the Condition of Affluence," and "The  
24 Formula for the Condition of Power Change." (Testimony of Complainant; Exhibit A-23)

1           16) The "Tone Scale" was developed by L. Ron Hubbard, founder of the  
2 Church of Scientology. A summary of a book called "The Scientology Handbook" that is  
3 posted on the internet on the website [http://www.scientologyhandbook.org/SH4\\_1.HTM](http://www.scientologyhandbook.org/SH4_1.HTM)  
4 includes, among other things, the following statements:

5           "The Tone Scale—a vital tool for any aspect of life involving one's fellows—is a  
6 scale which shows the successive emotional tones a person can experience. By  
7 'tone' is meant the momentary or continuing emotional state of a person.  
8 Emotions such as fear, anger, grief, enthusiasm and others which people  
9 experience are shown on this graduated scale.

10           "Skillful use of this scale enables one to both predict and understand human  
11 behavior in all its manifestations.

12           "This Tone Scale plots the descending spiral of life from full vitality and  
13 consciousness through half-vitality and half-consciousness down to death.

14           "By various calculations about the energy of life, by observation and by test, this  
15 Tone Scale is able to give levels of behavior as life declines.

16           "These various levels are common to all men.

17           \*\*\*\*\*

18           "*Every person has a chronic or habitual tone. He or she moves up or down the  
19 Tone Scale as he experiences success or failure. These are temporary, or  
20 acute, tone levels. A primary goal of Scientology is to raise a person's chronic  
21 position on the Tone Scale.*

22           \*\*\*\*\*

23           "©1996 – 2010 Church of Scientology International. All Rights Reserved."

24           (Testimony of Pirtle; Exhibit A-5)

25           17) On August 18 or 19, acting on her mother's advice, Complainant called  
Brent Dodrill, the pastor who had baptized her, and expressed her discomfort about  
attending the conference because she felt it involved exposure to something that was  
contrary to her personal beliefs. (Testimony of Complainant, Dodrill; Exhibit R-2)

          18) At the end of the workday on August 20, Dr. Engel and his wife Francie  
asked Complainant to meet with them in AWEPC's "relaxation room," where they gave  
Complainant three documents related to the symposium and Dr. Engel explained his  
need for Complainant to attend the symposium. The documents stated that the

1 symposium would be held October 8-10, 2009, at the Resort at the Mountain in  
2 Welches, Oregon, located "near Mt. Hood about 40 miles east of the Portland  
3 International Airport." One of the three documents Dr. Engel gave to Complainant read  
4 as follows:

5 **"Silkin Management Group**

6 **"Symposium Talks**

7 **"Emotions in the Workplace:** Learn to understand and predict human behavior  
8 during this presentation of the Emotional Tone Scale. Improve communication  
9 throughout the office and manage staff effectively using this information.

10 **"Stability, the Key to Success:** All Office Managers will achieve greater  
11 management success by learning basic management tools and exactly how to  
12 use them on the job.

13 **"Marketing & Promotion:** Doctors and staff learn how to increase the flow of  
14 new patients into the practice. Increased income will follow!

15 **"Working as a Team:** Staff members learn efficiency techniques, making it  
16 possible for you to expand your business, production and income with a lot less  
17 stress.

18 **"Hiring:** A 'must' for all Office Managers or anyone involved in hiring. Discover  
19 the precise steps you can take to hire professional staff members that will fit into  
20 your practice and contribute to its expansion.

21 **"Leadership & Efficiency:** Learn what it takes to be a good leader and how  
22 doctors, staff and patients will benefit as a result.

23 **"Financial Expansion:** Vital information that can be used immediately to  
24 increase profits, productivity and efficiency in any organization will be discussed  
25 in this session."

All these topics were covered at Silkin's symposium. One of the topics included in the  
"Marketing & Promotion" training involved dental staff obtaining referrals for the dental  
practice that employed them. Prior to this time, Complainant did not routinely ask  
patients for referrals. (Testimony of Complainant, Engel, Summer; Exhibits A-2, R-2)

19) During the meeting, Francie asked Complainant how she acquired her  
information about Scientology. Complainant explained she had researched it on the  
Internet, including the tone scale, and talked to her mom and pastor. In response to Dr.  
Engel's question about her religious beliefs, Complainant told Dr. Engel that her

1 religious belief “was none of his business” and that her objection to the symposium was  
2 based on its ties to the Church of Scientology and her personal “religious beliefs.”  
3 During the conversation, Dr. Engel told Complainant he and his wife used Scientology  
4 tools to better them. Complainant told Dr. Engel that she felt she was being pressured  
5 and harassed to attend the symposium and she would not attend. When Complainant  
6 got up to leave, Dr. Engel told her that if she left the building he would consider that to  
7 be her resignation. Complainant left and went to the employee locker room, where  
8 Francie approached her and convinced her to finish the conversation with Dr. Engel.  
9 Complainant and Dr. Engel finished the conversation in AWEPC’s “relaxation room” in  
10 Francie’s presence. At the end of the meeting, Dr. Engel told Complainant to “think  
11 about it overnight and make up her mind that she was either attending the symposium  
12 or she was out the door.” In direct response to Complainant’s question, Dr. Engel told  
13 Complainant that she could either go to the symposium or resign. (Testimony of  
14 Complainant, Engel; Exhibits A-2, R-2)

15 20) That night, Complainant conducted more internet research on Silkin and  
16 found websites containing information that led her conclude that Silkin was affiliated  
17 with the Church of Scientology, including the following:

- 18 • [http://stop-wise.biz/Hollander Consultants.html](http://stop-wise.biz/Hollander_Consultants.html), which stated that “Hollander was  
19 a “licensed World Institute of Scientology Enterprises company.” \* \* \* WISE is an  
20 integral part of Scientology and WISE licensed consultants like Hollander  
21 Consultants get money for every new Scientology recruit they are urged to  
22 make.”
- 21 • A business registry business name search with the Oregon Secretary of State  
22 that showed that Hollander Consultants, Inc. was the registrant for Silkin  
23 Management Group.
- 23 • A Wikipedia article on “Sterling Management Systems” that includes the following  
24 statement:

24 “WISE consulting companies like Sterling Management Systems may  
25 introduce their client to the religious aspects of Scientology and refer  
clients to the church for training and/or other religious services. Estimates  
vary as to the number of people introduced to Scientology in this manner,

1 officials of the WISE consulting company *Singer Consultants* estimate that  
2 20% of their clients end up taking courses in Scientology while Pat Lusey,  
3 co-founder of another WISE consulting group, *Uptrends*, has stated that  
4 50% of the clients of WISE consulting groups end up in Scientology.”

- A Wikipedia article on “World Institute of Scientology Enterprises” that includes the following statement:

5 **“World Institute of Scientology Enterprises (WISE)** is an organization  
6 affiliated with the Church of Scientology educates and assists businesses  
7 in the use of management methods and techniques developed by  
8 Scientology founder, L. Ron Hubbard, such methods and techniques  
9 being, like all of Hubbard's non-fiction writings, scripture of the Church of  
10 Scientology. The stated goal of WISE ‘is an ethical, sane and prosperous  
11 civilization’ and ‘returning to business the values and ethical standards  
12 upon which it was founded: honesty, integrity, craftsmanship, rewards for  
13 productivity, commitment to the prosperity of entire communities and  
14 nations.’ However critics of WISE say that its real purpose is  
15 dissemination of and recruitment into Scientology and they reference the  
16 incorporation papers of WISE which include the statement ‘It is organized  
17 under the Nonprofit Religious Corporation Law primarily for religious  
18 purposes. Its purposes are to promote and foster the religious teachings  
19 of L. Ron Hubbard in society, and to have and exercise all rights and  
20 powers granted to nonprofit corporations by law.”

21 (Testimony of Complainant; Exhibit A-2)

22 21) That same night, Complainant wrote following letter to Dr. Engel that she  
23 gave to him the next morning:

24 “Dr. Andrew Engel,

25 “It's my understanding that Oregon law makes it unlawful for any Oregon  
employer to discriminate against any individual on the basis of religion unless the  
employer can articulate a bonafied [sic] occupational requirement reasonably  
necessary to the operation of the business. As I indicated to you several times, I  
have sincerely held religious beliefs that directly contradict the principles of the  
Church of Scientology. The brochure on the conference you are expecting me to  
attend clearly states the Tone Scale program which was originated by the Church  
of Scientology will be included in this program. It is impossible for me to know in  
advance how much of the program will be based on the Church of Scientology  
teachings. For these reasons I respectfully request a reasonable accommodation  
from you. I am willing to attend any non-secular program that you would require  
of me.

“I value my job with you and the office. I hope you can appreciate the difficult  
position you are putting me by telling me I must either resign my position or  
attend a conference that would put me at odds with my sincerely held religious  
beliefs. I hope you will reconsider your ultimatum.

1           “Sincerely,  
2           Susan Muhleman”

3 (Testimony of Complainant, Engel; Exhibit A-2, p.9)

4           22)   Sometime during the morning on August 21 Dr. Engel asked Complainant  
5 to speak with his Silkin consultant about the symposium, noting that he could listen to  
6 “Saddam Hussein and no harm could come of it.” Complainant initially agreed to speak  
7 to the consultant. Complainant then decided not to talk with a Silkin representative  
8 because she believed that representative would be biased because of Silkin’s “known  
9 ties” to the Church of Scientology. About noon, Dr. Engel told Complainant that the  
10 consultant was on the phone. Complainant told Dr. Engel that she had decided not to  
11 speak to the consultant because she “felt pressured.” She also told Dr. Engel that she  
12 would not attend the symposium. (Testimony of Complainant, Engel; Exhibits A-2, A-8)

13           23)   At the end of the workday on August 21, Dr. Engel told Complainant that  
14 she would not be working the following week because he was taking the week off and  
15 Brianne Summer would be answering the phones instead of Complainant. He  
16 continued trying to convince Complainant to attend the symposium and told  
17 Complainant that if he made an exception for her, he would have to make an exception  
18 for everyone. At that point, Complainant told Dr. Engel she quit, gave him her office  
19 key, and left the office very upset and crying. (Testimony of Complainant, Engel,  
20 Middaugh; Exhibit A-2)

21           24)   All the conduct that Complainant considered religious harassment by Dr.  
22 Engel started August 18 and ended August 21. (Testimony of Complainant)

23           25)   Brianne Summer worked for Respondent from early 2008 until in or  
24 around March 2010. She was initially hired as an aesthetician in AWEPC’s “spa side,”  
25 then was trained on “the dental side” due to lack of spa business, and eventually

1 worked exclusively in AWEPC's dental office.<sup>7</sup> She was paid less than Complainant.  
2 (Testimony of Summer, Engel; Entire Record)

3 26) Dr. Engel had been absent before during Complainant's employment and  
4 this was the first time he had someone else cover her shift. (Testimony of Complainant;  
5 Exhibit A-8)

6 27) Dr. Engel never told Complainant that she did not have to attend the  
7 symposium. (Testimony of Complainant)

8 28) Complainant quit because she could no longer handle being pressured to  
9 attend the Silkin symposium. Had she not been required to attend the symposium, she  
10 would have chosen to remain employed by AWEPC. (Testimony of Complainant)

11 29) The workbook actually used at the Symposium includes a number of  
12 quotations attributed to L. Ron Hubbard. It contains sections on "Stability," the  
13 "Emotional Tone Scale," and "Marketing." Each section is prefaced by statements that it  
14 is published by the "SILKIN MANAGEMENT GROUP" and "Quoted material by L. Ron  
15 Hubbard \* \* \* from the copyrighted works of L. Ron Hubbard." The section on the  
16 Emotional Tone Scale contains seven pages of Hubbard's writings that summarize the  
17 different levels on the Tone Scale and is prefaced by an outline that states the following:

18 "EMOTIONAL TONE SCALE

- 19 4.0 Enthusiasm  
20 3.5 Strong Interest  
21 3.0 Conservatism  
22 2.5 Boredom  
23 2.0 Antagonism  
24 1.5 Anger  
25 1.1 Covert Hostility  
1.0 Fear

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<sup>7</sup> There was no evidence about the dates that these transitions occurred.

1           0.5   Grief

2           0.05   Apathy”

3 Eight of the 10 elements listed above are also included in the Tone Scale poster that Dr.  
4 Engel posted in his office. One exception is “3.5 Strong Interest,” which is “3.5  
5 Cheerfulness” on the poster in Dr. Engel’s office. “1.0” and its accompanying  
6 characteristic is cut off in the photograph of the poster in Dr. Engel’s office that the  
7 Agency offered in evidence, so the forum has no way of determining if it matches “1.0  
8 Fear” in the workbook. One of Hubbard’s printed quotes in the workbook about the  
9 Tone Scale is:

10                   “The Tone Scale is a vast subject and for a more extensive study of the  
11                   Tone Scale, a study of the book *Science of Survival* would be required.  
12                   This book covers a complete description of all levels of the Tone Scale.”

