

## CIVIL RIGHTS

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## CIVIL RIGHTS

### I. COMMISSIONER'S AUTHORITY

#### 1.0 GENERALLY

The commissioner has the authority to decide the constitutionality of statutes. In BOLI contested cases, the commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision set forth in the proposed order and subject to ratification by the commissioner in the final order. Accordingly, the ALJ had the initial authority to rule on the constitutional issues raised by respondents in their motion for summary judgment. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171 (2015), appeal pending.***

An agency's powers are limited to those delegated to it by statute. ----- In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 241 (2015).

An act of a \* \* \* governmental entity is *ultra vires* when that act falls outside the entity's corporate powers. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 241 (2015).***

ORS 651.060(4) gives BOLI's commissioner the authority to "adopt such reasonable rules as may be necessary to administer and enforce any statutes over which the commissioner or the bureau has jurisdiction." ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 241 (2015).***

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. ---- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76 (2015).***

In a case involving discrimination on the basis of sexual orientation in public accommodations, the commissioner of BOLI has the authority to eliminate the effects of unlawful practices found. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 240 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

The commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 172 (2012).*** See also *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 141 (2012).*

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012).*** See also *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012); In the Matter of Cyber Center, Inc., 32 BOLI 11, 36 (2012).*

#### 2.0 JURISDICTION AND ENFORCEMENT POWERS

##### 2.1 --- Cease and Desist

The commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 172 (2012).***

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238 (2015).*** See also *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012); In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012); In the Matter of Cyber Center, Inc., 32 BOLI 11, 36 (2012).*

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### 2.2 --- Commissioner's Complaint

### 2.3 --- Damages and Penalties

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices, including a back pay award. ---- *In the Matter of Oak Harbor Freight Lines, Inc.*, 33 BOLI 1, 37 (2014).

Pursuant to ORS 659A.850 and 659A.855, under the facts in this case, the deputy commissioner has authority to award compensatory damages to aggrieved persons and to assess civil penalties resulting from unlawful practices. ---- *In the Matter of Blachana, LLC*, 32 BOLI 220, 240 (2013), affirmed *Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806, 359 P3d 574 (2015).

Because the complaint initiating the case was a “commissioner’s complaint”, pursuant to ORS 659A.825 and 659A.855, the commissioner has authority to impose civil penalties for each violation. ---- *In the Matter of Blachana, LLC*, 32 BOLI 220, 240 (2013), affirmed *Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806, 359 P3d 574 (2015).

### 3.0 RULEMAKING

An agency's powers are limited to those delegated to it by statute. ---- *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 241 (2015).

An act of a \* \* \* governmental entity is *ultra vires* when that act falls outside the entity's corporate powers. ---- *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 241 (2015).

ORS 651.060(4) gives BOLI’s commissioner the authority to “adopt such reasonable rules as may be necessary to administer and enforce any statutes over which the commissioner or the bureau has jurisdiction.” ---- *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 241 (2015).

ORS 659A.199, adopted in 2009, does not identify a person or entity or limit the category of persons or entities to whom an employee must report information in order to attain the status of protected whistleblower under the provisions of ORS 659A.199. Had the legislature intended to create such a limitation, it knows how to do that and could have done so. The forum’s inclusion of such a limitation in its interpretation of ORS 659A.199 would also violate the provision of ORS 174.010(1) that prohibits a judge from “insert[ing] what has been omitted” when interpreting a statute. In conclusion, the forum held that BOLI’s inclusion of the phrase “to anyone” in OAR 839-010-0100(1) was a valid exercise of BOLI’s rulemaking authority and not *ultra vires*. ---- *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 241-42 (2015).

## II. INTERPRETATION OF ANTI-DISCRIMINATION LAWS

### 5.0 POLICY CONSIDERATIONS

### 6.0 EFFECT OF FEDERAL LAW

When no provisions in ORS 659A.855 or any other statute in ORS chapter 659A offered guidance as to factors the forum should consider in deciding whether to assess the maximum civil penalty or a lesser amount, and the agency’s administrative rules interpreting the housing discrimination provisions of ORS chapter 659A similarly lent no guidance, the forum took guidance from 24 CFR §180.671 that sets out specific guidelines for an ALJ to use when evaluating the appropriate amount of civil penalty in an FHA case. ---- *In the Matter of Kenneth Wallstrom*, 32 BOLI 63, 91 (2012).

Federal law similar to Oregon’s civil rights laws may be instructive, though not binding. --

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--- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 92 (2012).*

### 7.0 GENERAL PRINCIPLES OF CONSTRUCTION

#### 7.1 --- Statutes

The legislature is presumed to be aware of existing law. ----- In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 42-43 (2014), appeal pending.

The ADA contains no accompanying definition of “trained” to guide the forum in determining whether “trained” should be given the limited definition sought by Respondent, i.e. a dog that has completed training and is not retired, or whether the term should be interpreted more expansively to include dogs with the “training” status of complainant’s dogs at the time of the alleged discrimination. Since the word “trained” is a word of common usage, the forum gave it the plain, natural and ordinary meaning contained in *Webster’s Third New Int’l Dictionary*. ---- *In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 8 (2014), appeal pending.*

When the words “religious observance or practices” were not defined in ORS 659A.033, in OAR 839-005-0140, the agency’s administrative rule interpreting ORS 659A.033, in Title VII, the federal law analogous to ORS 659A.033, or in EEOC Regulations or Guidelines on Religion, and the forum found no case law on point, the forum found that the words “observances” and “practices” are words of common usage and ascribed to them the plain, natural and ordinary meaning contained in *Webster’s Third New Int’l Dictionary*. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128-29 (2012).*

In interpreting a statute, the forum follows the analytical framework set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Within that framework, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature’s intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature’s intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128 (2012).*

In interpreting statutory language, when no legislative history was proffered, the forum is not required to independently research that history unless the meaning of “religious observance or practices,” as used in ORS 659A.033, cannot be determined from a text and context analysis. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128 (2012).*

Since neither the statute, rule, or Oregon case law define “representing” in the context of ORS 659A.145(2)(e) and it is a word of common usage, the forum relied on *Webster’s* for the meaning of “representing.” ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 86 (2012).*

In interpreting a statute, the forum follows the analytical framework set out by the Oregon Supreme Court in *PGE v. Bureau of Labor and Industries*, 317 Or 606, 859 P2d 1143 (1993) and modified by *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009). Within that framework, the forum first examines the text and context of the statutes and also considers any pertinent legislative history proffered by the participants. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128 (2012).* See also *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).*

In interpreting statutory language, when no legislative history was proffered, the forum is not required to independently research that history unless the meanings of “coerce, intimidate, threaten,” as used in 659A.145(8), could not be determined from a text and context analysis. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).*

The text of the statutory provision itself is the starting point for interpretation and the best

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evidence of the legislature's intent. Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).***

The forum found that the words "coerce, intimidate, threaten" are words of common usage and gave them their plain, natural and ordinary meaning contained in *Webster's Third New Int'l Dictionary* (unabridged edition), the dictionary in use at the time ORS 659A.145(8) was enacted. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 80 (2012).***

### 7.2 --- Administrative Rules

Since neither the statute, rule, or Oregon case law define "representing" in the context of ORS 659A.145(2)(e) and it is a word of common usage, the forum relied on *Webster's* for the meaning of "representing." ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 86 (2012).***

### 7.3 --- Constitutional Provisions

When both state and federal constitutional claims are raised, the forum followed example established by Oregon courts of first evaluating the state claim. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 173 (2015), appeal pending.***

The forum analyzed whether respondents' actions violated the applicable public accommodation statutes before moving on to a determination of whether respondents had established one or more of their affirmative defenses that relied on the Oregon and U.S. Constitution. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 159 (2015), appeal pending.***

When the forum concluded that respondents voice-mail "request" was a denial of service and the respondents did not contend that the constitution protects them from actually denying service, neither the First Amendment to the U.S Constitution nor Article I, Section 8 of the Oregon Constitution protect the actions found by the forum to violate ORS 659A.403, ORS 659A.406 or ORS 659A.409. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 248 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

## III. THEORIES OF DISCRIMINATION

### 10.0 SPECIFIC INTENT

In a housing case, the agency can prove specific intent by showing that respondent's reason for expelling complainant – so that his daughter could move in -- was a pretext for discrimination because it was untrue. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012).***

Specific intent can be shown by direct or circumstantial evidence. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012).***

The different or unequal treatment theory of discrimination requires comparators and the mixed motive theory of discrimination requires dual motives. When the pleadings alleged neither, the forum applied the specific intent theory, which provides that unlawful discrimination occurs when a respondent "knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class." ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83-84 (2012).***

Under the "specific intent" theory of discrimination, proof of a causal connection may be established through evidence that shows a respondent knowingly and purposefully

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discriminated against a complainant because of the complainant's membership in a protected class. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

Respondent's general manager's statement to complainant that "I don't feel you are going to have the availability we are looking for in the future because you are pregnant," standing alone, was direct evidence of a discriminatory motive with regard to complainant's demotion due to her sex/pregnancy. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

A conversation between respondent's owner and general manager in which they discussed complainant's pregnancy and said they would probably have to let her go because of her pregnancy established discriminatory intent based on complainant's sex/pregnancy. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

### 11.0 DIFFERENT OR UNEQUAL TREATMENT

The different or unequal treatment theory of discrimination requires comparators and the mixed motive theory of discrimination requires dual motives. When the pleadings alleged neither, the forum applied the specific intent theory, which provides that unlawful discrimination occurs when a respondent "knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class." ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83-84 (2012).***

The different or unequal treatment theory of discrimination requires comparators and the mixed motive theory of discrimination requires dual motives. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83 (2012).***

### 12.0 HARASSMENT (GENERALLY)

#### 12.1 --- Types of Harassment in Employment

##### 12.1.1 --- Intimidating, Hostile, or Offensive Working Environment

The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 145-46 (2014).***

Two Guatemalan complainants credibly testified as to their fear that they would be attacked again after a January 10, 2011, assault by a respondent co-worker. Coupled with the co-worker's continued residence in the shack immediately across the road from the greenhouses complainants worked in, the co-worker's continued employment with MBI, and Maltby's failure to take any disciplinary action against the co-worker, the forum found that complainants were subjected to a hostile work environment based on their race and national origin after January 10, 2011, and that Maltby should have known this. The forum further found that, under those circumstances, a reasonable employer would know *per se* that a hostile environment exists that requires immediate and appropriate corrective action. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 151 (2014).***

Based on J. Bassett's attack on complainants, Maltby's knowledge of those actions, and Maltby's failure to take any immediate and appropriate corrective action after the January 10, 2011, incident, MBI was found to be liable for J. Bassett's role in the January 10, 2011, assault on complainants, and the resulting hostile environment created for complainants. H. Maltby and J. Bassett were held jointly and severally liable as aiders and abettors. ---- ***In the Matter of***

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***Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 151 (2014).***

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in complainant's particular circumstances. In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 162 (2012).***

In a religious harassment case, the forum must ultimately determine whether a reasonable person in the circumstances of the complaining individual would have perceived the conduct to be sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment. In making this determination, the forum looks at the "totality of the circumstances." ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 120 (2012).***

In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 121 (2012).***

When the agency's pleadings involved all three separate theories of harassment set out in OAR 839-005-0010(4)(A)(a-c), the forum stated that that the first required proof that respondent's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment, whereas the second and third theories, plead cumulatively and in the alternative, required proof that complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment "and/or" complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant. The forum examined each theory separately, stating that each required different proof and provided a different basis for liability. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 119-20 (2012).***

### **12.1.2 --- Submission to Unwanted Verbal or Physical Conduct Related to Protected Class Made Term or Condition of Employment or Used as Basis for Employment Decisions ("Quid Pro Quo")(see 31.2.3.3)**

When the agency's pleadings involved all three separate theories of harassment set out in OAR 839-005-0010(4)(A)(a-c), the forum stated that that the first required proof that respondent's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment, whereas the second and third theories, plead cumulatively and in the alternative, required proof that complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment "and/or" complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant. The forum examined each theory separately, stating that each required different proof and provided a different basis for liability. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 120 (2012).***

## **12.2 --- Employer Liability**

### **12.2.1 --- Generally**

An employer may be held liable for religious harassment regardless of the motivation for

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committing a harassing act. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 117 (2012).*

In a religious discrimination case, an employer's lack of knowledge that his conduct created an intimidating, hostile, or offensive work environment is an affirmative defense under sections 2 and 3 of Article I of the Oregon Constitution. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 117 (2012).*

### 12.2.2 --- Harassment by Supervisor

### 12.2.3 --- Harassment by Coworker or Agent

A prima facie case of co-worker harassment based on race or national origin consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at complainant by co-workers; (4) complainant's race or national origin was a reason for the co-worker harassment; and (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 145 (2014).*

Element (3) of the prima facie case – that complainant was harmed by harassment directed at complainant by co-workers -- was satisfied by complainant's credible testimony that J. Bassett's frequent racial epithets offended him. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146 (2014).*

As J. Bassett's epithet of choice -- "motherfucker"-- was always prefaced by the word "Spanish" or "Hispanic," there was no question that his comments were regarding or directed at complainant and his coworkers because of their race, thereby satisfying element (4) of the prima facie case. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146 (2014).*

Element (5) – that the harassment was sufficiently severe or pervasive -- was satisfied by complainant's credible testimony that J. Bassett's epithets created a hostile and offensive working environment for him prior to J. Bassett's "transfer" in August 2010 after the gunshot incident. The forum further found that a reasonable Hispanic person in the circumstances of Guevara would perceive that J. Bassett's repeated "Hispanic motherfucker" comments were sufficiently severe and pervasive to create a hostile, offensive or intimidating work environment. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146 (2014).*

An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146-47 (2014).*

The evidence was undisputed that, immediately after Guevara reported the gunshot incident and accompanying racial epithet to H. Maltby, H. Maltby immediately transferred J. Bassett to another set of greenhouses a mile away, instructed J. Bassett to have nothing to do with Guevara and his Hispanic coworkers, and denied him an expected pay raise. After that, there is no evidence that J. Bassett made any racial epithets or otherwise harassed Guevara or his Hispanic coworkers on MBI's work site or during work hours, other than to look at them "in an unusual way" during J. Bassett's undated visits sometime between August 2010 and January 2011. There is no evidence that H. Maltby or L. Bassett knew or should have known of these undated visits. Additionally, H. Maltby credibly testified that, sometime after the August 2010 gunshot incident, he asked Guevara if Guevara and his coworkers "were okay" with how

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the August 2010 incident was handled and if they felt comfortable at work and Guevara responded "yes." Under these circumstances, the forum concluded that H. Maltby, acting as MBI's agent, took "immediate and appropriate corrective action" in response to J. Bassett's discriminatory actions, thereby relieving respondents of any liability for those actions. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 147 (2014).***

The agency proved that at least two confrontations took place in the workplace between J. Bassett and Osorio. As Osorio and J. Bassett did not testify and there were no eyewitnesses to the encounters at issue, there is insufficient evidence for the forum to determine whether or not J. Bassett's actions in those encounters were motivated by Osorio's race or national origin. - --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 147 (2014).***

With a co-worker being the alleged perpetrator of the incident, no evidence of the incident in the record except for second-hand hearsay, and no evidence that it occurred either on MBI's worksite or during work hours or that H. Maltby or L. Bassett, Sr. knew or should have known of the incident during Osorio's employment with MBI, the forum cannot hold MBI liable for the incident. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 148 (2014).***

H. Maltby elected to take no action against J. Bassett because the harassment incident occurred after work hours and off the worksite and H. Maltby believed, under the circumstances, that it was the responsibility of the police, not MBI, to take appropriate action. The forum disagreed. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 148 (2014).***

In the gunshot incident in August 2010, J. Bassett engaged in behavior that put H. Maltby and L. Bassett, Sr. on notice of: (1) J. Bassett's racial animus, as demonstrated by his comment "Spanish motherfuckers," and (2) of the fact that J. Bassett's Hispanic coworkers reasonably viewed him as a threat to their physical safety because of his ownership of firearms and his demonstrated willingness to fire his .45 caliber pistol when he was displeased with them. In response to the gunshot incident, H. Maltby took immediate and appropriate corrective action. Based on that action, the forum concluded that MBI was not liable for the August 2010 incident. However, that incident, coupled with H. Maltby's comment to Guevara that he "knew how to control Jimmy," creates an inference that H. Maltby knew and believed that J. Bassett needed control. The January 10, 2011, incident put H. Maltby on notice that the problem was not solved. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 148-49 (2014).***

The January 10, 2011, incident occurred off MBI's worksite and outside work hours and Guevara and Calderon were assaulted by two persons who were not employed by MBI. However, a preponderance of the evidence leads the forum to conclude that the assaults would not have taken place without J. Bassett's direct involvement. Specifically, there is no evidence that Guevara or Calderon had ever met the unidentified other assailant before the assault. Based on the facts that J. Bassett was a long-time coworker of Guevara and Calderon, the brother of L. Bassett, Jr., and a likely cousin of the unidentified third assailant, the forum also infers that J. Bassett provided the information about the time Guevara drove home each day from work and the route he took. Furthermore, although J. Bassett did not hit Guevara or Calderon, he participated in the assault by getting Guevara to stop his car, then attempting to pull Guevara's car door open during the assault, presumably so Guevara could be pulled out of the car. Under those circumstances, the forum found that MBI had a responsibility to take "immediate and appropriate" corrective action in response to the January 10, 2011, assault, even though it was perpetrated by a coworker and occurred outside work hours and off the worksite. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and***

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### **Louis Bassett, 33 BOLI 121, 149 (2014).**

Considering the August 2010 gunshot incident, the severe discipline imposed on J. Bassett at the time by H. Maltby, and the serious nature of the January 10, 2011, assault, the forum concluded that the appropriate action for H. Maltby would have been to fire J. Bassett and bar him from Liskey Ranch property that was leased by MBI, as it should have been apparent that no lesser action would act as an effective deterrent. Instead, Maltby took no action, electing to wait until the criminal justice system resolved the charges brought against J. Bassett. As a result, Guevara had to continue work for ten days on a worksite that J. Bassett continued to live and work on. Calderon was off work for a week after the January 10, 2011, assault because of his injuries, but had to continue working under the same conditions until his termination in October 2011. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 150 (2014).***

Both Guevara and Calderon credibly testified as to their fear that they would be attacked again after the January 10 assault. Coupled with J. Bassett's continued residence in the shack immediately across the road from the greenhouses Guevara and Calderon worked in, J. Bassett's continued employment with MBI, and Maltby's failure to take any disciplinary action against J. Bassett, the forum found that Guevara and Calderon were subjected to a hostile work environment based on their race and national origin after January 10, 2011, and that Maltby should have known this. The forum further found that, under those circumstances, a reasonable employer would know per se that a hostile environment exists that requires immediate and appropriate corrective action. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 151 (2014).***

Based on J. Bassett's above-described actions, Maltby's knowledge of those actions, and Maltby's failure to take any immediate and appropriate corrective action after the January 10, 2011, incident, MBI is liable for J. Bassett's role in the January 10, 2011, assault on Guevara and Calderon and the resulting hostile environment created for Guevara and Calderon. For reasons described below, H. Maltby and J. Bassett are also jointly and severally liable as aiders and abettors. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 151 (2014).***

#### **12.2.4 --- Harassment by Non-Employee**

#### **12.2.5 --- Harassment by Employer Proxy**

When respondent's sole owner engaged in unlawful harassment, respondent was strictly liable for the owner's conduct. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 122 (2012).***

The agency was required to prove the following elements to prevail on a claim of religious harassment by an employer proxy: (1) The employer was an employer subject to ORS 659A.001 to 659A.033; (2) The employer employed complainant; (3) The employer, through its proxy, engaged in conduct directed at complainant related to her religious beliefs or non-beliefs; (4) the conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment; complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment and/or complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant; and (5) complainant was harmed by the conduct. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 117 (2012).***

#### **12.3 --- Withdrawn Consent**

#### **12.4 --- Harassment in Housing and Public Accommodations**

#### **13.0 CONSTRUCTIVE DISCHARGE (GENERALLY)**

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In a constructive discharge case, a prevailing complainant is entitled to the same damages she would have received, had he or she been fired. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012).*

### 14.0 ADVERSE IMPACT (GENERALLY)

### 15.0 FAILURE TO REASONABLY ACCOMMODATE (GENERALLY)

### 16.0 MIXED MOTIVE (GENERALLY)

## IV. COMMON BASES OF DISCRIMINATION

### 20.0 AGE

#### 20.1 --- Employment

##### 20.1.1 --- Generally

##### 20.1.2 --- Hiring, Promotion

##### 20.1.3 --- Terms, Conditions, and Privileges of Employment

##### 20.1.4 --- Harassment

##### 20.1.5 --- Discharge/Constructive Discharge

#### 20.2 --- Real Property

#### 20.3 --- Public Accommodation

ORS 659A.400(1)(a) defines "place of public accommodation" as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." Respondent's retail convenience store fit within this definition, which respondent admitted in her answer to the formal charges. ----- *In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 31 (2014), appeal pending.*