13 Hubbard is the author of *Science of Survival*. (Testimony of Engel; Exhibits A-12, R-1)

14           30)   Complainant was paid \$20 per hour at the time of her resignation and  
15 worked an average of 34 hours per week. (Testimony of Complainant)

16           31)   AWEPC provided Complainant with medical insurance that terminated on  
17 August 31, 2009. (Testimony of Complainant)

18           32)   On the morning of August 25, 2009, Complainant visited Dr. Paul  
19 Johnson. Among the things she consulted him for was a “rash on her stomach,” an  
20 “increase in anxiety, stress, upset stomach, and diarrhea for the past couple of weeks,”  
21 an inability to sleep, and loss of weight. She also told Dr. Johnson that she was “an  
22 emotional wreck.” Dr. Johnson found Complainant to be “very tearful, and obviously  
23 very anxious and emotional.” He diagnosed Complainant’s primary condition as  
24 “Anxiety,” prescribed Zolpidem and Lorazepam, and recommended she try some  
25 Lamisil for her stomach rash. Complainant had experienced a similar rash on her legs  
in September 2008 and Dr. Johnson had treated it as an allergic reaction. (Testimony  
of Complainant; Exhibit A-27)

1           33) On the afternoon of August 25, 2009, Complainant had an annual medical  
2 exam with Dr. Mary Jane Davis. Complainant had previously scheduled the  
3 appointment for September 1, but rescheduled it because of the pending expiration of  
4 AWEPC's medical insurance coverage. Dr. Davis's chart notes include the following  
5 statement:

6           "Constitutional: Huge stress, just resigned under duress from dental office after  
7 being extensively pressured to go to a scientology/hubbard based conference.  
8 saw Paul Johnson today, will be starting a new med for anxiety/depression, filing  
L and I complaint."

8 (Testimony of Complainant; Exhibit A-26)

9           34) Complainant had a follow-up appointment with Dr. Johnson on September  
10 14, 2009. She was billed \$74 for that visit and paid the entire bill in a series of  
11 payments. Had she still been insured, her portion of the bill would have been only \$20.

12 (Testimony of Complainant; Exhibit A-24)

13           35) Complainant has wanted to see a doctor on a number of occasions since  
14 September 1, 2009, for medical conditions that include colds, sinus infections, irregular  
15 moles, spots on her chest, and a periodic "excruciating pain" that "runs from [her] back  
16 down [her] left leg. Except for the September 14, 2009, visit to Dr. Johnson, she has  
17 not seen a doctor because she has no medical insurance and cannot afford it.

18 (Testimony of Complainant)

19           36) Complainant experienced stress for months as a result of her termination  
20 and experienced stomach aches, sleep problems – including two weeks of insomnia  
21 that began the weekend before her termination, worry about her future, and worry over  
22 her lack of health insurance for herself and her children. (Testimony of Complainant,  
23 Parkison)

24           37) Complainant filed for and received unemployment benefits after leaving  
25 AWEPC's employment and began to look for another job on or about September 1,

1 2009. To look for work, she read the Bend Bulletin newspaper and Craigslist  
2 employment advertisements daily and sent a cover letter and resume to prospective  
3 employers. Complainant continued to look for work in Central Oregon until she  
4 accepted a dental position in League City, Texas, a city near Houston. (Testimony of  
5 Complainant)

6 38) Complainant decided to look for a job in League City, Texas, because her  
7 sister lives there, she was having no luck finding a job in Central Oregon, and there  
8 were job opportunities in League City. She located three job openings through an  
9 internet job service for dental workers, scheduled three interviews for dental assistant  
10 positions in League City, and flew to Texas to be interviewed, using "air miles" to pay for  
11 her ticket. She was offered two jobs, accepted one with a dentist named Patterson that  
12 paid \$18 per hour, but had no benefits, moved to Texas with her boyfriend and Addison,  
13 the younger of her two daughters, and began work shortly before Thanksgiving 2009.<sup>8</sup>  
14 Her move cost \$10,600. Her moving expenses included renting a moving truck and car  
15 trailer, gasoline for the truck, hotel expenses, food expenses, and gasoline for the car  
16 she drove to Texas separate from the moving truck. She and her daughter initially lived  
17 with her sister and her sister's two children in a 1200 square foot house. (Testimony of  
18 Complainant; Exhibit A-22)

19 39) When Complainant moved, her older daughter, Allie, who is still in school  
20 and was 13 years old at the time of the hearing, remained in Central Oregon. Since her  
21 move, Complainant has only been able to see Allie on school breaks. While  
22 Complainant worked for Dr. Engel, she saw Allie every day except when Allie stayed at  
23 her father's house in Redmond. Complainant feels "very sad" because she is "missing  
24

25 \_\_\_\_\_  
<sup>8</sup> Thanksgiving in 2009 occurred on November 26.

1 out on a lot of [Allie's] life" that she would have experienced, had she remained  
2 employed by AWEPC. (Testimony of Complainant, Parkison)

3 40) After leaving AWEPC's employment, Complainant met her financial  
4 obligations, including her job search and moving expenses, with her unemployment  
5 benefits, \$5,000 that she borrowed from her mother and is still been unable to repay its  
6 entirety, and money that her boyfriend earned from his on-call work. (Testimony of  
7 Complainant, Parkison)

8 41) Complainant worked five months for Dr. Patterson, working an average of  
9 36 hours per week and earning \$648 per week gross wages. Complainant then went to  
10 work for another dentist named Wahbah, starting \$17.50 per hour and getting a raise to  
11 \$18 per hour after 90 days. Like Dr. Patterson, Dr. Wahbah provided no benefits.  
12 When Dr. Wahbah retired in October 2011, Complainant began work for Dr. Lynch, the  
13 dentist who bought Wahbah's practice. Complainant worked an average of 36 hours  
14 per week for Wahbah and Lynch. At the time of the hearing, Complainant still worked  
15 for Dr. Lynch and was paid \$18 per hour. (Testimony of Complainant)

16 42) On her 2009 IRS 1040 tax return, Complainant declared \$10,600 in  
17 moving expenses. Complainant did not produce a copy of the Form 3903 she was  
18 required to file with her 1040, and testified that she had filed her taxes electronically and  
19 was unable to find the Form 3903. (Testimony of Complainant; Exhibit A-22)

20 43) The IRS's 2009 Form 3903 only requires a taxpayer to state the total of  
21 "Transportation and storage of household goods and personal effects" and "Travel  
22 (including lodging) from your old home to your new home \* \* \*" and includes the  
23 admonition "**Do not** include the cost of meals." (Judicial Notice)



1 Engel gave Complainant an outline of the symposium, which included some terms  
2 Complainant was unfamiliar with, including "tone scale."

3 7) The symposium cost AWEPC the flat fee of \$3500, regardless of how  
4 many staff members attended.

5 8) Prior to receiving the symposium outline, Complainant knew no specifics  
6 about the Church of Scientology except that Tom Cruise and John Travolta "claimed to  
7 be members." Although Dr. Engel had used methodology developed by L. Ron  
8 Hubbard in his business practice since first contracting with Hollander, Complainant had  
9 been unaware that it was related in any way to Scientology prior to July 2009.

10 9) After receiving the outline, Complainant did internet research on some of  
11 the phrases it contained, including the "tone scale," and learned from the Church of  
12 Scientology's website that the "tone scale" is a "fundamental part of the Church of  
13 Scientology." After work on Tuesday, August 18, Complainant asked Dr. Engel if the  
14 conference was mandatory and he told her it was because he had already paid for it.  
15 Complainant told Dr. Engel she would not attend because of ties to the Church of  
16 Scientology. Based on her Christian beliefs, Complainant opposes "Scientology itself"  
17 and believes that her Christian beliefs are "contradicted by the Church of Scientology."

18 10) On Wednesday, August 19, 2009, two new posters were posted in  
19 Respondent's lunchroom that contained the writings of L. Ron Hubbard, respectively  
20 captioned "The Illustrated Tone Scale in Full, And the Know to Mystery Scale, L. RON  
21 HUBBARD" and "The Condition Formulas by L. RON HUBBARD."

22 11) At the end of the workday on August 20, Dr. Engel and his wife asked  
23 Complainant to meet with them in Respondent's "relaxation room," where they gave  
24 Complainant three documents related to the symposium and Dr. Engel explained his  
25 need for Complainant to attend the symposium. One of the documents stated that one

1 of the symposium talks was about the "Emotional Tone Scale." Another topic was  
2 "Marketing & Promotion" that included training on how to obtain referrals. Prior to this  
3 time, Complainant did not routinely ask patients for referrals.

4 12) During the meeting, Francie Engel asked Complainant how she acquired  
5 her information about Scientology. Complainant explained she had researched it on the  
6 Internet, including the tone scale, and talked to her mom and pastor. In response to Dr.  
7 Engel's question about her religious beliefs, Complainant told Dr. Engel that her  
8 religious belief "was none of his business" and that her objection to the symposium was  
9 based on its ties to the Church of Scientology and her personal religious beliefs. At the  
10 end of the meeting, Dr. Engel told Complainant that she could attend the symposium or  
11 resign.

12 13) That night, Complainant conducted more internet research on Silkin and  
13 found websites containing information that led her conclude that Silkin was affiliated  
14 with the Church of Scientology. Complainant also wrote a letter to Dr. Engel that she  
15 gave to him the next morning. In the letter, she stated her objection to attending the  
16 symposium because her "sincerely held religious beliefs \* \* \* directly contradict[ed] the  
17 principles of the Church of Scientology," in particular the "Tone Scale" program, and  
18 asked that Dr. Engel reasonably accommodate her by not requiring her to attend the  
19 symposium or allow her to attend alternative, equivalent training.

20 14) On the morning on August 21, Dr. Engel asked Complainant to speak with  
21 his Silkin consultant about the symposium. Complainant initially agreed, then declined  
22 after Dr. Engel set up the call because she "felt pressured" and because she believed  
23 that representative would be biased because of Silkin's "known ties" to the Church of  
24 Scientology." Complainant told Dr. Engel again that she would not attend the  
25 conference.

1           15) At the end of the workday on August 21, Dr. Engel told Complainant that  
2 she would not be working the following week because he was taking the week off and  
3 Brianne Summer would be answering the phones instead of Complainant. He  
4 continued trying to convince Complainant to attend the symposium and told  
5 Complainant that if he made an exception for her, he would have to make an exception  
6 for everyone. In response, Complainant quit.

7           16) Complainant quit because she could no longer handle being pressured to  
8 attend the Silkin symposium. Had she not been required to attend the symposium, she  
9 would have chosen to remain employed by AWEPC.

10           17) The workbook actually used at the Symposium includes a number of  
11 quotations attributed to L. Ron Hubbard. It contains sections on "Stability," the  
12 "Emotional Tone Scale," and "Marketing." Each section is prefaced by a statement that  
13 it is published by the "SILKIN MANAGEMENT GROUP" and "Quoted material by L. Ron  
14 Hubbard \* \* \* from the copyrighted works of L. Ron Hubbard." The section on the  
15 Emotional Tone Scale contains seven pages of Hubbard's writings that summarize the  
16 different levels on the Tone Scale.

17           18) Complainant was paid \$20 per hour at the time of her resignation and  
18 worked an average of 34 hours per week. AWEPC provided Complainant with medical  
19 insurance that terminated on August 31, 2009.

20           19) Complainant actively sought work starting one week after termination and  
21 continued to seek work until she was hired for a dental assistant job in Texas that  
22 started in Thanksgiving week 2009. She also paid \$54 in out-of-pocket medical  
23 expenses for a medical exam that would have been paid by AWEPC's insurance carrier,  
24 had she not left AWEPEC's employment. It cost her \$10,600 to move. As of the date of  
25 hearing, she had suffered \$12,000 in lost wages, calculated as follows:





1 or pervasive to have the purpose or effect of unreasonably interfering with  
2 Complainant's work performance or creating an intimidating, hostile or offensive working  
3 environment; (b) Complainant's submission to the conduct was made either explicitly or  
4 implicitly a term or condition of her employment; and/or (c) Complainant's submission to  
5 or rejection of the conduct was used as the basis for employment decisions affecting  
6 Complainant.

7 In pertinent part, ORS 659A.030(1)(b) provides:

8 (1) It is an unlawful employment practice \* \* \* (b) For an employer, because of an  
9 individual's \* \* \* religion \* \* \* to discriminate against the individual in  
compensation or in terms, conditions or privileges of employment."

10 OAR 839-005-0010(4)(a)-(d) provide:

11 "(4) Harassment: Harassment based on an individual's protected class is a type  
of intentional unlawful discrimination. \* \* \*

12 "(a) Conduct of a verbal or physical nature relating to protected classes other  
13 than sex is unlawful when substantial evidence of the elements of intentional  
discrimination, as described in section (1) of this rule, is shown and:

14 "(A) Such conduct is sufficiently severe or pervasive to have the purpose or effect  
15 of unreasonably interfering with an individual's work performance or creating an  
intimidating, hostile or offensive working environment;

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

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

19 "(b) The standard for determining whether harassment is sufficiently severe or  
20 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.