### 21.0 DISABILITY

#### 21.1 --- Generally

#### 21.2 --- Definitions

##### 21.2.1 --- "Disability" or "Disabled Person"

Complainant's credible testimony, corroborated by credible witness testimony of and medical records, established that she has multiple physical and mental impairments, including visual, hearing, PTSD, agoraphobia, and schizophrenia. Complainant also credibly testified that these impairments affect her major life activities of seeing, caring for herself, sleeping, socializing, and thinking clearly. Although she testified that she is hard of hearing, she did not testify how this restricted any major life activity, other than her statement that she wears one hearing aid. The forum concluded that each of her impairments, except for her hearing, restricted one or more complainant's major life activities as compared to most people in the general population. Based on the above, the forum concluded that the agency met its burden of showing that complainant is an individual with a disability under ORS 659A.104. ----- *In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 31-33 (2014), appeal pending.*

Testimony by complainant and his treating physician established that complainant had spondylolisthesis, a condition that occurs when one vertebrae slips onto another and causes a narrowing and irritation of nerve root openings. Complainant credibly testified that his spondylolisthesis made it difficult for him to climb in and out of truck trailers, and lifting heavy objects had made him extremely sore and unable to sleep at night throughout his employment with respondent. In addition, complainant credibly testified that by October 2010 his spondylolisthesis had intensified and made him uncomfortable if he had to sit for "periods for time," that standing also became "very uncomfortable at times," and bending down to pick up

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freight was “extremely painful.” Complainant and his treating physician both expected that complainant’s spondylolisthesis and associated lumbar radicular pain may be ameliorated by surgery at some future date. Based on these facts, the forum found that complainant’s conditions were a “physiological disorder or condition” that affect his “neurological” and “musculoskeletal” body systems and, as such, constituted a “physical impairment” within the meaning of OAR 839-006-0205(9) between October 2010 and April 2011. The constant pain and discomfort experienced by complainant in 2010 and 2011 in association with his conditions while sitting, standing, and bending constitute substantial limitations in major life activities under ORS 659.104(3) and OAR 839-006-0205(12). Taken together, the forum concluded that complainant had, at all times material, a physical impairment that substantially limited one or more of his major life activities and was an “individual” with “a disability for the purposes of ORS 659A.103 to 659A.145.” The forum also noted that his disability and his OFLA condition were one and the same. --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 29-30 (2014).*

### **21.2.2 --- "Employee"**

### **21.2.3 --- "Essential Functions"**

Complainant was able to and did perform all the essential functions of his job while he was at work. The question was whether being at work on time was an “essential function of complainant’s job. The forum first gives due consideration to the written job description for complainant’s job that states that meeting respondent’s attendance reliability standard was “an essential element of this position” because of respondent’s need to meet delivery commitments to customers. Additionally, respondent’s terminal manager credibly testified that respondent was one of a number of businesses operating in a competitive, deregulated industry, and its success and ability to survive were predicated on its promise of on-time delivery. He further testify that predictable driver attendant at work is critical to respondent’s ability to meet this promise because respondent schedules its drivers based on respondent’s past history of customer orders and deliveries. The forum noted that attendance may be necessary to perform the job, but it is not an essential function. Nevertheless, in jobs where performance requires attendance at the job, irregular attendance compromises essential function. --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 31-33 (2014).*

### **21.2.4 --- "Otherwise Qualified"**

### **21.2.5 --- "Physical or Mental Impairment"**

### **21.2.6 --- "Record" of Impairment**

### **21.2.7 --- "Regarded" as Impaired**

### **21.2.8 --- "Substantially Limits" a "Major Life Activity"**

## **21.3 --- Employment**

### **21.3.1 --- Generally**

### **21.3.2 --- Pre-Employment Disability Inquiries and Medical Exams**

### **21.3.3 --- Post-Employment Disability Inquiries and Medical Exams**

### **21.3.4 --- Hiring, Promotion**

### **21.3.5 --- Terms, Conditions, and Privileges of Employment**

### **21.3.6 --- Harassment**

### **21.3.7 --- Discharge/Constructive Discharge**

### **21.3.8 --- Interactive Process**

Respondent fulfilled its duty of initiating an interactive process through its HR manager’s response to complainant’s physician. In that letter, the HR manager foreclosed the accommodation sought by complainant, which was to have his disability-related tardies not be counted against him for disciplinary purposes. Complainant fulfilled his obligation of

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participating in the interactive process by telling the HR manager specific information about his disability and how the medication he took for it could cause him to have an unplanned tardy. There was no discussion about other possible accommodations. There is also no evidence in the record that any other accommodation was available other than the one sought by complainant. ---- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 35 (2014).*

An interactive process that readily identifies mutually agreeable reasonable accommodation is a meaningful interactive process. In this case, there was no mutually agreeable reasonable accommodation. When reasonable accommodation is not readily identifiable, a meaningful interactive process identifies the nature of the limitations result from the disability, relevant to potential reasonable accommodation that could allow the employee or applicant to perform the essential functions of the job. In this case, although the interactive process and outcome may not have been agreeable to complainant, the conditions of OAR 839-006-0206(5)(b) were satisfied. ---- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 35 (2014).*

### **21.3.9 --- Failure to Reasonably Accommodate Otherwise Qualified Disabled Person**

Respondent was placed on notice of complainant's disability and the need to accommodate complainant's occasional tardiness caused by his disability through the letter from his physician. ---- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 29-30 (2014).*

### **21.3.10--- Utilizing Standards, Criteria, or Methods of Administration that have the Effect of Discriminating on the Basis of Disability**

It is an unlawful employment practice for an employer to discriminate in terms, conditions or privileges of employment because a qualified individual has a disability. Prohibited discrimination includes an employer's use of standards, criteria or methods of administration that have the effect of discrimination against employees with disabilities. ---- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 36 (2014).*

The standard in question is respondent's tardy policy -- employees who are more than three minutes late to work have a .5 "occurrence" charged against them that can result in disciplinary action when sufficient occurrences have accrued. The formal charges allege that, "as applied" to complainant, Respondent's standard discriminated in terms, conditions and privileges of employment based on disability. The evidence in the record revealed no exceptions in respondent's application of its tardy policy to show that respondent did not apply it to non-disabled persons who were tardy or persons with disabilities who were tardy for reasons other than their disability. Complainant himself received numerous "occurrences" for tardies that were unrelated to his disability, along with one "occurrence" for his only tardy related to his disability, demonstrating respondent's even-handed application of the policy. There was also no evidence that respondent's facially neutral tardy policy had a greater impact on disabled employees in general. The forum found that respondent did not unlawfully discriminate against complainant in its application of its tardy policy with respect to complainant's single tardy attributable to his disability. ---- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 36 (2014).*

### **21.3.11--- Threat to Self or Others**

### **21.3.12--- Illegal Drug Use**

### **21.3.13--- Medical Marijuana**

### **21.3.14--- ORS 659A.112(2)(c)**

### **21.3.15--- ORS 659A.112(2)(g)**

## **21.4 --- Employment Agency, Labor Organization**

## **21.5 --- Interaction with Federal ADA**

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Pursuant to ORS 659A.139(1)'s deference to the ADA, the forum relied on the ADA's definition of "service animal." In respondent's motion for summary judgment, respondent argued that, regardless of any tasks they were trained to perform, complainant's dog Contessa was not a "service animal" because she was not "trained," in that she had not completed her training, and that complainant's dog Panda was not a "service animal" because he was "retired or retiring." The forum rejected respondent's argument based on the policy statement contained in ORS 659A.103(1) and the ADA's failure to exclude dogs that (a) have been trained but are retired or retiring or (b) dogs that are undergoing training but are not yet fully trained from its detailed definition of "service animal." ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 34 (2014), appeal pending.***

When the agency's formal charges alleged that respondent violated ORS 659.142(4) and OAR 839-006-0300(2) through her alleged actions, but neither the statute nor the rule contained any reference to service or assistance animals, the forum turned to the ADA for guidance. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 7 (2014), appeal pending.***

### **21.6 --- Public Accommodation**

#### **21.6.1 --- Generally**

The agency's prima facie case consisted of the following elements: (1) respondent is a place of public accommodation as defined in ORS 659A.400; (2) complainant is an individual with a disability; (3) respondent made a distinction, discrimination or restriction against complainant because she is an individual with a disability; and (4) complainant was harmed by respondent's conduct. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 31 (2014), appeal pending.***

#### **21.6.2 --- Service Animals**

Respondent violated ORS 659A.142(4) when complainant visited DSM, respondent's market, with complainant's service dog, who wore her vest and training harness, for the primary reason of educating respondent about service dogs and (a) respondent and one of her store clerks met complainant outside DSM with crossed arms, standing between the door and complainant, making complainant feel that she was being blocked from DSM's doorway; (b) complainant and respondent met for 20 minutes and discussed service dogs; (c) complainant did not ask or attempt to enter DSM; (d) respondent did not invite Complainant into the store and told complainant that dogs were not allowed in DSM and that complainant was not allowed on the property until respondent determined what to do with complainant's service dogs. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 36 (2014), appeal pending.***

Respondent violated ORS 659A.142(4) on two consecutive days by not allowing complainant to shop in her market (DSM) while accompanied by her service animals, based on the following: (a) complainant and her husband entered DSM for the purpose of buying milk, respectively accompanied by complainant's two service dogs, Contessa and Panda, who were both leashed; (b) Contessa wore her service dog in training vest, a training harness, and a "haltie," a type of soft muzzle; (c) complainant was accosted by respondent, who told them they could not bring dogs into DSM and that they needed to leave; (d) complainant told respondent that Contessa and Panda were service dogs and pointed out the poster in DSM's front window that said service dogs were allowed; (e) respondent again told complainant she could not let the dogs come into DSM, but complainant could use DSM's drive-up window or respondent and DSM's clerk would hold the dogs outside while complainant shopped; (f) respondent did not ask complainant either of the questions permitted by the ADA -- if Contessa and Panda were required because of a disability and what work or task they had been trained to perform; and (g) there was no evidence that either Contessa or Panda was out of control or not housebroken, the two exceptions that would have justified respondent's refusal to allow complainant entry with her dogs. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 36-37 (2014),***

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### ***appeal pending.***

At hearing, complainant and the agency's expert witness credibly testified as to numerous tasks that complainant's two service dogs were trained to perform, as of April 2013, which mitigate complainant's multiple disabilities. Tasks Contessa was trained to perform included: (1) "covering"; (2) assisting Complainant to walk through crosswalks, including pushing the "walk" button; (3) leading Complainant to a vehicle that she was to ride in; (4) locate bus stops; (5) alerting Complainant to traffic; (6) alerting Complainant to take her medication every two hours; (7) helping Complainant breathe properly when Complainant suffers panic attacks in her sleep; (8) opening and closing doors; (9) providing "tactile" stimulation; and (10) helping Complainant avoid objects while walking. Tasks Panda was trained to perform included: (a) "covering" and chest compression when Complainant had a PTSD attack; (b) waking Complainant at night when she has nightmares and calming her down; (c) dropping on Complainant's chest and getting her to breathe again when Complainant stops breathing at night; and (d) keeping Complainant from running into street curbs and things in her house. Based on this evidence, the forum concluded that Contessa and Panda were both "individually trained to do work or perform tasks for the benefit of an individual (Complainant) with a disability as of April 2013 and were "service animals" under Oregon law. --- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 34-35 (2014), appeal pending.***