21 "(c) Employer Proxy: An employer is liable for harassment when the harasser's  
22 rank is sufficiently high that the harasser is the employer's proxy, for example,  
the employer's president, owner, partner or corporate officer.

23 "(d) Harassment by Supervisor plus Tangible Employment Action: An employer is  
24 liable for harassment by a supervisor with immediate or successively higher  
authority over an individual when the harassment results in a tangible  
25 employment action that the supervisor takes or causes to be taken against the  
individual. A tangible employment action includes, but is not limited to, any of the  
following:

1 (A) Terminating employment, including constructive discharge;

2 \*\* \* \* \* \*

3 (D) Changing a term or condition of employment, such as work assignment, work  
4 schedule, compensation or benefits or making a decision that causes a  
5 significant change in an employment benefit.”

6 In pertinent part, OAR 839-005-0010(1) provides:

7 “(1) Substantial evidence of intentional unlawful discrimination exists if the  
8 division’s investigation reveals evidence that a reasonable person would accept  
9 as sufficient to support the following elements:

10 “(a) The respondent is a respondent as defined by ORS 659A.001(10) and OAR  
11 839-005-0003(12) of these rules;

12 “(b) The complainant is a member of a protected class;

13 “(c) The complainant was harmed by an action of the respondent; and

14 “(d) The complainant’s protected class was the motivating factor for the  
15 respondent’s action.”

16 Based on the above, the Agency is required to prove the following elements to  
17 prevail on its harassment claim: (1) AWEPC was an employer subject to ORS  
18 659A.001 to 659A.033; (2) AWEPC employed Complainant; (3) AWEPC, through its  
19 proxy, engaged in conduct directed at Complainant related to her religious beliefs or  
20 non-beliefs; (4) the conduct was sufficiently severe or pervasive to have the purpose or  
21 effect of unreasonably interfering with Complainant’s work performance or creating an  
22 intimidating, hostile or offensive working environment; Complainant’s submission to the  
23 conduct was made either explicitly or implicitly a term or condition of her employment  
24 and/or Complainant’s submission to or rejection of the conduct was used as the basis  
25 for employment decisions affecting Complainant; and (5) Complainant was harmed by  
the conduct. An employer may be held liable for religious harassment regardless of the  
motivation for committing a harassing act. *In the Matter of James Meltebeke, 10 BOLI  
102, 122 (1992), reversed and remanded, Meltebeke v. Bureau of Labor and Industries,  
120 Or App 273, 852 P2d 859 (1993), remanded with instructions to dismiss, 322 Or  
132, 903 P2d 351 (1995)* The forum must also consider the Oregon Supreme Court’s

1 holding in *Meltebeke* that, in a religious discrimination case, an employer's lack of  
2 knowledge that his conduct created an intimidating, hostile, or offensive work  
3 environment is an affirmative defense under sections 2 and 3 of Article I of the Oregon  
4 Constitution.<sup>9</sup> *Id.*, at 153.

5 **A. AWEPC was an employer subject to ORS 659A.001 to 659A.033.**

6 This element is undisputed.

7 **B. AWEPC employed Complainant.**

8 This element is also undisputed.

9 **C. Dr. Engel's conduct directed at Complainant was related to her religious**  
10 **beliefs.**

11 The third element requires an analysis of whether Dr. Engel's conduct that was  
12 directed at Complainant was related to her religious beliefs. The conduct directed at  
13 Complainant that she found objectionable all occurred between August 18 and 21<sup>10</sup> and  
14 is summarized below:

- 15 • After work on Tuesday, August 18, Complainant asked Dr. Engel if the Silkin  
16 symposium was mandatory and he told her it was because he had already  
17 paid for it. Complainant told Dr. Engel that she did not want to attend  
18 because of the symposium's ties to the Church of Scientology, her belief that  
19 "it was religious in nature," and because it was "against her religion."
- 20 • Between August 19 and 21, 2009, there were two newly-posted posters in  
21 Respondent's lunchroom containing writings attributed to L. Ron Hubbard  
22 entitled "The Illustrated Tone Scale in Full, And the Know to Mystery Scale"  
23 and "The Condition Formulas."<sup>11</sup>

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21 <sup>9</sup> Under OAR 839-050-0130(3), the "failure of the party to raise an affirmative defense in the answer is a  
22 waiver of such a defense." In their answer, Respondents did not specifically raise Respondents' lack of  
23 knowledge that Dr. Engel's conduct created an intimidating, hostile, or offensive work environment as an  
24 affirmative defense. However, the forum need not decide whether Respondents waived this defense  
25 because the facts establish that Respondents knew that Complainant objected to Dr. Engel's conduct.

<sup>10</sup> See Finding of Fact #24 – The Merits.

<sup>11</sup> Complainant's testimony that she would have continued to work despite the presence of the posters,  
had she not been required to attend the symposium, does not require a conclusion that she did not find  
the posters offensive in light of her testimony that she may have objected to them, had she continued in  
AWEPC's employ. Her specific testimony in this regard was: **Q:** "If you would not have quit, you would

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- At the end of the workday on August 20, Dr. Engel and his wife required Complainant to meet with them to discuss the symposium and Dr. Engel's need for Complainant to attend that symposium. During the meeting, Dr. Engel's wife asked Complainant how she acquired her information about Scientology. Complainant explained she had researched it on the Internet, including the tone scale, and talked to her mom and pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told Dr. Engel that her religious belief "was none of his business" and that her objection to the symposium was based on its ties to the Church of Scientology and her personal religious beliefs. During the meeting, Complainant got up to leave and Dr. Engel told her that if she left the building, he would consider that she had resigned. At the end of the meeting, Dr. Engel told Complainant that she could either go to the symposium or resign.
- 9
- Sometime during the morning on August 21 Dr. Engel asked Complainant to speak with his Silkin consultant over the phone about the symposium, noting that he could listen to "Saddam Hussein and no harm could come of it." Complainant initially agreed to speak to the consultant, then refused to when Dr. Engel made the consultant available to talk with her. Complainant decided not to talk with a Silkin representative because she believed that representative would be biased because of Silkin's "known ties" to the Church of Scientology and she felt pressured.

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Except for the posters, the above events all involved Dr. Engel's attempts to convince Complainant to attend the Silkin symposium, which Complainant opposed because it involved exposure, in a sequestered setting at a mountain resort over a three-day period, to teachings that conflicted with her Christian beliefs.<sup>12</sup> Other than his mandate that Complainant attend the symposium, there is no evidence that Dr. Engel tried to actively proselytize Complainant to Scientology, his religion. Complainant and Dr.

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have continued to work at Dr. Engel's office with the posters, with the DVDs, with the tone scale, and with all the Scientology terms, right?" A: "I would have continued my employment there. I'm not saying that I would not have objected to those." Cf. *In the Matter of Central Oregon Building Supply, Inc.*, 17 BOLI 1, 12 (1998), *aff'd without opinion*, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999) ("Viewing the record as a whole, it is not inconsistent to conclude that Respondent's work environment had been hostile and offensive to Complainant, but also to find that he wanted another job with Respondent.")

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<sup>12</sup> There is no dispute that Scientology is a religion, that the training at the symposium involved study of L. Ron Hubbard's non-fiction writings -- as those writings are quoted extensively in the symposium training materials -- and Respondent provided no evidence to contradict evidence in the record obtained by

1 Engel agree that Complainant told Dr. Engel on August 18th that she did not want to  
2 attend the symposium due to its ties to the Church of Scientology, and made the same  
3 objection on August 20th, and 21<sup>st</sup>, adding her objections that “it was religious in nature”  
4 and because it was “against her religion.” They also agree that, after she had stated  
5 her objections on August 18, he continued his attempts to persuade her to attend the  
6 symposium, as described above, arguing that the symposium was not religious in  
7 nature<sup>13</sup> because it involved a purely “secular” application of Scientology principles.<sup>14</sup>  
8 Finally, the forum has concluded that Dr. Engel required his entire staff to attend, not  
9 just Complainant. However, it is only Complainant who objected to attending based on  
10 her religious beliefs.

11 Based on these facts, the forum concludes that, after Complainant voiced her  
12 objections to attending the symposium based on her religious beliefs, Dr. Engel’s  
13 conduct that was directed at convincing Complainant to attend the symposium was  
14 related to Complainant’s religious beliefs.

15 **D. The three theories of harassment.**

16 The fourth element, as plead by the Agency in its Formal Charges, involves all  
17 three separate theories of harassment set out in OAR 839-005-0010(4)(A)(a-c). The  
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20 Complainant on August 20 that “all of Hubbard’s non-fiction writings [are] scripture of the Church of  
21 Scientology.” See Findings of Fact ##3, 20, 29 – The Merits.

21 <sup>13</sup> Dr. Engel’s position can be summarized in his testimony: “The confusion for me was, is she was  
22 stating that it was religious in nature. And for me, it confuses me because the tone scale, marketing,  
23 hiring, topics that were involved here about the symposium, stability, financial success, working as a  
24 team, to me, there’s nothing religious about that.”

23 <sup>14</sup> In *Christofferson*, after a lengthy discussion of the history of and theories of Scientology, the Oregon  
24 Court of Appeals held that Scientology is a religion and that its teachings qualified for the protection of the  
25 Free Exercise Clause of the First Amendment of the Oregon and U.S. Constitutions, but found itself  
unable to separate the Church of Scientology’s “theories” into secular and religious components. In its  
discussion, the Court stated: “Although certain of the theories espoused by Scientology appear to be  
more psychological than religious, we cannot dissect the body of beliefs into individual components. It  
seems clear that if defendants sought to teach Scientology in the public schools in this country, they  
would be prohibited from doing so by reason of the Establishment Clause of the First Amendment. \* \* \*

1 first requires proof that Dr. Engel's conduct was sufficiently severe or pervasive to have  
2 the purpose or effect of unreasonably interfering with Complainant's work performance  
3 or creating an intimidating, hostile or offensive working environment. The second and  
4 third theories, plead cumulatively and in the alternative, require proof that Complainant's  
5 submission to the conduct was made either explicitly or implicitly a term or condition of  
6 her employment "and/or" Complainant's submission to or rejection of the conduct was  
7 used as the basis for employment decisions affecting Complainant. The forum  
8 examines each theory separately, as each requires different proof and provides a  
9 different basis for liability. If the Agency prevails on any of the three theories, AWEPC  
10 is strictly liable for its harassment of Complainant based on religion if the forum also  
11 concludes that Dr. Engel was AWEPC's "proxy." OAR 839-050-0010(4)(c)&(d).

12 1. The First Theory – Dr. Engel's conduct created a hostile, intimidating or  
13 offensive working environment for Complainant.

14 In determining whether conduct is sufficiently severe or pervasive to have  
15 created a hostile, intimidating or offensive working environment, the forum looks at the  
16 totality of the circumstances, i.e., the nature of the conduct and its context, the  
17 frequency of the conduct, its severity or pervasiveness, whether it is physically  
18 threatening or humiliating, and whether it unreasonably interferes with an employee's  
19 work performance. *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 287  
20 (2009).

21 In this case, the conduct consisted of (1) Dr. Engel's initial attempt on August 18  
22 to convince Complainant to attend the Silkin symposium, during which time  
23 Complainant stated her religious-based opposition; (2) the presence of two posters, for  
24 three days, in AWEPC's lunch room that contained L. Ron Hubbard's writings about the

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The theories of Hubbard are interrelated and involved a theory of the nature of the person and of the individual's relationship with the universe." (internal citations omitted)

1 "Tone Scale" and "The Condition Formulas"; (3) Dr. Engel's repeated attempts on  
2 August 20 and 21 to convince Complainant to attend the Silkin symposium after she  
3 had already stated her religious-based opposition, including his request that she talk  
4 with his Silkin consultant; and (4) Dr. Engel's ultimatums that she attend or lose her job.

5 The context involves several primary components. First, the conduct all occurred  
6 at Complainant's workplace, either after work or the end of the workday, and was all  
7 initiated by Dr. Engel. Second, although Complainant did not testify that she found the  
8 posters offensive, they appeared in AWEPC's lunch room same week that Dr. Engel  
9 was trying to convince Complainant to attend the symposium. Third, Complainant's  
10 knowledge, based on research she conducted from August 18-20, that most or all of the  
11 symposium training was based on the writings of L. Ron Hubbard, the founder of  
12 Scientology, and Dr. Engel's unequivocal statements to Complainant that her job was  
13 on the line if she did not attend the symposium.