Pursuant to ORS 659A.139(1)'s deference to the ADA, the forum relied on the ADA's definition of "service animal." In respondent's motion for summary judgment, respondent argued that, regardless of any tasks they were trained to perform, complainant's dog Contessa was not a "service animal" because she was not "trained," in that she had not completed her training, and that complainant's dog Panda was not a "service animal" because he was "retired or retiring." The forum rejected respondent's argument based on the policy statement contained in ORS 659A.103(1) and the ADA's failure to exclude dogs that (a) have been trained but are retired or retiring or (b) dogs that are undergoing training but are not yet fully trained from its detailed definition of "service animal." --- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 34 (2014), appeal pending.***

In April 2013, Oregon law required places of public accommodation to allow individuals with disabilities to be accompanied by their service animal: (a) unless the animal is out of control and the animal's handler does not take effective action to control it or (b) the animal is not housebroken. When there was no evidence in this case that either of these exceptions applied to complainant's service animals in April 2013, respondent was required to allow complainant to access respondent's market with her service dogs unless the forum concluded that neither dog was a "service animal." --- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 34 (2014), appeal pending.***

Service animals include dogs that (a) have been trained but are retired or retiring and (b) dogs that are undergoing training but are not yet fully trained. --- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 8-9 (2014), appeal pending.***

The ADA contains no accompanying definition of "trained" to guide the forum in determining whether "trained" should be given the limited definition sought by Respondent, i.e. a dog that has completed training and is not retired, or whether the term should be interpreted more expansively to include dogs with the "training" status of complainant's dogs at the time of the alleged discrimination. Since the word "trained" is a word of common usage, the forum gave it the plain, natural and ordinary meaning contained in *Webster's Third New Int'l Dictionary*. --- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 8 (2014), appeal pending.***

ORS 659A.139 provides that "ORS 659A.103 to 659A.144 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended." Accordingly, the forum adopted the ADA's definition of

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“service animal” as set out in Title III of the ADA, at 28 C.F.R. §36.104. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 7-8, 33-34 (2014), appeal pending.***

When the agency’s formal charges alleged that respondent violated ORS 659.142(4) and OAR 839-006-0300(2) through her alleged actions, but neither the statute nor the rule contained any reference to service or assistance animals, the forum turned to the ADA for guidance. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 7 (2014), appeal pending.***

When neither OAR 839-006-0345 nor ORS 659A.143, the statute it interprets, existed at the time of the alleged discrimination and there is no language in either the statute or rule to show that they were intended to be applied retroactively, the forum concluded that they did not apply to this proceeding. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 7 (2014), appeal pending.***

**21.7 ---- Real Property**

**22.0 INJURED WORKER**

**22.1 --- Definitions**

**22.2 --- Generally**

**22.3 --- Hiring, Promotion**

**22.4 --- Terms, Conditions and Privileges of Employment**

**22.5 --- Harassment**

**22.6 --- Discharge/Constructive Discharge**

In a case alleging discharge based on use of the workers’ compensation system, the agency’s prima facie case consisted of the following elements: (1) respondent is an Oregon employer at times material herein who employed six or more persons, including complainant; (2) complainant applied for benefits or invoked or utilized the workers’ compensation procedures in ORS chapter 656; (3) respondent knew that complainant applied for benefits or invoked or utilized the workers’ compensation procedures in ORS chapter 656; (4) respondent terminated complainant; (5) There is a causal connection between complainant’s application for benefits or invocation or utilization of the workers’ compensation procedures in ORS chapter 656 and complainant’s termination; and (6) complainant was harmed by her termination. ---- ***In the Matter of Leo Thomas Ryder dba Leo’s BBQ Bar & Grill, 34 BOLI 67, 74 (2015).***

The agency satisfied all the elements of its prima facie case except for causation by proving: (1) respondent employed six or more persons during complainant’s employment with respondent; (2) complainant was respondent’s star employee until she suffered a compensable injury while lifting a heavy tray at work; (3) complainant reported her injury to respondent and self-treated her injury for three weeks before she visited a doctor; (4) while at the doctor’s office, complainant reported that she had been injured while working for respondent; thereafter respondent complained to complainant that respondent had been fined \$8,000 because respondent did not have workers’ compensation insurance; (5) complainant understood from respondent’s comments that she would be fired if she did not cross out her signature on her workers’ compensation claim form, then was fired shortly thereafter. ---- ***In the Matter of Leo Thomas Ryder dba Leo’s BBQ Bar & Grill, 34 BOLI 67, 74-75 (2015).***

The causation element of the agency’s prima facie case was establish by proof of the following: (1) respondent’s hostility towards complainant because of the \$8,000 fine levied on respondent for not having workers’ compensation insurance after complainant reported her injury to her doctor; (2) respondent’s threatening statements to complainant in connection with complainant’s signature on her workers’ compensation paperwork; (3) respondent’s termination of complainant only minutes after complainant signed, then crossed out her signature on her workers’ compensation paperwork; and (4) the absence of any reliable evidence in the record of

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any legitimate, nondiscriminatory reason Respondent may have had for terminating complainant. ---- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 75 (2015).***

**22.7 --- Termination of Health Benefits**

**22.8 --- Reinstatement of Worker to Former Job**

**22.9 --- Reemployment of Disabled Worker in Available and Suitable Job**

**22.10 --- Reemployment Rights of State Workers**

**23.0 MARITAL STATUS**

**23.1 --- Employment**

**23.1.1 --- Hiring, Promotion**

**23.1.2 --- Terms, Conditions and Privileges of Employment**

**23.1.3 --- Harassment**

**23.1.4 --- Discharge/Constructive Discharge**

**23.2 --- Public Accommodation**

**23.3 --- Real Property**

**24.0 NATIONAL ORIGIN**

**24.1 --- Employment**

**24.1.1 --- Hiring, Promotion**

**24.1.2 --- Terms or Condition of Employment**

**24.1.3 --- Harassment**

The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 145-46 (2014).***

Element (3) of the prima facie case – that complainant was harmed by harassment directed at complainant by co-workers -- was satisfied by Guevara's credible testimony that J. Bassett's frequent racial epithets offended him. As J. Bassett's epithet of choice -- "motherfucker"-- was always prefaced by the word "Spanish" or "Hispanic," there can be no question that his comments were regarding or directed at Guevara and his coworkers because of their race, thereby satisfying element (4) of the prima facie case. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146 (2014).***

Element (5) – that the harassment was sufficiently severe or pervasive -- was satisfied by Guevara's credible testimony that J. Bassett's epithets created a hostile and offensive working environment for him prior to J. Bassett's "transfer" in August 2010 after the gunshot incident. The forum further found that a reasonable Hispanic person in the circumstances of Guevara would perceive that J. Bassett's repeated "Hispanic motherfucker" comments were sufficiently severe and pervasive to create a hostile, offensive or intimidating work environment. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146 (2014).***

There was no evidence in the record that other complainants were offended by Bassett's epithets. Calderon, the only other Hispanic employee who testified, stated that he did not understand anything that J. Bassett said and further testified that, except for the gunshot incident, he had no problems with J. Bassett until J. Bassett participated in the January 10, 2011, assault. There was no evidence that any of MBI's Klamath Falls Hispanic workers except Guevara spoke or understood English and no evidence in the record that Guevara explained the

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meaning of J. Bassett's epithets to his coworkers. The forum recognized that comments made about or to a person regarding their protected class that cannot be understood by the person may still create an intimidating, hostile or offensive working environment if the context in which the comments are made or the body language, demeanor, and tone of the person making the comments make it apparent that the comments are offensive and related to the person's protected class. However, in this case there was no testimony by any of the non-English speaking Hispanic workers that they understood or were offended by J. Bassett's racial epithets and the forum concludes that the agency has failed to meet elements (3) and (5) of its prima facie case with respect to Calderon, Yoc, Osorio, R. Herrera, and J. Herrera. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 146 (2014).***

### **24.1.4 --- Discharge/Constructive Discharge**

The forum found that respondent's statement that complainant preferred to "stay with your own kind, like the Guatemalan you are" during the termination conversation reflected a discriminatory animus and, thus was sufficient to establish a nexus between complainant's nation origin and his discharge. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157 (2014).***

### **24.2 --- Public Accommodation**

### **24.3 --- Real Property**

## **25.0 OPPOSITION TO SAFETY HAZARD (ORS 654.062)**

### **25.1 --- Generally**

### **25.2 --- Prima Facie Case**

### **25.3 --- Causal Connection**

### **25.4 --- Nature of Opposition**

### **25.5 --- Term or Condition of Employment**

### **25.6 --- Discharge/Constructive Discharge**

## **26.0 OPPOSITION TO UNLAWFUL PRACTICE (ORS 659.030)**

### **26.1 --- Generally**

In its formal charges, the agency alleged that respondents reduced complainant's hours of work, effectively reducing her pay, after she opposed attending a symposium based on her religious beliefs, in violation of ORS 659A.030A(1)(b). Based on the same set of facts, the agency also alleged that respondents retaliated against complainant in violation of ORS 659A.030(1)(f) and OAR 839-005-0033, the agency's rule interpreting ORS 659A.030(1)(f). At hearing, the agency presented evidence from which it argued that the alleged cut in hours was set to take place during the one-week period immediately after complainant's termination. Since the ORS 659A.030A(1)(b) claim was also founded on complainant's opposition to attending the symposium, the forum concluded that it was properly a complaint of retaliation, and that the two charges were properly merged into a single charge of retaliation. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94,131-32 (2012).***

### **26.2 --- Prima Facie Case**

The agency's prima facie case in an ORS 659A.030(1)(f) retaliatory discharge case consists of the following elements: (1) complainant opposed an unlawful employment practice; (2) respondent discharged complainant; and (3) there is a causal connection between complainant's opposition and her discharge. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 166 (2012).***

A violation of ORS 659A.030(1)(f) is established by evidence that shows a complainant opposed an unlawful practice, the respondent subjected the complainant to an adverse employment action, and that there is a causal connection between the complainant's opposition

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and the respondent's adverse action. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 123 (2012).*

By her refusal to attend a symposium on religious grounds, complainant explicitly and implicitly opposed a practice that she reasonably believed to be an unlawful practice. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 133 (2012).*