14 As to frequency, severity, and pervasiveness, the conduct occurred daily during a  
15 four-day period that culminated in Complainant's resignation. There was scant  
16 testimony about how it affected Complainant during her actual workdays on August 18,  
17 19, and 20, except for the end of the day conversations she had with Dr. Engel in which  
18 he and his wife tried to persuade Complainant to attend the symposium by explaining it  
19 involved a purely "secular" application of L. Ron Hubbard's writings. However,  
20 Complainant credibly testified that she was "very nervous and anxious about confronting  
21 Dr. Engel" on August 18 when she first told him that she "wished not to attend the  
22 symposium due to the ties to the Church of Scientology," that she "had increased  
23 anxiety and stress" from the time Dr. Engel asked the staff if they were available to  
24 attend the symposium and Complainant "started looking into Church of Scientology,"  
25 and that she was "stressed and anxious about it, about telling Dr. Engel, \* \* \* I guess

1 confronting him with my opposition to [the symposium].” Regarding her resignation, she  
2 testified that “Quitting my job was not taken lightly. I know for my mental and physical  
3 well-being that I could not continue to work under such – such a hostile environment.”

4 There is no evidence that the conduct interfered with Complainant’s work  
5 performance, except for her testimony that it ultimately made her tender her resignation.

6 Considering all of the above, the forum must ultimately determine whether a  
7 reasonable person in the circumstances of the complaining individual would have  
8 perceived the conduct to be sufficiently severe or pervasive to create a hostile,  
9 intimidating, or offensive working environment. OAR 839-050-0010(4)(b). In making  
10 this determination, the forum looks at the “totality of the circumstances.” *In the Matter of*  
11 *Servend International, Inc.*, 21 BOLI 1, 28 (2000), citing *In the Matter of Fred Meyer,*  
12 *Inc.*, 15 BOLI 77 (1996), affirmed, *Fred Meyer v. Bureau of Labor and Industries*, 152 Or  
13 App 302, 309, 954 P2d 804 (1998).

14 The forum has issued Final Orders in only three prior cases involving allegations  
15 of religious harassment. In two cases, the forum found that respondent’s aggressive  
16 and constant attempts to proselytize a complainant who held different beliefs than  
17 respondent created an offensive environment and constituted unlawful harassment.  
18 *Meltebeke*, 10 BOLI at 113; *In the Matter of Sapp’s Realty, Inc.*, 4 BOLI 232, 278-81  
19 (1985). In the third case, the forum held that respondent had not harassed complainant  
20 when respondent employer and respondent’s manager engaged in conversations with  
21 complainant regarding the merits of her religion because complainant’s continued  
22 employment was not dependent upon listening to these discussions, the remarks were  
23 not of a continuous nature, and the remarks were not in the nature of preaching or  
24 proselytizing. *In the Matter of Deana Miller*, 6 BOLI 12, 27-28 (1986). This case does  
25 not involve explicit preaching or proselytizing, but insistence that the Complainant

1 attend a symposium involving extensive exposure to religious writings she opposed  
2 based on her own religious beliefs. Consequently, these cases provide little guidance  
3 to assist the forum in evaluating the perspective of a reasonable person in  
4 Complainant's circumstances. Likewise, the forum has found no published court  
5 opinions involving a similar fact pattern.

6 A reasonable person in Complainant's circumstances would have been a  
7 baptized Christian with a sincerely-held religious belief, like Complainant. In the forum's  
8 opinion, that person would have taken similar steps as Complainant to educate him or  
9 herself about the nature of the symposium and would have also learned that attending  
10 the workshops on "Stability," the "Emotional Tone Scale," and "Marketing" involved  
11 being exposed to and assimilating basic principles of Scientology over a three-day  
12 period in a sequestered setting at a mountain resort.<sup>15</sup> That reasonable person would  
13 likely have also learned that some websites link the Silkin group to the Church of  
14 Scientology and would have found some websites containing allegations that consulting  
15 groups like Silkin introduce their clients to the religious aspects of Scientology.<sup>16</sup> In  
16 addition, that person would have seen L. Ron Hubbard posters containing statements  
17 that were a fundamental part of the Church of Scientology appear in AWEPC's lunch  
18 room in the same time frame. Under those circumstances, although their duration was  
19 only four days, the forum concludes that the complained of conduct was sufficiently  
20 severe or pervasive to create a hostile, intimidating, or offensive working environment  
21 for a reasonable person in Complainant's circumstances and did so for Complainant.

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23 <sup>15</sup> Respondents argue in their exceptions that the "Tone Scale" presented at the symposium was a  
24 different "tone scale" than the one used by the Church of Scientology, but presented no evidence that L.  
25 Ron Hubbard created more than one "tone scale" and the numbered elements of the "tone scale" in the  
symposium workbook are virtually identical to elements similarly numbered in the poster Dr. Engel posted  
in his office on August 19, 2009.

<sup>16</sup> There is no evidence that Complainant possesses more than average skills at internet research.

1 Dr. Engel, as AWEPC's sole owner and proxy, was AWEPC's "proxy" under OAR 839-  
2 005-0010(4)(c), making AWEPC strictly liable for Dr. Engel's conduct.

3 2. The second theory – Complainant's submission to conduct was made a term or  
4 condition of employment

5 Under this theory, the forum need not evaluate the frequency, severity, and  
6 pervasiveness of the conduct. With the first three elements of the harassment test  
7 satisfied, the only question is whether Dr. Engel made Complainant's submission to his  
8 conduct an explicit or implicit term or condition of Complainant's continued employment  
9 with AWEPC. Again, the conduct in question was Dr. Engel's attempts to persuade  
10 Complainant to attend the symposium. In the August 20 conversation in which Dr.  
11 Engel tried to convince Complainant to attend the symposium, he told Complainant that  
12 if she left the office and did not let him finish the conversation that he would take that as  
13 her resignation. This left Complainant no choice but to submit to the conduct if she  
14 wanted to keep her job.

15 3. The third theory – Complainant's rejection of Dr. Engel's conduct was used as a  
16 basis for an employment decision affecting Complainant.

17 As with the second theory, the forum need not evaluate the frequency, severity,  
18 and pervasiveness of the conduct. With the first three elements of the harassment test  
19 satisfied, the only question is whether Dr. Engel used Complainant's rejection of his  
20 conduct as a basis for an employment decision affecting Complainant. Two  
21 employment decisions were made that are relevant to this question – Dr. Engel's  
22 decision that Complainant would not work the week following August 21, and  
23 Complainant's resignation. The decision about Complainant's work schedule was not  
24 caused by Complainant's refusal to attend the symposium.<sup>17</sup> However, Complainant's

25 <sup>17</sup> See, *infra*, the forum's discussion regarding the Agency's allegation that Dr. Engel cut Complainant's  
hours in retaliation for her refusal to attend the symposium.

1 resignation, which the forum finds to be a constructive discharge,<sup>18</sup> was a direct result of  
2 her refusal to attend the symposium and, as such, the forum finds that Complainant's  
3 refusal to submit to Dr. Engel's conduct was the basis for an employment decision  
4 affecting her.

5 **E. Complainant was harmed by the conduct.**

6 Complainant credibly testified that she experienced anxiety and stress prior to  
7 her resignation as a result of Dr. Engel's efforts to persuade her to attend the  
8 symposium. This satisfies the "harm" element of the Agency's harassment case.<sup>19</sup>

9 **FAILURE TO REASONABLY ACCOMMODATE BASED ON RELIGION**

10 The Agency's Formal Charges, paragraphs 27-30, allege that Respondent  
11 AWEPC failed to reasonably accommodate Complainant's religious beliefs by (1) failing  
12 to engage in an interactive process, (2) by refusing to grant Complainant's request to be  
13 excused from the symposium, and (3) by failing to reasonably accommodate  
14 Complainant's religious belief, observance or practice, and/or to accommodate her use  
15 paid or unpaid leave rather than attend the symposium. The first two allegations  
16 encompass one potential violation of ORS 659A.030(1)(b) because "interactive process"  
17 is a step in the analysis of whether a reasonable accommodation violation has occurred,  
18 not a separate, stand-alone violation.<sup>20</sup> The third allegation states a potential violation

19 \_\_\_\_\_  
20 <sup>18</sup> See, *infra*, the forum's discussion regarding constructive discharge.

21 <sup>19</sup> Cf. *In the Matter of Servend International, Inc., 21 BOLI 1, 27 (2000)*, *In the Matter of Servend*  
22 *International, Inc., 21 BOLI 1, 27 (2000)*, affirmed without opinion, *Servend International, Inc. v. Bureau of*  
23 *Labor and Industries*, 183 Or App 533, 53 P3d 471 (2002) (complainant's credible testimony that she was  
offended by behavior the forum found to be racial harassment satisfied the "harm" element of the  
agency's prima facie case).

24 <sup>20</sup> Compare OAR 839-006-0206(4), the rule promulgated by the Agency regarding reasonable  
25 accommodation related to disability that requires the employer to "initiate a meaningful interactive process  
with the employee or applicant to determine whether reasonable accommodation would allow the  
employee or applicant to perform the essential functions of a position held or sought." OAR 839-006-  
0206(4). There is no similar statutory provision or rule with respect to reasonable accommodation of  
religious beliefs. C.f. *EEOC Compliance Manual on Religious Discrimination*, issued 7/22/08, at 48 ("[A]n

1 of ORS 659A.030, through ORS 659A.033(1).<sup>21</sup> In response, Respondents raised five  
2 affirmative defenses: (1) symposium attendance was a bona fide occupational  
3 requirement; (2) excusing Complainant from attendance was an undue hardship; (3)  
4 Complainant's religious beliefs did not prohibit her attendance at the symposium; (4)  
5 Complainant failed to cooperate in good faith with Respondents' attempt to  
6 accommodate Complainant; and (5) Respondents granted the accommodation  
7 requested but Complainant resigned before Respondents could implement it.

8 **A. Sincerely held religious belief.**

9 Through the credible testimony of Complainant, her baptizing pastor, and a copy  
10 of her baptismal certificate, the Agency established that Complainant was baptized as a  
11 Christian in 1993 at age 17, that she has maintained sincerely held Christian beliefs,  
12 and that she objected to attending the symposium because it contained teachings that  
13 conflicted with her Christian beliefs. Respondents do not argue with the sincerity of her  
14 beliefs, but contend that those beliefs did not prohibit Complainant from attending  
15 Silkin's "wholly secular" symposium that was "not in any way religious."

16 The evidence does not support Respondents' position. Respondents presented  
17 no evidence to dispute evidence provided by the Agency that L. Ron Hubbard is the  
18 founder of the Church of Scientology, that all of Hubbard's non-fiction writings are  
19 scripture of the Church of Scientology, and that most or all of the symposium training  
20 was based on the writings of Hubbard, including training on the Emotional Tone Scale,  
21 a fundamental part of the Church of Scientology.<sup>22</sup> Respondents' claim that Scientology

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22  
23 employer is not required by Title VII to conduct a discussion with an employee before denying the  
24 employee's accommodation request \* \* \*")

24 <sup>21</sup> ORS 659A.033 begins with the following statement: "(1) An employer violates ORS 659A.030 if:  
25 [followed by enumerated circumstances]."

<sup>22</sup> See Finding of Fact #29 – The Merits.

1 is a religion but that Hubbard's non-fiction writings -- the undisputed "scripture" of  
2 Scientology -- lose all religious context when reproduced for instructional purposes as a  
3 "secular" business model has no more merit than an argument that reproduction of  
4 sections of the Quran, Bible, or Book of the Mormon, when used for instructional  
5 purposes as a business model, has no religious context and is purely "secular." In  
6 support of this proposition, the forum further notes the inability of Oregon Court of  
7 Appeals to separate the Church of Scientology's "theories" into secular and religious  
8 components.<sup>23</sup> In summary, the forum finds that Complainant, had she attended the  
9 symposium, would have been subjected to training based on and quoting specific  
10 "scripture" from the Church of Scientology, training that she opposed because she  
11 believed the teachings of the Church of Scientology were in conflict with her own  
12 sincerely held Christian beliefs.

13 **B. Complainant's request for accommodation**

14 Complainant's request was that she be excused from attending the symposium  
15 based on its religious content and that she be allowed to "attend any non-secular"<sup>24</sup>  
16 program that you would require of me." Specifically, she told Dr. Engel she did not want  
17 to attend because of ties to the Church of Scientology, her belief that "it was religious in  
18 nature" and because it was "against her religion." Dr. Engel's initial response was to tell  
19 Complainant that attendance was mandatory because he had already paid for it.  
20 Subsequently, Dr. Engel and his wife asked Complainant to meet with them in  
21 AWEPC's "relaxation room," where they gave Complainant documents related to the  
22 symposium, explained the need for Complainant's attendance, and asked Complainant

23 \_\_\_\_\_  
24 <sup>23</sup> See fn. 14.