### 26.3 --- Nature of Opposition

### 26.4 --- Term or Condition of Employment

The primary evidence supporting the agency's charge of retaliation was the timing of respondent's announcement to complainant that she would not be working the following week based on respondent's absence. In support of the agency's case, complainant credibly testified that she had never been scheduled for time off during respondent's previous absences. However, complainant did not testify about the circumstances of those previous absences, there was no other evidence about the duration or circumstances of those absences, and respondent credibly testified he scheduled a complainant's co-worker to work instead of complainant because the co-worker was paid less than complainant and complainant, whose primary job was assisting him in his dental work, was not needed during his absence. Respondent also credibly testified that his absence had been scheduled months earlier. There was no evidence concerning whether the co-worker had been qualified to answer the phones in the dental office during respondent's previous absences, whereas there was no dispute that she was qualified to perform that function at the time of complainant's termination. Based on this evidence, the forum was unable to conclude to complainant's scheduled week off was a retaliatory act based complainant's opposition to attending the symposium. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 133 (2012).*

### 26.5 --- Discharge/Constructive Discharge

The forum concluded that respondent used complainant's rejection of and objections to unwelcome sexual conduct by respondent's president and general manager as a basis for discharging her based on the following: (1) respondent's general manager told her she was fired because respondent did not have the money to pay her and complainant had overheard respondent's president and general manager talking the previous day about how much money respondent would be making in the next month; (2) complainant received no warnings about her job performance prior to her discharge; (3) respondent's president and general manager were both aware of complainant's objection; (4) complainant was discharged the day after she objected to respondent's sexually offensive emails. This evidence proved that complainant was discharged in retaliation opposing respondent's unlawful sexual harassment. ---- *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 166 (2012).*

### 26.6 --- To "Otherwise" Discriminate

### 27.0 RACE OR COLOR

### 27.1 --- Employment

#### 27.1.1 --- Generally

#### 27.1.2 --- Hiring, Promotion

#### 27.1.3 --- Term, Conditions and Privileges of Employment

#### 27.1.4 --- Harassment

The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 145-46 (2014).*

#### 27.1.5 --- Discharge/Constructive Discharge

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### 27.2 --- Public Accommodation

### 27.3 --- Real Property

## 28.0 RACE, RELIGION, COLOR, SEX, NATIONAL ORIGIN, MARITAL STATUS OR AGE OF PERSON WITH WHOM INDIVIDUAL ASSOCIATES

### 28.1 --- Employment

#### 28.1.1 --- Hiring, Promotion

#### 28.1.2 --- Terms, Conditions, or Privileges of Employment

#### 28.1.3 --- Discharge/Constructive Discharge

### 29.0 RELIGION

### 29.1 --- Employment

#### 29.1.1 --- Hiring, Promotion

#### 29.1.2 --- Terms, Conditions, or Privileges of Employment

In its formal charges, the agency alleged that respondents reduced complainant's hours of work, effectively reducing her pay, after she opposed attending a symposium based on her religious beliefs, in violation of ORS 659A.030A(1)(b). Based on the same set of facts, the agency also alleged that respondents retaliated against complainant in violation of ORS 659A.030(1)(f) and OAR 839-005-0033, the agency's rule interpreting ORS 659A.030(1)(f). At hearing, the agency presented evidence from which it argued that the alleged cut in hours was set to take place during the one-week period immediately after complainant's termination. Since the ORS 659A.030A(1)(b) claim was also founded on complainant's opposition to attending the symposium, the forum concluded that it was properly a complaint of retaliation, and that the two charges were properly merged into a single charge of retaliation. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 122-23 (2012).*

#### 29.1.3 --- Harassment

##### 29.1.3.1-- Intimidating, Hostile, or Offensive Work Environment

Complainant's credible testimony that she experienced anxiety and stress prior to her resignation as a result of respondent's harassment efforts to persuade her to attend the symposium satisfied the "harm" element of the agency's harassment case. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 123 (2012).*

When submission to objectionable religious conduct is made an explicit or implicit term or condition of continued employment, the forum need not evaluate the frequency, severity, and pervasiveness of the conduct. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 122 (2012).*

When respondent told complainant that he would consider she had resigned if she left the office and did not let him finish a conversation in which he attempted to convince her to attend a symposium with religious content that she had already objected to due to her religious beliefs, the forum concluded that complainant had no choice but to submit to the conduct if she wanted to keep her job. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 122 (2012).*

In a religious harassment case, the forum must ultimately determine whether a reasonable person in the circumstances of the complaining individual would have perceived the conduct to be sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment. In making this determination, the forum looks at the "totality of the circumstances." ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 121 (2012).*

The forum concluded that respondent's harassment of complainant was sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment for a reasonable person in complainant's circumstances and did so for complainant. The conduct

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consisted of respondent's initial attempt to convince complainant to attend a work-related symposium that included training based on teachings of the Church of Scientology, during which time complainant stated her religious-based opposition; (2) the presence of two posters, for three days, in respondent's workplace lunch room that contained L. Ron Hubbard's writings about the "Tone Scale" and "The Condition Formulas"; (3) respondent's repeated attempts in the workplace to convince complainant to attend the symposium after she had already stated her religious-based opposition, including his request that she talk with respondent's symposium; and (4) respondent's ultimatums that she attend or lose her job. As to frequency, severity, and pervasiveness, the conduct occurred daily during a four-day period that culminated in complainant's resignation. Complainant credibly testified that she was "very nervous and anxious about confronting" respondent when she first told him that she "wished not to attend the symposium due to the ties to the Church of Scientology," that she "had increased anxiety and stress" from the time respondent asked the staff if they were available to attend the symposium and complainant "started looking into Church of Scientology," and that she was "stressed and anxious" about telling respondent she did not want to attend because of her religious beliefs. Although there was no evidence that the conduct interfered with complainant's work performance, complainant credibly testified it ultimately made her tender her resignation. The forum found that a reasonable person in complainant's circumstances would have been a baptized Christian with a sincerely-held religious belief, like complainant, who would have taken similar steps as complainant to educate him or herself about the nature of the symposium and would have also learned that attending the workshops involved being exposed to and assimilating basic principles of Scientology over a three-day period in a sequestered setting at a mountain resort. That reasonable person would likely have also learned that some websites link the symposium consultants to the Church of Scientology and would have found some websites containing allegations that similar consulting groups introduce their clients to the religious aspects of Scientology. In addition, that person would have seen L. Ron Hubbard posters containing statements that were a fundamental part of the Church of Scientology appear in respondent's lunch room in the same time frame. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 120-21 (2012).***

In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, i.e., the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 122 (2012).***

When the agency's pleadings involved all three separate theories of harassment set out in OAR 839-005-0010(4)(A)(a-c), the forum stated that that the first required proof that respondent's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment, whereas the second and third theories, plead cumulatively and in the alternative, required proof that complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment "and/or" complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant. The forum examined each theory separately, stating that each required different proof and provided a different basis for liability. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 119-20 (2012).***

The agency was required to prove the following elements to prevail on a claim of religious harassment by an employer proxy: (1) The employer was an employer subject to ORS 659A.001 to 659A.033; (2) The employer employed complainant; (3) The employer, through its proxy, engaged in conduct directed at complainant related to her religious beliefs or non-beliefs; (4) the conduct was sufficiently severe or pervasive to have the purpose or effect of

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unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment; complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment and/or complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant; and (5) complainant was harmed by the conduct. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 117 (2012).***

### 29.1.3.2--- Tangible Employment Action

Complainant's credible testimony that she experienced anxiety and stress prior to her resignation as a result of respondent's harassment efforts to persuade her to attend the symposium satisfied the "harm" element of the agency's harassment case. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 123 (2012).***

When harassment involves a tangible employment action, the forum need not evaluate the frequency, severity, and pervasiveness of the conduct. When complainant's resignation was a constructive discharge and a direct result of her refusal to attend a symposium that she opposed based on her religious beliefs, the forum found that complainant's refusal to submit to respondent's ultimatum that she attend the symposium was the basis for an employment decision affecting her. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 123 (2012).***

When respondent told complainant that he would consider she had resigned if she left the office and did not let him finish a conversation in which he attempted to convince her to attend a symposium with religious content that she had already objected to due to her religious beliefs, the forum concluded that complainant had no choice but to submit to the conduct if she wanted to keep her job. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 125 (2012).***

When the agency's pleadings involved all three separate theories of harassment set out in OAR 839-005-0010(4)(A)(a-c), the forum stated that that the first required proof that respondent's conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment, whereas the second and third theories, plead cumulatively and in the alternative, required proof that complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment "and/or" complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant. The forum examined each theory separately, stating that each required different proof and provided a different basis for liability. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 119-20 (2012).***

The agency was required to prove the following elements to prevail on a claim of religious harassment by an employer proxy: (1) The employer was an employer subject to ORS 659A.001 to 659A.033; (2) The employer employed complainant; (3) The employer, through its proxy, engaged in conduct directed at complainant related to her religious beliefs or non-beliefs; (4) the conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating an intimidating, hostile or offensive working environment; complainant's submission to the conduct was made either explicitly or implicitly a term or condition of her employment and/or complainant's submission to or rejection of the conduct was used as the basis for employment decisions affecting complainant; and (5) complainant was harmed by the conduct. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 117 (2012).***

### 29.1.4 --- Discharge/Constructive Discharge

In a constructive discharge case, a prevailing complainant is entitled to the same damages she would have received, had he or she been fired. ----- ***In the Matter of Dr. Andrew***

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### ***Engel, DMD, PC, 32 BOLI 94, 137 (2012).***

In a constructive discharge case, the forum concluded that respondent intentionally created or intentionally maintained discriminatory working conditions related to the individual's protected class status when, over complainant's last four days of employment, complainant clearly stated her religious objections to attending a required symposium and respondent continued to pressure complainant to attend. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 134-35 (2012).***

In a constructive discharge case, the forum concluded that complainant's working conditions were so intolerable that a reasonable person in complainant's circumstances would have resigned because of them when complainant found herself in a position where she reasonably believed she would lose her job if she did not attend a required symposium scheduled to occur in two months that she opposed because of her religious beliefs and that she would be pressured to attend the symposium or resign until the date of the symposium, and if she changed her mind and attended the symposium, she would be subjected to training containing fundamental tenets of the Church of Scientology in a sequestered setting at a mountain resort. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 136 (2012).***

In a constructive discharge case, respondent should have known that the complainant was certain, or substantially certain, to leave employment as a result of the working conditions once complainant made it clear to respondent that she objected to attending a required symposium based on the conflict between her religious beliefs and the contents of the symposium that were based on L. Ron Hubbard's writings and respondent continued to insist that she attend. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 136 (2012).***