25 <sup>24</sup> Based on Complainant's objection to the Silkin symposium based on its religious content, the forum infers that the request in the note Complainant gave Dr. Engel on August 21 for a "non-secular" program was an error and that Complainant intended it to state "any secular program."

1 how she acquired her information about Scientology. Complainant explained she had  
2 researched it on the Internet, including the tone scale, and talked to her mom and  
3 pastor. In response to Dr. Engel's question about her religious beliefs, Complainant told  
4 Dr. Engel that her religious belief "was none of his business" and that her objection to  
5 the symposium was based on its ties to the Church of Scientology and her personal  
6 religious beliefs. During the conversation, Dr. Engel told Complainant he and his wife  
7 used Scientology tools to better them. Complainant told Dr. Engel that she felt she was  
8 being pressured and harassed to attend the symposium and she would not attend, then  
9 got up to leave, at which point Dr. Engel told her that if she left the building, he would  
10 consider that to be her resignation. Complainant left the room, then returned and  
11 finished the conversation in the "relaxation room," where Dr. Engel's wife was also  
12 present. At the end of the meeting, Dr. Engel told Complainant to "think about it  
13 overnight and make up her mind that she was either attending the symposium or she  
14 was out the door." In direct response to Complainant's question, Dr. Engel told  
15 Complainant that she could either go to the symposium or resign. The next day, Dr.  
16 Engel asked Complainant to speak with his Silkin consultant about the symposium,  
17 noting that he could listen to "Saddam Hussein and no harm could come of it."  
18 Complainant initially agreed to speak to the consultant, then decided not to talk with a  
19 Silkin representative when Dr. Engel told her the consultant was on the phone to talk  
20 with her because she believed that representative would be biased because of Silkin's  
21 "known ties" to the Church of Scientology. Complainant told Dr. Engel that she had  
22 decided not to speak to the consultant because she "felt pressured" and repeated that  
23 that she would not attend the conference.

24           Respondent argues that Complainant's refusal to disclose her specific religious  
25 beliefs to Dr. Engel and to talk with a Silkin consultant constituted Complainant's refusal

1 to engage in the very same interactive process that the Agency accuses Respondents  
2 of refusing to engage in. The forum rejects this argument. As part of a reasonable  
3 accommodation request, Complainant was not required to disclose her specific religious  
4 beliefs so that Dr. Engel could evaluate them to determine if they formed the basis for a  
5 reasonable accommodation AWEPC might be required to provide. The record as a  
6 whole also supports the conclusion that the Silkin consultant's talk would have focused  
7 on convincing Complainant that the symposium had no religious content. Given the  
8 forum's conclusion that the symposium was based on the theories and teachings of the  
9 Church of Scientology and Complainant's religious objection to attending, Dr. Engel's  
10 request that she talk with a Silkin consultant was not an act Complainant was required  
11 to engage to "cooperate in good faith with Respondents' attempt to accommodate  
12 Complainant."

13 In summary, Complainant's actions in the "interactive process" consisted of  
14 obtaining information from Dr. Engel about the symposium, doing independent research  
15 about the symposium and its contents, talking with her mom and pastor, telling Dr.  
16 Engel her conclusion that she would not attend because of the religious content of the  
17 symposium, listening to Dr. Engel's attempts to convince her that the symposium had  
18 no religious content and was purely secular, and telling Dr. Engel she would attend an  
19 equivalent program that lacked religious content. Dr. Engel's actions consisted of giving  
20 information to Complainant about the symposium, trying to convince her it had nothing  
21 to do with the Church of Scientology, telling Complainant that attendance was  
22 mandatory and that if she left the building on August 20 after work before he finished  
23 talking with her about the symposium that he would consider that her resignation,  
24 asking her about her specific religious beliefs, and attempting to get her to talk with a  
25 Silkin consultant.

1 **C. Was an accommodation available for Complainant?**

2 Under the facts of this case, the forum finds that there were two possible  
3 accommodations, both of which were requested by Complainant. First, that  
4 Complainant be excused entirely from attending the symposium. Second, that  
5 Complainant be scheduled to attend an alternative, equivalent symposium that had no  
6 religious content that was objectionable to her. Both alternatives, particularly the first,  
7 as it was held on Thursday-Saturday, involved the possibility that Complainant might  
8 have to take leave.

9 **D. Interplay of ORS 659A.030 and ORS 659A.033.**

10 As an initial matter, Respondents argue that Complainant was actually granted  
11 the accommodation she requested – being excused from attending the symposium --  
12 but she resigned before Respondents could implement it. The forum rejects this  
13 defense because it is not supported by the facts.

14 Prior to the enactment of ORS 659A.033, ORS 659A.030 and its predecessor,  
15 *former* ORS 659.030, prohibited discrimination in employment based on several  
16 protected classes that included religion. That prohibition included and still includes an  
17 affirmative duty on employers to make reasonable accommodation for an employee's  
18 religious beliefs to the extent the accommodation did not cause “undue hardship in the  
19 conduct of the employer's business.” *See In the Matter of Albertson's, Inc.*, 7 BOLI 227,  
20 239 (1988) (*citing In the Matter of Union Pacific Railroad Co.*, 2 BOLI 234, 237 (1982)).  
21 The standard for determining undue hardship was whether it imposed “more than *de*  
22 *minimus* costs.” *Albertson's*, at 242, *citing Transworld Airlines, Inc. v. Hardison*, 432 US  
23 63 (1977). In 2009, the legislature enacted ORS 659A.033, which contains provisions  
24 regarding the denial of religious leave or prohibition of specific observances or practices  
25 and establishes a more “employee-friendly” standard, set out below, for determining if

1 the accommodation imposes "undue hardship" on the employer in the specific  
2 circumstances set out in ORS 659A.033. That standard, set out in ORS 659A.033(4),  
3 reads as follows:

4 "(4) A reasonable accommodation imposes an **undue hardship on the**  
5 **operation of the business of the employer for the purposes of this section**  
6 **if the accommodation requires significant difficulty or expense.** For the  
purpose of determining whether an accommodation requires significant difficulty  
or expense, the following factors shall be considered:

7 "(a) The nature and the cost of the accommodation needed.

8 "(b) The overall financial resources of the facility or facilities involved in the  
9 provision of the accommodation, the number of persons employed at the facility  
and the effect on expenses and resources or other impacts on the operation of  
the facility caused by the accommodation.

10 "(c) The overall financial resources of the employer, the overall size of the  
11 business of the employer with respect to the number of persons employed by the  
employer and the number, type and location of the employer's facilities.

12 "(d) The type of business operations conducted by the employer, including the  
13 composition, structure and functions of the workforce of the employer and the  
geographic separateness and administrative or fiscal relationship of the facility or  
facilities of the employer."

14 (Bolded emphasis added)

15 There is a significant difference between the ORS 659A.030 standard of "*de minimus*  
16 costs" and the ORS 659A.033 standard of "significant difficulty or expense."  
17 Consequently, the forum must make an initial determination as to which standard  
18 applies to the facts in this case before it can decide if the two potential accommodations  
19 were "reasonable."

20 In pertinent part, ORS 659A.033 provides:

21 "(1) An employer violates ORS 659A.030 if:

22 "(a) The employer does not allow an employee to use vacation leave, or other  
23 leave available to the employee, for the purpose of allowing the employee to  
engage in the religious observance or practices of the employee;

24 "(b) Reasonably accommodating use of the leave by the employee will not  
25 impose an undue hardship on the operation of the business of the employer as  
described in subsections (4) and (5) of this section.

1 “(2) Subsection (1) of this section applies only to leave that is not restricted as to  
2 the manner in which the leave may be used and that the employer allows the  
3 employee to take by adjusting or altering the work schedule or assignment of the  
4 employee.

5 “(3) An employer violates ORS 659A.030 if:

6 “(a) The employer imposes an occupational requirement that restricts the ability  
7 of an employee \* \* \* to take time off for a holy day or to take time off to participate  
8 in a religious observance or practice;

9 “(b) Reasonably accommodating those activities does not impose an undue  
10 hardship on the operation of the business of the employer as described in  
11 subsections (4) and (5) of this section; and

12 “(c) The activities have only a temporary or tangential impact on the employee’s  
13 ability to perform the essential functions of the employee’s job.”

14 Summarized, ORS 659A.033 requires an employer to grant available unrestricted leave  
15 to an employee to engage in the religious observance or practices of the employee and  
16 prohibits an employer from imposing an occupational requirement that restricts the  
17 ability of an employee to take time off for a holy day or to participate in a religious  
18 observance or practice, absent a showing of undue hardship. Only the first requirement  
19 potentially applies here, as there is no evidence that attendance at the symposium  
20 restricted Complainant's ability to take time off for a holy day or to participate in a  
21 religious observance or practice. Both provisions focus on an employee's need for time  
22 off based on the “religious observance or practices” of the employee. This focus on the  
23 employee indicates that the ORS 659A.033 was tailored to ensure that employees must  
24 be allowed time off to observe or participate in their own “religious observance or  
25 practices,” absent undue hardship to the employer. In this case, Complainant, a  
Christian, sought the opposite – time off to not attend employer-required training that  
she believed was based on the teachings of the Church of Scientology and was  
contrary to her “personal religious beliefs.” Accordingly, whether or not Complainant’s

1 leave request<sup>25</sup> was covered under ORS 659A.033(1)(a) depends on whether her  
2 request for leave involved her own “religious observance or practices.” To determine  
3 that, the forum must first determine what the legislature meant when it used the terms  
4 “religious observance or practices.”

5 In interpreting a statute, the forum follows the analytical framework set out by the  
6 Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d  
7 1143 (1993) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). See  
8 *In the Matter of Petition for Declaratory Ruling, International Association of Fire*  
9 *Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor*, 31 BOLI 267, 281-  
10 82 (2012), *appeal pending*. Within that framework, the forum first examines the text  
11 and context of the statutes and also considers any pertinent legislative history proffered  
12 by the participants. In this case no legislative history was proffered, and the forum is  
13 not required to independently research that history unless the meaning of “religious  
14 observance or practices,” as used in ORS 659A.033, cannot be determined from a text  
15 and context analysis. The text of the statutory provision itself is the starting point for  
16 interpretation and the best evidence of the legislature’s intent. Also relevant is the  
17 context of the statutory provision, which includes other provisions of the same statute  
18 and other related statutes. If the legislature’s intent is clear from the text and context of  
19 the statutory provision, further inquiry is unnecessary. *In the Matter of Captain Hooks,*  
20 *LLP*, 27 BOLI 211, 229 (2006). In this case, the words “religious observance or  
21 practices” are not defined in ORS 659A.033 or in OAR 839-005-0140, the Agency’s  
22 administrative rule interpreting ORS 659A.033. They are also not defined in Title VII,  
23

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24 <sup>25</sup> The forum considers Complainant’s request not to attend the symposium as a “leave” request because  
25 it was held on Thursday through Saturday, Complainant would ordinarily have been working on Thursday  
and Friday, and there is no evidence that there would have been any work for her in the absence of Dr.  
Engel and the rest of his staff.

1 the federal law analogous to ORS 659A.033, or in EEOC Regulations or Guidelines on  
2 Religion, and the forum has found no case law on point. However, because the words  
3 “observances” and “practices” are words of common usage, the forum ascribes to them  
4 their plain, natural and ordinary meaning contained in Webster’s Third New Int’l  
5 Dictionary. *Id.* Those meanings, as relevant to this case, are as follows:

6 “**Practice:** \* \* \* **1b:** actual performance or application of knowledge as  
7 distinguished from mere possession of knowledge : performance or application  
8 habitually engaged in \* \* \*. *Webster’s*, at 1780.

9 “**Practices:** \* \* \* **3a:** systematic exercise for instruction or discipline <troops  
10 called out for~> <~makes perfect> <daily piano~> \* \* \*.” *Webster’s*, at 1780.

11 “**Observance:** **1a:** something (as an act of religious or ceremonial nature) that is  
12 carried out in accord with prescribed forms : a customary practice, rite, or  
13 ceremony **b:** a rule or set of regulations governing members of a religious order  
14 \* \* \*.” *Webster’s*, at 1558.

15 Accordingly, the forum concludes that “religious practices” are a form of behavior  
16 habitually engaged in based on the tenets of a person’s sincerely held religious  
17 beliefs,<sup>26</sup> and “religious observances” are acts of a ceremonial religious nature carried  
18 out in a form prescribed by a person’s sincerely held religious beliefs. Relying on  
19 *Webster’s*, the forum also concludes that “religious practices” are not limited to  
20 affirmative acts that a person believes he or she is required to take based on the  
21 person’s religious beliefs, e.g. praying at specific times every day, but can also include  
22 regular abstinence from commonly accepted practices proscribed by a person’s  
23 sincerely held religious beliefs, for example, not eating certain foods or not saluting a  
24 nation’s flag. Based on these definitions, Complainant’s objection to attending the  
25 symposium because of its relationship to the Church of Scientology “and her personal  
26 religious beliefs” does not qualify as a “religious observance” or “religious practice”

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<sup>26</sup> The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee. See 29 C.F.R. § 1605.1.

1 within the meaning of ORS 659A.033(1). Even if it did, under ORS 659A.033(2)  
2 AWEPC's failure to accommodate Complainant would have been unlawful only if  
3 Complainant was entitled to take leave during the symposium that was not restricted as  
4 to the manner in which the leave could be used and granting such leave did not create  
5 an undue hardship for AWEPC under ORS 659A.033(4). There is no evidence in the  
6 record whatsoever to show what AWEPC's leave policies were, that AWEPC even had  
7 a leave policy, or that Complainant was entitled to such leave.

8 In contrast, the focus of ORS 659A.030 is on employer accommodation of the  
9 employee's "religious beliefs." *Albertson's* at 239. In this case, the forum has  
10 concluded that Complainant's objection to attending the symposium was based on her  
11 religious beliefs. Under ORS 659A.030, AWEPC was required to provide reasonable  
12 accommodation to Complainant based on that objection.

13 **E. Under ORS 659A.030, was either excusing Complainant from attendance at**  
14 **the Silkin symposium or providing alternative, equivalent training a**  
15 **"reasonable accommodation?"**

16 The primary accommodation requested by Complainant was that she be excused  
17 entirely from attending the symposium. She also expressed her willingness to attend an  
18 alternative, equivalent training that had no religious content. Both were potentially  
19 "reasonable" accommodations unless they created an undue hardship for Respondents.  
20 The standard of proving undue hardship under ORS 659A.030 for any violations not  
21 covered under ORS 659A.033 is whether the proposed accommodation imposed "more  
22 than *de minimus* costs." This is an affirmative defense that Respondents have the  
23 burden of proving.

24 The forum first examines the costs, if any, associated with Complainant's request  
25 not to attend the symposium. AWEPC was assessed the flat fee of \$3500 for the  
symposium, regardless of how many staff members attended. Consequently,

1 Complainant's absence from the symposium would not have cost AWEPC anything in  
2 added symposium costs. Respondents assert that Complainant's failure to attend  
3 would have caused AWEPC to lose potential income and office efficiencies because  
4 Complainant would not have assimilated Silkin's business technology used by  
5 Respondents, including Silkin's marketing and teambuilding techniques. Respondents  
6 presented evidence that the AWEPC used Silkin's business technology throughout  
7 Complainant's employment, but no evidence that Complainant's failure to attend any  
8 previous symposium affected her work performance in any way. Complainant  
9 acknowledged that she did not routinely ask Dr. Engel's patients for referrals, and it is  
10 undisputed that the symposium included seeking patient referrals as a major topic in its  
11 Marketing section. However, Respondents provided no quantifiable evidence that  
12 Complainant's failure to attend the symposium would have affected Respondents'  
13 income negatively or that she had problems working as part of the "team" using  
14 Respondents' Hollander/Silkin business technologies before her termination.  
15 Respondents presented no other evidence to assist the forum in determining the  
16 potential income loss claimed by Respondents, such as who was hired to replace  
17 Complainant as Dr. Engel's dental assistant, whether that assistant underwent Silkin  
18 training, whether that assistant actively sought referrals from patients, whether  
19 Respondent's income increased as a result of the assistant's referral activities after  
20 Complainant left AWEPC's employment, or that Complainant's work performance was  
21 unsatisfactory. In short, the only evidence Respondents presented was pure  
22 speculation.<sup>27</sup> Since there is no evidence that Respondents' accommodation of

23 \_\_\_\_\_

24 <sup>27</sup> The following exchange during the Agency's cross examination of Dr. Engel is illustrative:

25 Q: "You testified that Silkin Management tools increased productivity in your office, and Ms. Muhleman was employed by you for 18 months, correct?"

A: "Correct."

1 Complainant's request to not attend the symposium would have cost Respondents  
2 anything, the forum concludes that Respondents failed to satisfy their burden of proof to  
3 show that the costs of excusing Complainant from attending the symposium would have  
4 been more than *de minimus*.

5 The second accommodation requested by Complainant was that she be allowed  
6 to attend alternative, equivalent training that had no religious content.<sup>28</sup> There is no  
7 evidence in the record that alternative, equivalent training existed. Given that Silkin's  
8 business technology was based specifically on the writings of L. Ron Hubbard, the  
9 possibility that alternative, equivalent training existed seems remote. Consequently, the  
10 forum declines to speculate on whether Complainant's attendance at an alternative,  
11 equivalent training that had no religious content would have involved more than *de*  
12 *minimus* costs for Respondents.

13 **F. Was Respondents' requirement that all employees attend the Silkin**  
14 **symposium a "bona fide occupational requirement?"**

15 In their answer, Respondents raised an affirmative defense that the requirement  
16 that all employees attend the Silkin symposium was a "bona fide occupational  
17 requirement. AWEPC's requirement that its employees attend the Silkin symposium  
18 was a "term" or "condition" of employment. ORS 659A.030A(1)(b) is the statute that  
19 makes it unlawful for employers to discriminate against an employee because of the  
20 employee's religion in "terms, conditions or privileges of employment." "Bona fide  
21

22 Q: "And during those 18 months she had not attended a symposium, had she?"

23 A: "No, she has not."

24 Q: "And so you have no way to definitively say that had [Complainant] attended the symposium she  
25 would have been more productive based on attendance, do you? You have no way to look into the future  
and make a determination?"

A: "No, I can't look into the future."

<sup>28</sup> See fn. 22.

1 occupational requirement" is not available as an affirmative defense under that section  
2 of ORS 659A.030.<sup>29</sup> Consequently, the form rejects this defense.

### 3 **DISCRIMINATION IN HOURS OF WORK AND PAY AND RETALIATION**

4 In its Formal Charges, the Agency alleges that Respondents reduced  
5 Complainant's hours of work, effectively reducing her pay, after she opposed attending  
6 the symposium based on her religious beliefs, in violation of ORS 659A.030A(1)(b).  
7 Based on the same set of facts, the Agency also alleges that Respondents retaliated  
8 against Complainant in violation of ORS 659A.030(1)(f) and OAR 839-005-0033, the  
9 Agency's rule interpreting ORS 659A.030(1)(f).<sup>30</sup> At hearing, the Agency presented  
10 evidence from which it argued that the alleged cut in hours was set to take place during  
11 the one-week period immediately after Complainant's termination. Since the ORS  
12 659A.030A(1)(b) claim is also founded on Complainant's opposition to attending the  
13 symposium, the forum concludes that it is properly a complaint of retaliation, and that  
14 the two charges are properly merged into a single charge of retaliation.

15 A violation of ORS 659A.030(1)(f) is established by evidence that shows a  
16 complainant opposed an unlawful practice, the respondent subjected the complainant to  
17 an adverse employment action, and that there is a causal connection between the  
18 complainant's opposition and the respondent's adverse action. *In the Matter of From*  
19 *the Wilderness*, 30 BOLI 227, 288 (2009); *In the Matter of Trees, Inc.*, 28 BOLI 218, 247  
20 (2007); *In the Matter of Robb Wochnick*, 25 BOLI 265, 287 (2004); *In the Matter of*  
21 \_\_\_\_\_

22 <sup>29</sup> Compare 659A.030(1)(a), which prohibits discrimination in regard to hiring, employing, barring, or  
23 discharging an employee based on religion and other enumerated protected classes, and specifically  
24 provides that "discrimination is not an unlawful employment practice if the discrimination results from a  
25 bona fide occupational qualification reasonably necessary to the normal operation of the employer's  
business." See also 659A.030(1)(d) and (e), which contain a similar provision, and OAR 839-005-0013,  
the Agency's administrative rule regarding the affirmative defense of "bona fide occupational  
qualification."

<sup>30</sup> This rule was *renumbered* on 1/1/12 as OAR 839-005-0125.

1 *Barbara Bridges*, 25 BOLI 107, 123 (2003). OAR 839-005-0125 provides, in pertinent  
2 part:

3 \* \* \* \* \*

4 “(2) An employer will be found to have unlawfully retaliated against an employee  
if:

5 “(a) The employee has engaged in protected activity by:

6 “(A) Explicitly or implicitly opposing an unlawful practice or what the employee  
reasonably believed to be an unlawful practice, or

7 \* \* \* \* \*

8 “(b) The employer has subjected the employee to any adverse treatment, in or  
9 out of the workplace, that is reasonably likely to deter protected activity,  
regardless of whether it materially affects the terms, conditions, or privileges of  
10 employment; and

11 “(c) There is a causal connection between the protected activity and the adverse  
treatment.”

12 Summarized, the relevant facts related to these allegations are:

- 13 • On August 18, 20, and 21, Complainant told Dr. Engel that she would not  
14 attend the Silkin symposium because she reasonably believed it contained  
religious content she objected to because of her own religious beliefs. On  
15 August 21, she also refused to speak with a Silkin consultant.
- 16 • At the end of the workday on August 21, Dr. Engel told Complainant that she  
17 would not be working the following week because he was taking the week off  
to have a surgical procedure and that Brianne Summer would be answering  
18 the phones instead of Complainant.
- 19 • Dr. Engel had scheduled his surgical procedure months earlier.
- 20 • Dr. Engel had been absent before during Complainant’s employment, and  
Complainant had covered the phones in his absence. This was the first time  
21 Dr. Engel had someone else cover her shift.
- 22 • Brianne Summer worked for Respondent from early 2008 until in or around  
23 March 2010. She was initially hired as an aesthetician in AWEPC’s “spa  
side,” then was trained on “the dental side” due to lack of spa business, and  
24 eventually worked exclusively in AWEPC’s dental office. She was paid less  
than Complainant.
- 25 • No evidence was presented about the date that Summer began working  
exclusively in AWEPC’s dental office.

1 By her refusal to attend the symposium on religious grounds, Complainant explicitly and  
2 implicitly opposed a practice that she reasonably believed to be an unlawful practice  
3 and that the forum has found to be an unlawful practice. On August 21, her last day,  
4 she was told that she would not be working during Dr. Engel's absence the following  
5 week, and that Brianne Summers would be answering the phone. This satisfies the first  
6 two elements of the Agency's prima facie case. The third element is whether there is a  
7 causal connection between Complainant's opposition and her scheduled temporary cut  
8 in hours.

9 The primary evidence supporting the Agency's charge of retaliation is the timing  
10 of Dr. Engel's announcement to Complainant that she would not be working the  
11 following week.<sup>31</sup> In support of the Agency's case, Complainant credibly testified that  
12 she had never been scheduled for time off during Dr. Engel's previous absences.  
13 However, she did not testify about the circumstances of those previous absences, and  
14 there was no other evidence about the duration or circumstances of those absences.  
15 Dr. Engel credibly testified that scheduling Summers to answer the phones was a  
16 business decision, in that Summers was paid less than Complainant and Complainant,  
17 whose primary job was assisting him in his dental work, was not needed during his  
18 absence. He also credibly testified that his absence had been scheduled months  
19 earlier. There was no evidence concerning whether Summers, who worked for AWEPC  
20 from 2008 to 2010, was even qualified to answer the phones in the dental office during  
21 his previous absences as a "replacement for Complainant," whereas there was no  
22 dispute that she was qualified to perform that function at the time of Complainant's  
23 termination. It was undisputed that schedules were not posted in AWEPC's office.

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24  
25 <sup>31</sup> See Barbara Lindeman and Paul Grossman, *Employment Discrimination Law, Fourth Edition*, volume I,  
pp. 1030-1034 (4<sup>th</sup> Ed. 2007)(discussing the significance of temporal proximity in proving causation in  
Title VII retaliation cases).

1 Without this additional context, the forum cannot conclude that the timing of Dr. Engel's  
2 scheduling of Summers to answer the phones during his absence instead of  
3 Complainant proves that Dr. Engel's decision to schedule Summers was a retaliatory  
4 act based Complainant's opposition to attending the symposium.

### 5 **CONSTRUCTIVE DISCHARGE**

6 It is undisputed that Complainant quit her job at the end of the workday on  
7 August 21, 2009. The Agency contends that Complainant's resignation was a  
8 constructive discharge, in that a reasonable person in her circumstances would have  
9 found working conditions so intolerable that resignation was the only option. The  
10 elements of constructive discharge are set out in OAR 839-005-0011, which reads as  
11 follows:

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

14 "(1) The employer intentionally created or intentionally maintained discriminatory  
15 working conditions related to the individual's protected class status;

16 "(2) The working conditions were so intolerable that a reasonable person in the  
17 complaining individual's circumstances would have resigned because of them;

18 "(3) The employer desired to cause the complaining individual to leave  
19 employment as a result of those working conditions, or knew or should have  
20 known that the individual was certain, or substantially certain, to leave  
21 employment as a result of the working conditions; and

22 "(4) The complaining individual left employment as a result of the working  
23 conditions."