In a constructive discharge case, the forum relied on complainant's credible testimony that "[q]uitting my job was not taken lightly. I know for my mental and physical well-being that I could not continue to work under such – such a hostile environment" to conclude that complainant quit as a direct result of respondent's insistence that she attend a symposium she opposed based on her religious beliefs. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 136-37 (2012).***

### **29.1.5 --- Failure to Reasonably Accommodate**

#### **29.1.5.1-- Generally**

"Bona fide occupational requirement" is not available as an affirmative defense under ORS 659A.030(1)(b) in a case alleging failure to accommodate based on a complainant's religious beliefs. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 131 (2012).***

As part of a reasonable accommodation request, complainant was not required to disclose her specific religious beliefs so that respondent could evaluate them to determine if those beliefs formed the basis for a reasonable accommodation respondent might be required to provide. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 125 (2012).***

When a symposium that respondent required complainant to attend and that complainant objected to attending based on her religious beliefs was based on the theories and teachings of the Church of Scientology, respondent's request that she talk with a symposium consultant was not an act complainant was required to engage to "cooperate in good faith" with respondents' attempt to accommodate complainant when the record as a whole showed that the consultant's talk would have focused on convincing complainant that the symposium had no religious content. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 125 (2012).***

#### **29.1.5.2-- Under ORS 659A.030**

When complainant requested the accommodation that she be allowed to attend alternative, equivalent required training that had no religious content, there is no evidence in the record that alternative, equivalent training existed, and the training was based specifically on the

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writings of L. Ron Hubbard, the forum concluded that the possibility that alternative, equivalent training existed was remote and declined to speculate on whether complainant's attendance at an alternative, equivalent training that had no religious content would have involved more than *de minimus* costs for respondents. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 131 (2012).***

The standard of proving undue hardship under ORS 659A.030 for any violations not covered under ORS 659A.033 is whether the proposed accommodation imposed "more than *de minimus* costs." This is an affirmative defense that respondents have the burden of proving. When respondents provided no quantifiable evidence that complainant's failure to attend a required symposium would have affected respondents' income negatively, that she had problems working as part of the "team" using respondents' business technologies before her termination, and no other evidence to assist the forum in determining the potential income loss claimed by respondents as a result of complainant's failure to attend a required symposium the forum concluded that respondents failed to satisfy their burden of proof to show that the costs of excusing complainant from attending the symposium would have been more than *de minimus*. -- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 130-31 (2012).***

In contrast to ORS 659A.033, the focus of ORS 659A.030 is on employer accommodation of the employee's "religious beliefs." ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 129 (2012).***

When the agency's formal charges alleged that respondent failed to reasonably accommodate complainant's religious beliefs by failing to engage in an interactive process and by refusing to grant complainant's request to be excused from the symposium, the forum concluded that these allegations encompassed one potential violation of ORS 659A.030(1)(b) because "interactive process" is a step in the analysis of whether a reasonable accommodation violation has occurred, not a separate, stand-alone violation. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 123 (2012).***

### 29.1.5.3-- Under ORS 659A.033

Under ORS 659A.033, complainant's objection to attending a symposium because of its relationship to the Church of Scientology "and her personal religious beliefs" does not qualify as a "religious observance" or "religious practice." Even if it did, under ORS 659A.033(2) respondent's failure to accommodate complainant would have been unlawful only if complainant was entitled to take leave during the symposium that was not restricted as to the manner in which the leave could be used and granting such leave did not create an undue hardship for respondent under ORS 659A.033(4). ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 129 (2012).***

As set out in ORS 659A.033, the forum concluded that "religious practices" are not limited to affirmative acts that a person believes he or she is required to take based on the person's religious beliefs, e.g. praying at specific times every day, but can also include regular abstinence from commonly accepted practices proscribed by a person's sincerely held religious beliefs, for example, not eating certain foods or not saluting a nation's flag. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 129 (2012).***

As set out in ORS 659A.033, the forum concluded that "religious practices" are a form of behavior habitually engaged in based on the tenets of a person's sincerely held religious beliefs, and "religious observances" are acts of a ceremonial religious nature carried out in a form prescribed by a person's sincerely held religious beliefs. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 129 (2012).***

When the words "religious observance or practices" were not defined in ORS 659A.033, in OAR 839-005-0140, the agency's administrative rule interpreting ORS 659A.033, in Title VII, the federal law analogous to ORS 659A.033, or in EEOC Regulations or Guidelines on Religion,

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and the forum found no case law on point, the forum found that the words “observances” and “practices” are words of common usage and ascribed to them the plain, natural and ordinary meaning contained in Webster’s Third New Int’l Dictionary. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128 (2012).*

ORS 659A.033 requires an employer to grant available unrestricted leave to an employee to engage in the religious observance or practices of the employee and prohibits an employer from imposing an occupational requirement that restricts the ability of an employee to take time off for a holy day or to participate in a religious observance or practice, absent a showing of undue hardship. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128 (2012).*

ORS 659A.033 was tailored to ensure that employees must be allowed time off to observe or participate in their own “religious observance or practices,” absent undue hardship to the employer. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 128 (2012).*

### **29.1.6 --- Permissible Preference of Employee Based on Religion in Certain Employment**

#### **29.1.7 --- Religious Belief**

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. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 129 , fn. 26 (2012).*

The forum rejected respondents’ claim that Scientology is a religion but that L. Ron Hubbard’s non-fiction writings -- the undisputed “scripture” of Scientology -- lose all religious context when reproduced for instructional purposes as a “secular” business model has no more merit than an argument that reproduction of sections of the Quran, Bible, or Book of the Mormon, when used for instructional purposes as a business model, have no religious context and are purely “secular.” ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 124 (2012).*

Through the credible testimony of complainant, her baptizing pastor, and a copy of her baptismal certificate, the agency established that complainant was baptized as a Christian in 1993 at age 17, that she had maintained sincerely held Christian beliefs, and that she objected to attending the symposium because it contained teachings that conflicted with her Christian beliefs. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 124 (2012).*

#### **29.1.8 --- Relationship to Religious Belief**

The forum found that alleged discriminatory conduct directed at complainant by respondent was related to complainant’s religious beliefs when complainant had Christian beliefs, her beliefs caused her to object to the teachings of the Church of Scientology, and respondent’s conduct consisted of his attempts to convince complainant to attend a work-related symposium that involved training based on religious writings by the founder of the Church of Scientology. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 118-19 (2012).*

### **29.2 --- Public Accommodation**

### **29.3 --- Real Property**

## **30.0 RETALIATION FOR FILING WAGE CLAIM (ORS 652.355)**

In the context of OR 652.355, the words “wage claim” mean either (1) having made a formal wage claim with BOLI or (2) having discussed or inquired about unpaid wages with anyone or consulted an attorney or agency about unpaid wages. Complainant’s call to the Better Business Bureau and her discussions with her coworkers about not being paid the wages due and owing to her both satisfied the latter definition. ----- *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 93 (2015).*

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When it was undisputed that complainant was a fulltime employee with a regular work schedule until she called the Better Business Bureau and talked to coworkers about her pay, complainant's testimony and respondent's prior statements showed that respondent and complainant's manager were both aware that complainant had contacted the BBB before they decided to make complainant an on-call employee, and text messages between complainant and her manager showed that complainant's job status had been changed to on-call, the forum concluded that complainant was made an on-call employee because of her complaints. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 93-94 (2015).***

When it was undisputed that complainant was a fulltime employee with a regular work schedule until she called the Better Business Bureau and talked to coworkers about her pay, complainant's testimony and respondent's prior statements showed that respondent and complainant's manager were both aware that complainant had contacted the BBB before they decided to make complainant an on-call employee, and text messages between complainant and her manager showed that complainant's job status had been changed to on-call, the forum concluded that complainant was made an on-call employee because of her complaints. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 94-95 (2015).***

When complainant credibly testified that she never quit, respondent's manager told respondent that complainant was "down at the labor board, turning us in" and respondent's reaction was to decide "I guess she quit. I guess she made her decision," the forum found that respondent's excuse for deciding complainant had quit was pretextual, and the real reason complainant was never called again for work was in retaliation for her complaints about not being paid. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 94-95 (2015).***

### 31.0 SEX

#### 31.1 --- Pregnancy and Related Conditions (generally)

To prove that respondent violated ORS 659A.030(1)(b) by demoting complainant from her assistant manager position and cutting her hourly wage rate because she was pregnant, the agency prima facie case must establish the following five elements: (1) respondent was an employer subject to ORS 659A.010 to 659.865; (2) respondent employed complainant; (3) complainant was a pregnant woman; (4) respondent demoted complainant and cut her hourly wage; and (5) respondent took these actions against complainant because of her pregnancy. --- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 31 (2012).***

Respondent's general manager's statement to complainant that "I don't feel you are going to have the availability we are looking for in the future because you are pregnant," standing alone, was direct evidence of a discriminatory motive with regard to complainant's demotion due to her sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

A conversation between respondent's owner and general manager in which they discussed complainant's pregnancy and said they would probably have to let her go because of her pregnancy established discriminatory intent based on complainant's sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

Based on negative statements made by respondent's owner and general manager related to complainant's pregnancy and respondent's lack of credibility with regard to its proffered legitimate, nondiscriminatory reasons for demoting complainant and cutting her pay, the forum concluded that respondent demoted complainant and cut her pay because of her sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

When there was no evidence that respondent made any statements demonstrating

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respondent's intent to take complainant off the schedule because of her sex/pregnancy and no comparator evidence to show that her hours would not have been temporarily cut, had she been out sick and visited the emergency room and not been pregnant, the forum concluded that the agency failed to prove by a preponderance of the evidence that complainant's hours were cut because of her sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 33 (2012).***

The lack of credibility by respondent witnesses, combined with "specific intent" statements made by respondent's owner and general manager made concerning complainant's pregnancy vis-à-vis her continuing employment status, her demotion eight days earlier because of her pregnancy, and her pregnancy-related trip to the emergency room a few days earlier that caused her to be temporarily taken off the schedule, caused the forum to conclude that complainant was discharged because of her sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 34-35 (2012).***

### **31.2 --- Employment**

#### **31.2.1 --- Hiring, Promotion**

#### **31.2.2 --- Terms, Conditions, or Privileges of Employment**

Based on negative statements made by respondent's owner and general manager related to complainant's pregnancy and respondent's lack of credibility with regard to its proffered legitimate, nondiscriminatory reasons for demoting complainant and cutting her pay, the forum concluded that respondent demoted complainant and cut her pay because of her sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012).***

When there was no evidence that respondent made any statements demonstrating respondent's intent to take complainant off the schedule because of her sex/pregnancy and no comparator evidence to show that her hours would not have been temporarily cut, had she been out sick and visited the emergency room and not been pregnant, the forum concluded that the agency failed to prove by a preponderance of the evidence that complainant's hours were cut because of her sex/pregnancy. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 33 (2012).***