24 See *In the Matter of Gordy's Truck Stop*, 28 BOLI 200, 213 (2007).

25 **A. Respondents intentionally created or intentionally maintained  
discriminatory working conditions related to Complainant's protected class  
status.**

Complainant's protected class status was her religious beliefs. The  
discriminatory working conditions occurred over a four-day period and demonstrate an  
intentional pattern of behavior engaged in by Dr. Engel after Complainant stated her  
religious objections to attending the Silkin symposium. They began with Dr. Engel's

1 mandate on August 18 that Complainant attend training symposium and her objections  
2 because she believed it had ties to the Church of Scientology, her reasonable belief that  
3 "it was religious in nature," and because it was "against her religion."

4 The next day, two posters appeared in AWEPC's lunchroom containing writings  
5 by L. Ron Hubbard that set out some fundamental tenets of the Church of Scientology,  
6 including the Tone Scale, one of the topics at the symposium.

7 On August 20, at the end of the workday, Dr. Engel and Francie Engel, his wife,  
8 asked Complainant to meet with them in AWEPC's "relaxation room," where they gave  
9 Complainant three documents related to the symposium, including one that covered the  
10 topics to be presented. The first one listed was the "Emotional Tone Scale," followed by  
11 this description:

12 **"Emotions in the Workplace:** Learn to understand and predict human behavior  
13 during this presentation of the Emotional Tone Scale. Improve communication  
throughout the office and manage staff effectively using this information."

14 The documents also stated that the symposium would be held October 8-10, 2009, at  
15 the Resort at the Mountain in Welches, Oregon, located "near Mt. Hood about 40 miles  
16 east of the Portland International Airport." During the meeting, Francie Engel asked  
17 Complainant how she acquired her information about Scientology. Complainant  
18 explained she had researched it on the Internet, including the tone scale, and talked to  
19 her mom and pastor. In response to Dr. Engel's question about her religious beliefs,  
20 Complainant told Dr. Engel that her religious belief "was none of his business" and that  
21 her objection to the symposium was based on its ties to the Church of Scientology and  
22 her personal religious beliefs. During the conversation, Dr. Engel told Complainant he  
23 and his wife used Scientology tools to better them. Complainant told Dr. Engel that she  
24 felt she was being pressured and harassed to attend the symposium and she would not  
25 attend and got up to leave, at which point Dr. Engel told her that if she left the building,  
he would consider that to be her resignation. In direct response to Complainant's

1 question, Dr. Engel told Complainant that she could either go to the symposium or  
2 resign.

3 On August 21, Complainant's last day of work, Complainant gave Dr. Engel a  
4 letter in which she stated:

5 "As I indicated to you several times, I have sincerely held religious beliefs that  
6 directly contradict the principles of the Church of Scientology. The brochure on  
7 the conference you are expecting me to attend clearly states the Tone Scale  
8 program which was originated by the Church of Scientology will be included in  
9 this program. It is impossible for me to know in advance how much of the  
program will be based on the Church of Scientology teachings. For these  
reasons I respectfully request a reasonable accommodation from you. I am  
willing to attend any non-secular program that you would require of me."

10 In response, Dr. Engel asked Complainant to speak with his Silkin consultant about the  
11 content of the symposium in an attempt to persuade her that the symposium had no  
12 religious content. Complainant initially agreed, then changed her mind because she  
13 believed that the Silkin consultant would be biased based on information she found on  
14 the Internet indicating that Silkin was tied to Scientology. About noon, Dr. Engel asked  
15 Complainant to come to the telephone to talk to the Silkin consultant. Complainant  
16 declined, stating she changed her mind because she felt "pressured," and again told Dr.  
17 Engel that she would not attend the conference. Finally, at the end of the day, Dr.  
18 Engel told Complainant that she would not be working the following week because he  
19 was taking the week off and Brianne Summer would be answering the phones instead  
20 of Complainant. He continued trying to convince Complainant to attend the symposium  
21 and told Complainant that if he made an exception for her, he would have to make an  
22 exception for everyone. At that point, Complainant told Dr. Engel that she quit.

23 These facts satisfy the first element of the Agency's prima facie case.  
24  
25

1 **B. The working conditions were so intolerable that a reasonable person in the**  
2 **Complainant's circumstances would have resigned because of them.**

3 Respondents argue that Dr. Engel actually granted Complainant the  
4 accommodation she sought by telling her that she did not have to attend the  
5 symposium. The forum did not believe Dr. Engel's testimony that he withdrew his  
6 ultimatum. There are three reasons for the forum's disbelief. First, viewed in the  
7 context of the facts described in the previous section, the forum finds it highly unlikely  
8 that Dr. Engel, after pressuring Complainant to attend and threatening her with the loss  
9 of her job if she did not continue to listen to his arguments about why she should attend,  
10 should suddenly change his mind. Second, Dr. Engel offered no explanation for his  
11 sudden purported change of mind. Third, it seems equally improbable that  
12 Complainant, with a family to support and no alternative employment in sight, should  
13 quit on the spur of the moment when Dr. Engel had just offered to give her exact  
14 accommodation that she requested. Instead, the forum concludes that on August 21,  
15 based on Dr. Engel's actions over the prior four days, Complainant found herself in a  
16 position where she reasonably believed she would lose her job if she did not attend the  
17 symposium and that she would be pressured to attend the symposium or resign until the  
18 date of the symposium in October. If she changed her mind and attended the  
19 symposium, she would be subjected to training containing fundamental tenets of the  
20 Church of Scientology in a sequestered setting at a mountain resort. Under those  
21 circumstances, Complainant resigned. The forum finds that a reasonable person in  
22 those circumstances would have also resigned.

23 **C. Respondents should have known that the individual was certain, or**  
24 **substantially certain, to leave employment as a result of the working**  
25 **conditions.**

Once Complainant made it clear to Dr. Engel that she objected to attending the  
symposium based on the conflict between her religious beliefs and the contents of the

1 symposium that were based on L. Ron Hubbard's writings, Dr. Engel should have  
2 anticipated that his continued insistence that she attend the symposium to keep her job  
3 and further attempts to convince her that the symposium contents were purely secular  
4 would result in her leaving her job. His opinion that the symposium contents were  
5 purely secular was not supported by the evidence.

6 **D. Complainant quit as a result of the working conditions**

7 Complainant credibly testified that she quit as a direct result Dr. Engel's  
8 insistence that she attend the Silkin symposium. Specifically, she testified "[q]uitting my  
9 job was not taken lightly. I know for my mental and physical well-being that I could not  
10 continue to work under such – such a hostile environment."

11 **E. Conclusion.**

12 Complainant was constructively discharged and is entitled to the same damages  
13 she would have received, had she been fired.

14 **AIDING AND ABETTING**

15 ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or  
16 any person, whether an employer or employee, aid, abet, incite, compel or coerce the  
17 doing of any of the acts of this chapter or to attempt to do so." This forum has  
18 previously held that aiding and abetting, in the context of an unlawful employment  
19 practice, means "to help, assist, or facilitate the commission of an unlawful employment  
20 practice, promote the accomplishment thereof, help in advancing or bring it about, or  
21 encourage, counsel or incite as to its commission." *In the Matter of Cyber Center, Inc.*,  
22 32 BOLI \_\_ (2012), *citing In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 277 (1985).

23 In this case, Respondent Dr. Engel was Respondent AWEPC's sole owner and  
24 president, as well as Complainant's immediate supervisor. A corporate officer and  
25 owner who commits acts rendering the corporation liable for an unlawful employment

1 practice may be found to have aided and abetted the corporation's unlawful employment  
2 practice. *Cyber Center*, at \_\_\_\_\_. See also *In the Matter of Executive Transport, Inc.*, 17  
3 BOLI 81, 94 (1998); *In the Matter of Body Imaging, P.C.*, 17 BOLI 162, 183-84 (1998),  
4 affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau*  
5 *of Labor and Industries*, 166 Or App 54 (2000); *In the Matter of Katari, Inc.*, 16 BOLI  
6 149, 161 (1997), affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries*,  
7 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998); *In the Matter of Vision*  
8 *Graphics and Publishing, Inc.*, 16 BOLI 124, 138 (1997); *In the Matter of A.L.P.*  
9 *Incorporated*, 15 BOLI 211, 219-22 (1997), affirmed, *A.L.P. Incorporated, v. Bureau of*  
10 *Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

11 The forum has determined that Respondent AWEPC engaged in three distinct  
12 unlawful employment actions – harassing Complainant based on her religious beliefs,  
13 failing to reasonably accommodate her, and constructively discharging her. Dr. Engel  
14 was the primary actor in all of these actions and, as such, is jointly and severally liable  
15 with AWEPC as an aider and abettor for all three actions.

## 16 **DAMAGES**

### 17 **A. Complainant is entitled to back pay and reimbursement for out-of-pocket** 18 **expenses related to her constructive discharge.**

19 The commissioner has the authority to fashion a remedy adequate to eliminate  
20 the effects of unlawful employment practices. *In the Matter of From the Wilderness*, 30  
21 BOLI 227, 290 (2009). The purpose of back pay awards in employment discrimination  
22 cases is to compensate a complainant for the loss of wages and benefits the  
23 complainant would have received but for the respondent's unlawful employment  
24 practices. Awards are calculated to make a complainant whole for injuries suffered as a  
25 result of the discrimination. *In the Matter of Trees, Inc.*, 28 BOLI 218, 251 (2007). A  
complainant who seeks back pay is required to mitigate damages by using reasonable

1 diligence in finding other suitable employment. *In the Matter of Rogue Valley Fire*  
2 *Protection*, 26 BOLI 172, 184 (2005). A respondent has the burden of proving that a  
3 complainant failed to mitigate his or her damages. *In the Matter of Wal-Mart Stores,*  
4 *Inc.*, 24 BOLI 37, 65 (2003). To meet that burden, a respondent must prove that a  
5 complainant failed to use reasonable care and diligence in seeking employment and  
6 that jobs were available which, with reasonable diligence, the complainant could have  
7 discovered and which the complainant was qualified." *Id.* Economic loss that is directly  
8 attributable to an unlawful practice is recoverable from a respondent as a means to  
9 eliminate the effects of any unlawful practice found, including actual expenses. *Trees,*  
10 *Inc.*, at 251.

11 At the time Complainant was constructively discharged, she was paid \$20 an  
12 hour and worked an average of 34 hours per week, for total gross wages of \$680 per  
13 week. She also received medical insurance that was terminated on August 31, 2009,  
14 and had \$54 in out-of-pocket medical expenses that would have been covered by  
15 AWEPC's medical insurance, had she remained employed by AWEPC.<sup>32</sup>

16 Complainant filed for and received unemployment benefits after leaving  
17 AWEPC's employment and began to look for another job on or about September 1,  
18 2009. To look for work, she read the Bend Bulletin newspaper and Craigslist  
19 employment advertisements daily and sent a cover letter and resume to prospective  
20 employers. As her job search in central Oregon continued without success,  
21 Complainant decided to look for a job in League City, Texas because her sister lived  
22 there and job opportunities for dental professionals existed in League City. She located  
23 three job openings through an internet job service for dental workers, scheduled three  
24 interviews for dental assistant positions in League City, and flew to Texas on October

25 \_\_\_\_\_  
<sup>32</sup> See Finding of Fact 34 – The Merits.

1 10, 2009, to be interviewed, using "air miles" to pay for her ticket. She was offered two  
2 jobs and accepted one with a Dr. Patterson that paid \$18 per hour, but had no benefits.  
3 She moved to Texas with her boyfriend and the younger of her two daughters and  
4 began work shortly before Thanksgiving 2009.

5 Respondents plead in their answer and argue that Complainant failed to mitigate  
6 her damages. Complainants are required to mitigate their damages by seeking  
7 replacement employment, but it is a respondent's burden to disprove mitigation.  
8 Complainant, whose profession was dental assistant, credibly testified that she diligently  
9 and unsuccessfully sought employment in central Oregon before pursuing her option in  
10 Texas. Respondents provided no evidence that any dental jobs were available in  
11 central Oregon which, with reasonable diligence, Complainant could have discovered  
12 and for which she was qualified.<sup>33</sup> Respondents argue it was Complainant's choice to  
13 take a job in Texas and Respondents should not bear the cost of this choice. By not  
14 working, Complainant was losing \$2500+ in gross wages every month. Given  
15 Complainant's unsuccessful job search in central Oregon, her financial responsibilities,  
16 and the likelihood of employment in Texas and certainty of a temporary place to live in  
17 League City, Complainant's choice seems reasonable to the forum. Although her  
18 moving expenses were significant, those expenses only equaled four months of lost  
19 wages, and Complainant stood to lose far more with no employment prospects in  
20 central Oregon in her profession.