#### **31.2.3 --- Harassment**

##### **31.2.3.1-- Intimidating, Hostile, or Offensive Work Environment**

Hostile environment sexual harassment must be sex-based. ----- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 276 (2013).*** See also *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 161 (2012).*

The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." ----- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 276 (2013).*** See also *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 161 (2012).*

The agency's prima facie case in a hostile environment case in which respondent's president and general manager were alleged to have sexually harassed complainant consisted of the following elements: (1) respondent is an employer subject to ORS 659A.001 to 659A.030; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent's president and general manager engaged in unwelcome conduct (verbal or physical) directed at complainant because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with complainant's work performance or creating a hostile, intimidating or offensive work environment for complainant; and (6) complainant was harmed by the unwelcome conduct. ----- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 276 (2013).*** See also *In the*

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*Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 161 (2012).*

In a hostile environment case, the agency did not meet its burden of proof on the fourth element of its prima facie case when the agency presented no credible evidence that respondent engaged in unwelcome conduct directed at complainant because of her sex. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 277 (2013).***

In a hostile environment case in which respondent's president and general manager were alleged to have sexually harassed complainant, the forum concluded that the alleged harassment occurred based on complainant's credible testimony. The forum concluded that the conduct was unwelcome to complainant based on her convincing testimony that it offended and embarrassed her; her multiple objections to it; her complaints to her sister about it; and her change in apparel and cessation of using makeup at work in an attempt to deter the behavior. The forum further concluded that the unwelcome conduct was due to complainant's sex because of president's and general manager's direct references to: (1) their perception of complainant's sexual behavior and needs; (2) a movie with erotic sex as its main theme; (3) the breasts of another female employee; (4) strippers; along with the president's attempt to date complainant. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 162 (2012).***

The standard for determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment is from the objective standpoint of a reasonable person in complainant's particular circumstances. In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 162 (2012).***

The forum concluded that sexual conduct by respondent's president and general manager was sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment based on the following: (1) the conduct was comments of a distinctly sexual nature directed at complainant, a single mother, who quit her previous job after being solicited to work for respondent; (2) there were at least 12 separate incidents during the three months that complainant worked for respondent; (3) the conduct made plaintiff feel upset, awkward, uncomfortable and embarrassed; and (4) complainant credibly testified that the conduct made it very difficult for her perform her job. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 162-63 (2012).***

### **31.2.3.2-- Tangible Employment or Quid Pro**

The agency's prima facie case in a tangible employment action case when the agency alleged that complainant's submission to sexual conduct was made either an explicit or implicit term of employment consisted of the following elements: (1) respondent was an employer subject to ORS 659A.001 to 659A.030; (2) respondent employed complainant; (3) complainant is a member of a protected class (sex); (4) respondent's president and general manager engaged in unwelcome conduct (verbal or physical) directed at complainant because of her sex; (5) complainant's submission to this conduct was made an explicit or implicit term or condition of complainant's employment. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 164 (2012).***

The forum concluded that complainant's submission to a unwelcome sexual conduct was not made either explicitly or implicitly a term or condition of complainant's employment because there was no evidence that harassers made any explicit or implicit threats about what might happen to complainant if she did not go along with their behavior and because complainant complained about the harasser's other offensive conduct on multiple occasions

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without any adverse consequences. ----- *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 164 (2012).*

The forum concluded that respondent used complainant's rejection of unwelcome sexual conduct by respondent's president and general manager as a basis for discharging her based on the following: (1) respondent's general manager told her she was fired because respondent did not have the money to pay her and complainant had overheard respondent's president and general manager talking the previous day about how much money respondent would be making in the next month; (2) complainant received no warnings about her job performance prior to her discharge; (3) respondent's president and general manager were both aware of complainant's objection; (4) complainant was discharged the day after she objected to respondent's sexually offensive emails. ----- *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 165-66 (2012).*

### 31.2.3.3--- Discharge/Constructive Discharge

The forum concluded that respondent used complainant's rejection of unwelcome sexual conduct by respondent's president and general manager as a basis for discharging her based on the following: (1) respondent's general manager told her she was fired because respondent did not have the money to pay her and complainant had overheard respondent's president and general manager talking the previous day about how much money respondent would be making in the next month; (2) complainant received no warnings about her job performance prior to her discharge; (3) respondent's president and general manager were both aware of complainant's objection; (4) complainant was discharged the day after she objected to respondent's sexually offensive emails. ----- *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 165-66 (2012).*

The lack of credibility by respondent witnesses, combined with "specific intent" statements made by respondent's owner and general manager made concerning complainant's pregnancy vis-à-vis her continuing employment status, her demotion eight days earlier because of her pregnancy, and her pregnancy-related trip to the emergency room a few days earlier that caused her to be temporarily taken off the schedule, caused the forum to conclude that complainant was discharged because of her sex/pregnancy. ----- *In the Matter of Cyber Center, Inc., 32 BOLI 11, 34-35 (2012).*

### 31.2.4 --- Term or Condition of Employment

#### 31.3 --- Public Accommodation

#### 31.4 --- Real Property

### 32.0 SEXUAL ORIENTATION

#### 32.1 --- Generally

Within Oregon's public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. The ability to enter public places, to shop, to dine, to move about unfettered by bigotry. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 124 (2015), appeal pending.*

In a sexual orientation case, the forum inferred that complainants' sexual orientation was homosexual and that a respondent perceived they were homosexual from four undisputed facts: (a) complainants were planning to have a same-sex marriage; (b) respondent told complainants that respondents do not make wedding cakes for same-sex ceremonies; (c) one complainant's mother told respondent that she had "two gay children"; and (d) In response to the mother's statement, respondent quoted a reference from Leviticus related to male homosexual behavior. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 (2015), appeal pending.*

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In a case alleging discrimination on the basis of sexual orientation, the forum must determine the complainant's or complainants' sexual orientation. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 160-61 (2015), appeal pending.***

### 32.2 --- "Sexual orientation" defined

As used in ORS chapter 659A, "sexual orientation" is defined as "an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's assigned sex at birth." ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 (2015), appeal pending.***

### 32.3 --- Nexus between sexual orientation and adverse action

On a motion for summary judgment, respondents argued that there was no evidence of any connection between complainants' sexual orientation and respondents' alleged discriminatory action of refusing to bake a wedding cake for complainants' wedding because their prior sale of a wedding cake to one complainant for her mother's wedding proved respondents' lack of animus towards complainant's sexual orientation and because respondents' decision not to bake a cake for complainants was not on account of complainants' sexual orientation, but on respondents' objection to participation in the event for which the cake would be prepared. The forum rejected respondents' arguments for the following reasons. First, there was no evidence in the record that A. Klein, the person who refused to make a cake for complainants while acting on Sweetcakes' behalf, had any knowledge of complainants' sexual orientation when the wedding cake purchase for one complainant's mother was made and, even if A. Klein was aware of complainants' sexual orientation at that time, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion. The forum found that respondents' attempt to divorce their refusal to provide a cake for complainants' same-sex wedding from complainants' sexual orientation is neither novel nor supported by case law, finding that there was no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple, and that the conduct, a marriage ceremony, was inextricably linked to complainants' sexual orientation. The forum held that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation, and that respondents' refusal to provide a wedding cake for complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of complainants' sexual orientation. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 163-65 (2015), appeal pending.***

Respondents' claimed that they did not refuse to bake a wedding cake for complainants because of their sexual orientation but rather because respondents did not wish to participate in their same sex wedding ceremony. There is no distinction between the two. Further, to allow respondents, a for profit business, to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace. This would clearly be contrary to Oregon law as well as any standard by which people in a free society should choose to treat each other. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 124 (2015), appeal pending.***

### 32.4 --- "Place of Public Accommodation"

A bar that offers drinks, dancing, food, and games, that is a neighborhood bar open to everyone, and where everyone is allowed in is a "place of public accommodation" under ORS 659A.400 in the absence of any evidence to show that any of the exceptions in ORS 659A.400(2) apply. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 241 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

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A bar owner's voice-mail request that certain persons not come back to his bar, followed by a second voice-mail stating that he was losing money due to those persons' use of his bar as their gathering place would be interpreted by a reasonable person as a statement that the persons were not welcome at his club and is the functional equivalent of "denying" full and equal accommodations, advantages, facilities and privileges to the persons. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 242-43 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

Once a bar owner communicated to customers that they were not welcome, the aggrieved persons were not required to actually enter the bar after hearing those communications in order to establish a violation of ORS 659A.403(3). --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 242 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

"Full and equal" means the same accommodations, advantages, facilities and privileges accorded to persons in general. When a bar owner's communication specified that the aggrieved persons were not welcome on Friday nights and Friday nights were the only nights they went to the bar, the fact that the communication was confined to Friday nights was irrelevant. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 243 (2013), appeal pending.***

ORS 659A.403(3) makes it unlawful for any place of public accommodation to deny "full and equal accommodations, advantages, facilities and privileges to a person based on that person's sexual orientation. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 243 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

ORS 659A.403 prohibits discrimination in places of public accommodation "on account of" the sexual orientation of any person. BOLI has defined "sexual orientation" by rule in OAR 839-005-0003(14) and OAR 839-005-0003 (7) & (8) to include gender identity and gender expression. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 243 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

When a bar owner decided to ask the aggrieved persons not to return to his bar on account of his perception that the bar was losing business because the aggrieved persons' sexual orientation caused people to think his bar was targeted to transgendered and gay persons, the decline in sales at the bar when the aggrieved persons were present was not a defense. The request not to return to the bar was based on the aggrieved persons' sexual orientation, and thereby violated ORS 659A.403(3). --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 244 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

Using definitions from Webster's dictionary, the forum found that when a bar owner used voice-mails to commit an unlawful practice in violation of ORS 659A.403, he violated ORS 659A.409 by issuing a notice and communication as described in that statute and that the bar for which he worked also violated the statute because he was acting as its agent in leaving the voice-mails. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 246-47 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

The fact that the aggrieved persons stated they did not want to "take over" respondents' bar facility is not an excuse for the violation of civil rights caused by emails communicated by respondent to the aggrieved persons to the effect that they were not welcome at his bar. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 255 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 33.0 REAL PROPERTY (DISABILITY)

#### 33.1 --- Definitions

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### 33.1.1 --- “Aggrieved Person”

### 33.1.2 --- “Coerce” (ORS 659A.145(8))

The forum found that “coerce,” “intimidate,” and “threaten” all involve (a) an intentional act (b) designed to compel someone to act or refrain from acting in a certain way (c) that is premised on a potential negative consequence that the actor has the power to influence or bring about and (d) the apprehension of that negative consequence by the person sought to be compelled. Based on these definitions, the forum examined respondent’s intent in making his alleged discriminatory statement and complainant’s reaction to that statement to determine if it was an attempt to “coerce,” “intimidate,” or “threaten” complainant based on the exercise of her rights related to her disability and Oregon’s housing laws. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81 (2012).*