21 Complainant credibly testified that it cost her \$10,600 to move to Texas, an  
22 amount that was allowed as a deduction by the IRS. Her moving expenses included

23 \_\_\_\_\_  
24 <sup>33</sup> See, e.g., *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 139 (2000) (When complainant had  
25 been employed by respondent as a dishwasher and respondent proved, through the presence of  
numerous help wanted ads and expert testimony, that complainant should have been able to find work as  
a dishwasher within one week after his discharge, the forum limited complainant's back pay award to one  
week's lost wages even though complainant remained unemployed for a longer period of time).

1 renting a moving truck and car trailer, gasoline for the truck, hotel expenses, food  
2 expenses, and gasoline for the car she drove to Texas separate from the moving truck.  
3 The forum has awarded job search and moving expenses in the past and does so in this  
4 case.<sup>34</sup>

5 Complainant worked five months for Dr. Patterson, working an average of 36  
6 hours per week and earning \$648 per week gross wages (\$18 per hour x 36 hours =  
7 \$648). Complainant then went to work for a Dr. Wahbah and was paid \$17.50 per hour  
8 to start, with a raise to \$18 per hour after 90 days. Like Dr. Patterson, Dr. Wahbah  
9 provided no benefits. When Dr. Wahbah retired in October 2011, Complainant began  
10 work for the dentist who bought Dr. Wahbah's practice. Up to the time of the hearing,  
11 Complainant had worked an average of 36 hours per week for Wahbah and his  
12 successor. While employed by Dr. Wahbah, Complainant earned \$630 per week in  
13 gross wages for the first 90 days (\$17.50 per hour x 36 hours = \$630), then \$648 per  
14 week gross wages (\$18 per hour x 36 hours = \$648). The Agency presented no  
15 evidence to show the wages Complainant has been paid by Dr. Wahbah's successor  
16 since October 2011.

17 The Agency also seeks reimbursement for the \$882.90 in airfare Complainant  
18 spent for herself, her boyfriend, and her daughter Addison to fly to Oregon for the  
19 hearing. The forum declines to award damages for that expense, as costs incurred by a  
20 complainant to attend a hearing are non-compensable in this forum.

21 In total, Complainant's back pay and out-of-pocket damages amount to **\$22,654**,  
22 computed as follows:

23 \_\_\_\_\_  
24 \_\_\_\_\_

25 <sup>34</sup> See *In the Matter of Barrett Business Services, Inc.*, 20 BOLI 189, 215 (2000), affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001); *In the Matter of Day Trucking, Inc.*, 2 BOLI 83, 87-88 (1981); *In the Matter of Bend Millworks Company*, 1 BOLI 214, 216 (1979).

1 Medical Expenses: \$54 in out-of-pocket medical expenses for Complainant's  
2 September 14, 2009, visit with Dr. Johnson.

3 Moving Expenses: \$10,600 in moving expenses for Complainant's move to Texas for  
4 replacement employment after her constructive discharge.

5 Back Pay: \$12,000 in back pay, computed as follows:

- 6 • September 1 - 3, 2009: \$480 (3 days x 8 hours x \$20 per hour)
- 7 • September 6 - October 1, 2009: \$2,720 (\$680 per week x 4 weeks)
- 8 • October 4 - 29, 2009: \$2,720 (\$680 per week x 4 weeks)
- 9 • November 1 - 26, 2009: \$2,720 (\$680 per week x 4 weeks)
- 10 • November 29 - December 31, 2009: \$160 (\$680 per week - \$648 week = \$32 x 5 weeks)
- 11 • January 1 - December 31, 2010: \$1,664 (\$680 per week - \$648 week = \$32 x 52 weeks)<sup>35</sup>
- 12 • January 1 - December 9, 2011: \$1,536 (\$680 per week - \$648 week = \$32 x 48 weeks)

13 **B. Damages for emotional, mental, and physical suffering.**

14 In its Formal Charges, the Agency seeks "at least \$80,000" in damages for  
15 Complainant's "emotional, mental, and physical suffering" resulting from Respondents'  
16 unlawful employment practices.

17 In determining an award for emotional and mental suffering, the forum considers  
18 the type of discriminatory conduct, and the duration, frequency, and severity of the  
19 conduct. It also considers the type and duration of the mental distress and the  
20 vulnerability of the Complainant. The actual amount depends on the facts presented by  
21 each complainant. A complainant's testimony, if believed, is sufficient to support a  
22 claim for mental suffering damages. *From the Wilderness*, at 291-92 (internal citations  
23 omitted).

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24  
25 <sup>35</sup> The forum computes Complainant's 90 days at \$17.50 per hour for Dr. Wahbah at \$18 per hour because there was no evidence as to why Complainant left Dr. Patterson's employment, where she earned \$18 per hour.

1 Through the credible testimony of Complainant and her mother, as well as  
2 physician notes, the Agency established that Complainant suffered an increase in  
3 anxiety, stress, upset stomach, diarrhea, sleep problems, and weight loss over her last  
4 week of work and had become an “emotional wreck” because of Respondents’ unlawful  
5 employment practices. When she quit, she left the office very upset and crying.  
6 Complainant saw two doctors on August 25 who prescribed medication for her anxiety  
7 and sleeplessness and noted the medical conditions listed above. One of the doctors  
8 noted that Complainant had “just resigned under duress from dental office after being  
9 extensively pressured to go to a scientology/hubbard based conference.” In addition,  
10 Complainant also credibly testified that she experienced stress for months after leaving  
11 AWEPC’s employment because of significant financial issues caused by a lack of  
12 income and moving expenses, concern over her future, and worry over her lack of  
13 health insurance for herself and her children. She also had to borrow \$5,000 from her  
14 mother to make ends meet, then live with her sister and her sister’s family in League  
15 City when she first moved to Texas.

16 Complainant has wanted to see a doctor on a number of occasions since  
17 September 1, 2009, for medical conditions that include colds, sinus infections, irregular  
18 moles, spots on her chest, and a periodic “excruciating pain” that “runs from [her] back  
19 down [her] left leg. She has not seen a doctor because she cannot afford it due to the  
20 fact that her Texas employers have not provided medical insurance.

21 She has suffered additional stress and sadness because Allie, her now-13-year-  
22 old daughter, remained in central Oregon when Complainant moved to Texas, and  
23 Complainant has only been able to see her on school breaks, whereas she saw Allie  
24 every day while she worked for Dr. Engel except when Allie stayed at Allie father’s  
25

1 house in Redmond. As a result, she has missed experiencing much of Allie's life that  
2 she would have experienced, had she remained employed by AWEPC.

3 A week before the hearing, she received a call at work from a Silkin Management  
4 representative who asked to speak with Dr. Wahbah. Complainant's first reaction was  
5 "Oh, my goodness, how did they find me?" Her current employer, Dr. Lynch, told  
6 Complainant to tell Silkin she wanted nothing to do with them, but the representative  
7 had hung up before Complainant could pass on Dr. Lynch's message. A couple days  
8 later, the Silkin representative called back and Complainant gave Dr. Lynch's message  
9 to the representative. Both incidents upset Complainant. Although Respondents are  
10 not liable for these calls, they serve to illustrate the extent of Complainant's emotional  
11 response to the requirement that she attend the Silkin symposium.

12 Considering all these factors, the forum concludes that \$325,000 is an  
13 appropriate sum to compensate Complainant for the emotional, mental, and physical  
14 suffering she experienced as a result of Respondents' unlawful employment practices.

15 **C. Mandatory Training On Recognizing And Preventing Discrimination In The**  
16 **Workplace Based On Protected Class**

17 The Agency asks that "Respondents be required to provide to its owners,  
18 managers and all employees, during paid working hours, training in recognizing and  
19 preventing discrimination in the workplace based on protected class, including but not  
20 limited to religion." The Commissioner of BOLI is authorized to issue an appropriate  
21 cease and desist order reasonably calculated to eliminate the effects of any unlawful  
22 practice found. ORS 659A.850(4). Among other things, that may include requiring the  
23 respondent to:

24 "(a) Perform an act or series of acts designated in the order that are reasonably  
25 calculated to:

"(A) Carry out the purposes of this chapter;

1 “(B) Eliminate the effects of the unlawful practice that the respondent is found to  
2 have engaged in, including but not limited to paying an award of actual damages  
3 suffered by the complainant and complying with injunctive or other equitable  
4 relief; and

5 “(C) Protect the rights of the complainant and other persons similarly situated[.]”

6 Requiring Respondents to undergo training specifically tailored to prevent future similar  
7 unlawful practices, as the Agency seeks, falls within authority granted to the  
8 Commissioner in ORS 659A.850(4). See *Cyber Center* at \_\_\_\_\_. However, since the  
9 unlawful employment practices only relate to the protected class of religion, requiring  
10 training related to all protected classes cuts an overly broad swath. Consequently, the  
11 forum has required training but tailored it to Complainant’s protected class.

## 12 **RESPONDENTS’ EXCEPTIONS**

13 Respondents filed extensive exceptions to the Proposed Findings of Fact – The  
14 Merits, Proposed Ultimate Findings of Fact, Proposed Conclusions of Law, and  
15 Proposed Opinion. In response, the forum has made changes in Findings of Fact – The  
16 Merits ##4, 9, 12-13, and 18, and Ultimate Findings of Fact ##2, 8-9, and 11. The  
17 forum rejects Respondents’ request that additional Findings of Fact be made, finding  
18 them either irrelevant or not supported by a preponderance of the evidence.

19 Respondents’ exceptions to the Proposed Opinion are based on Respondents’  
20 suggested changes to the Findings of Fact and Respondents’ interpretation of the law  
21 with respect to the version of the facts proffered by Respondents. In response, the  
22 forum has made several changes in the Opinion to clarify its reasoning, but rejects the  
23 substantive changes suggested by Respondents.

24 Respondents’ exceptions to the damages for moving expenses and back pay are  
25 not supported by the facts or the law and the Proposed Order contains an adequate  
discussion of the reason for the proposed awards. In contrast to Respondents’  
exception, the forum finds the proposed award of \$80,000 for emotional distress

1 damages inadequate and has increased that award to \$325,000, an amount  
2 commensurate with the evidence in the record of the emotional, mental, and physical  
3 distress suffered by the Complainant in this case.

4 **ORDER**

5 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
6 659A.850(4), and to eliminate the effects of Respondent AWEPC's unlawful  
7 employment practices violating ORS 659A.030(1)(a)&(b) and Respondent Dr. Andrew  
8 W. Engel's unlawful employment practices under ORS 659A.030(1)(g), and as payment  
9 of the damages awarded, the Commissioner of the Bureau of Labor and Industries  
10 hereby orders **Andrew W. Engel, DMD, PC dba AWE Dental Spa and Dr. Andrew W.**  
11 **Engel individually** to deliver to the Fiscal Services Office of the Bureau of Labor and  
12 Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-  
13 2180, a certified check payable to the Bureau of Labor and Industries **in trust for**  
14 **Complainant Susan Muhleman** in the amount of:

15 1) TWELVE THOUSAND DOLLARS (\$12,000.00), less lawful  
16 deductions, representing wages lost by Susan Muhleman between September 1,  
17 2009, and December 9, 2011, as a result of Respondents' unlawful employment  
18 practices found herein; plus,

19 2) TEN THOUSAND SIX HUNDRED AND FIFTY-FOUR DOLLARS  
20 (\$10,654.00), representing out-of-pocket expenses incurred by Susan Muhleman  
21 as a result of Respondents' unlawful employment practices found herein; plus,

22 3) THREE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS  
23 (\$325,000.00), representing compensatory damages for emotional, mental, and  
24 physical distress Susan Muhleman suffered as a result of Respondents' unlawful  
25 employment practices found herein; plus,

4) Interest at the legal rate on the sum of THREE HUNDRED FORTY-  
SEVEN THOUSAND SIX HUNDRED AND FIFTY-FOUR DOLLARS  
(\$347,654.00) from the date of the Final Order until Respondents comply herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
659A.850(4), and to eliminate the effects of Respondent AWEPC's unlawful  
employment practices violating ORS 659A.030(1)(a)&(b) and Respondent Dr. Andrew

1 W. Engel's unlawful employment practices under ORS 659A.030(1)(g), the  
2 Commissioner of the Bureau of Labor and Industries hereby orders Respondents to  
3 require its current employees, if any, including Dr. Andrew W. Engel, to attend training  
4 on recognizing and preventing discrimination in the workplace based on religion. Such  
5 training may be provided by the Bureau of Labor and Industries Technical Assistance  
6 for Employees unit or another trainer agreeable to the Agency.

7 C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
8 659A.850(4), the Commissioner of the Bureau of Labor and Industries hereby orders  
9 Respondents to cease and desist from discriminating against any employee based upon  
10 the employee's religion.

11  
12 DATED this 13 day of September, 2012.

13  
14  
15 

16 \_\_\_\_\_  
17 Brad Avakian, Commissioner  
18 Bureau of Labor and Industries  
19  
20  
21  
22  
23  
24  
25