### 33.1.3 --- “Disability”

In a housing case, “disability” is defined as “[a] \* \* \* mental impairment that substantially limits one or more major life activities of the individual.” “Mental impairment” is defined as “any mental or psychological disorder, \* \* \* emotional or mental illness, and specific learning disabilities.” The agency proved that complainant has had anxiety and depression for 15 years and that those conditions substantially limit her sleeping, learning, concentrating, remembering, and ability to self-care, thereby establishing that complainant had a “disability” as set out in OAR 659A.145 at the time of the alleged discrimination. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 77 (2012).*

### 33.1.4 --- “Dwelling”

Under ORS 659A.145, a “dwelling” has the meaning given it in ORS 659A.421. As relevant to this proceeding, ORS 659A.421(1)(a)(A) defines “dwelling” as “[a] building or structure, or portion of a building or structure, that is occupied, or designed or intended for occupancy, as a residence by one or more families[.]” OAR 839-005-0195-0200(4) parrots that definition. A duplex designed and intended for residential occupancy and its respective units that were occupied by complainant and respondent’s brother-in-law during the time of the alleged discrimination qualified as a “dwelling” under ORS 659A.145. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 77 (2012).*

### 33.1.5 --- “Interfere” (ORS 659A.145(8))

Whether or not respondent’s statement constituted “interference” under ORS 659A.145(8) was not a question before the forum because the formal charges did not allege that respondent “interfered” with complainant’s exercise or enjoyment or her rights under ORS 659A.145(8), and the forum lacks the authority to draw a legal conclusion on an allegation that is not set out in the formal charges. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).*

### 33.1.6 --- “Intimidate” (ORS 659A.145(8))

The forum found that “coerce,” “intimidate,” and “threaten” all involve (a) an intentional act (b) designed to compel someone to act or refrain from acting in a certain way (c) that is premised on a potential negative consequence that the actor has the power to influence or bring about and (d) the apprehension of that negative consequence by the person sought to be compelled. Based on these definitions, the forum examined respondent’s intent in making his alleged discriminatory statement and complainant’s reaction to that statement to determine if it was an attempt to “coerce,” “intimidate,” or “threaten” complainant based on the exercise of her rights related to her disability and Oregon’s housing laws. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81(2012).*

### 33.1.7 --- “Threaten” (ORS 659A.145(8))

The forum found that “coerce,” “intimidate,” and “threaten” all involve (a) an intentional

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act (b) designed to compel someone to act or refrain from acting in a certain way (c) that is premised on a potential negative consequence that the actor has the power to influence or bring about and (d) the apprehension of that negative consequence by the person sought to be compelled. Based on these definitions, the forum examined respondent's intent in making his alleged discriminatory statement and complainant's reaction to that statement to determine if it was an attempt to "coerce," "intimidate," or "threaten" complainant based on the exercise of her rights related to her disability and Oregon's housing laws. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81 (2012).*

### 33.1.8 --- "Purchaser"

ORS 659A.145, read together with ORS 659A.421(1)(b), defines "purchaser" as "an occupant, prospective occupant, renter, prospective lessee, buyer or prospective buyer." Complainant, as an "occupant" of the subject property, was a "purchaser." ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 76 (2012).*

### 33.1.9 --- "Representing"

Because "representing" is the present part of "represent," the forum focused on the availability of respondent's rental property as of the date respondent stated it would not be available. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 87 (2012).*

### 33.2 --- Coercing, Intimidating, Threatening or Interfering with an Individual's Exercise or Enjoyment or Rights (ORS 659A.145(8))

The agency established that respondent's intent was that he did not want to let complainant have a dog. Complainant reacted by becoming upset and having trouble sleeping for a night and testified that she took respondent's denial of her request for a dog "as a threat," but did not testify as to why she took it as a threat, as opposed to a mere denial of her request to have a dog. There was no evidence concerning respondent's body language or manner of speech when he denied complainant's request that could indicate the words were intended to coerce, intimidate, or threaten complainant and no testimony that respondent took any action related to his statement, or that complainant refrained from getting a dog because she feared repercussions from respondent. Although the fact that complainant did not get a dog while she continued to live in the subject property leads to a possible inference that she did not do so because of respondent's statement and her resultant fear, the forum declined to draw that inference because of the lack of other supporting evidence. Based on the above, the forum concluded that the evidence was insufficient to show that respondent's statement violated ORS 659A.145(8). ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81 (2012).*

The forum found that "coerce," "intimidate," and "threaten" all involve (a) an intentional act (b) designed to compel someone to act or refrain from acting in a certain way (c) that is premised on a potential negative consequence that the actor has the power to influence or bring about and (d) the apprehension of that negative consequence by the person sought to be compelled. Based on these definitions, the forum examined respondent's intent in making his alleged discriminatory statement and complainant's reaction to that statement to determine if it was an attempt to "coerce," "intimidate," or "threaten" complainant based on the exercise of her rights related to her disability and Oregon's housing laws. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 81 (2012).*

As a person with disabilities who had been prescribed a service dog, complainant had the legal right to a service dog while she lived in respondent's covered dwelling. That right necessarily includes the right to request a service dog. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).*

Under ORS 659A.145(8), a person may not be subject to coercion, threats, or intimidation related to a request for a service dog. ----- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 79 (2012).*

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### **33.3 --- Expulsion from Real Property (ORS 659A.145(2)(b))**

In a housing case, the agency can prove specific intent by showing that respondent's reason for expelling complainant – so that his daughter could move in -- was a pretext for discrimination because it was untrue. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012).*

The agency's prima facie case consists of the following elements: (1) complainant has a "disability" as defined in ORS 659A.421; (2) respondent is a "person" as defined in ORS 659A.001(9); (3) complainant was a "purchaser" as defined in ORS 659A.421(1)(b) who leased and occupied a "dwelling" as defined in ORS 659A.421(1)(a) that was owned by respondent; (4) respondent expelled complainant from her dwelling; (5) respondent expelled complainant because of her disability. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 82 (2012).*

When the formal charges did not specify which of the three theories of discrimination – specific intent, different or unequal treatment, or mixed motive -- supported the agency's allegation of discriminatory expulsion, the forum referred to the facts alleged in the charges in support of the agency's allegation to determine which theory should be applied. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83 (2012).*

### **33.4 --- Failure to Make Reasonable Accommodation (ORS 659A.145(2)(g))**

By denying complainant's request to have a service dog, respondent violated ORS 659A.145(2)(g) and OAR 839-005-0220(2)(c)(C). ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 78 (2012).*

The forum did not consider the "direct threat" exception in OAR 839-005-0220(2)(c)(C) because it is an affirmative defense that was waived by respondent's failure to raise it in the answer. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 78 (2012).*

Complainant was not required to show her medical prescription for a service dog to respondent for her to be entitled to reasonable accommodation. In any event, respondent did not ask complainant to see medical documentation and no evidence was produced to establish that respondent would have been legally entitled to ask complainant to provide a prescription. --- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 78 (2012).*

Complainant would not be entitled to reasonable accommodation under the law if she requested a dog as company for her non-disabled daughter because the purpose of the request would not be to mitigate one or more of the complainant's disability-related needs. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 77 (2012).*

A service dog, when it "mitigates one or more of the person's disability-related needs," may be a "reasonable accommodation" under OAR 839-005-0220(2)(c)(C). ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 76 (2012).*

### **33.5 --- Representing Property is not Available When it is in Fact Available (ORS 659A.145(2)(e))**

The forum determined that the subject property became available for rent after complainant moved out in February 2009 due to the failure of respondent's daughter to move in, and that respondent did not obtain new tenants until March 18, 2009. However, because "representing" is the present part of "represent," the forum focused on the prospective post-February 2009, availability of the subject property on January 12, 2009, and the date respondent told complainant she needed to move because his daughter would be moving into the subject property. The forum did this by examining the intentions of respondent and his daughter on January 12 related to the daughter's prospective tenancy, finding that both respondent and his daughter believed and intended that the daughter would move to the subject property after complainant moved out. Since respondent believed on January 12, 2009, that the subject property would not be available for "rental or lease" after February 2009, respondent's

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representation to complainant did not violate ORS 659A.145(2)(e). ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 87 (2012).***

Since neither the statute, rule, or Oregon case law define “representing” in the context of ORS 659A.145(2)(e) and it is a word of common usage, the forum relied on *Webster’s* for the meaning of “representing.” ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 86 (2012).***

### **33.6 --- Damages**

Complainant’s daughter testified that complainant was “shaky,” “confused” and “upset” after respondent told her she could not have a dog and didn’t sleep that night. Complainant, her daughter, and complainant’s therapist, testified that complainant has had a service dog since May 2010, that the dog makes her feel safe, requires her to go outside more and get more exercise, and is very important to her emotional stability. From this testimony, the forum inferred that complainant would have had the same benefits during her tenancy with respondent, had she been allowed a service dog. The forum recognized that it is impossible to determine the exact date complainant would have acquired a service dog, had respondent granted her request, but inferred that it would have happened at some time during her remaining tenancy with respondent and that respondent’s complainant’s request caused her to be denied those benefits for some period of time. The forum awarded complainant \$10,000 in compensation for her emotional and mental suffering. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 89-90 (2012).***

The forum rejected respondent’s contention that any mental suffering award to complainant should be diluted by the concurrent mental suffering she experienced due to related to family problems, stating it has consistently held in prior final orders when calculating mental suffering damage awards that respondents must take complainants “as they find them.” - ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 90 (2012).***

The forum did not consider four prior final orders in evaluating the monetary value of complainant’s mental suffering because the most recent was issued in 1990. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 89 (2012).***

The forum awarded no damages for complainant’s moving expenses based on its conclusion that complainant’s expulsion was not an unlawful practice. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 89 (2012).***

### **33.7 --- Civil Penalty under ORS 659A.855**

The forum concluded that \$5,500 is an appropriate civil penalty for respondent’s violation of ORS 659A.145(2)(g) when (1) there was no evidence that respondent had engaged in any previous housing discrimination and no evidence of respondent’s financial resources, other than that he owned only one rental property, the duplex complainant lived in; (2) the nature of the violation was an indirect, but effective oral denial of a service dog for a maximum period of four and one-half months to a complainant who was prescribed a dog for her depression issues; (3) respondent was the only culpable person; (4) respondent had limited property holdings; (5) respondent let complainant keep two “service” cats that were prescribed for her “medical well being”; (6) respondent allowed his other renters to keep a dog; (7) the absence of any evidence of a bias on respondent’s part toward disabled persons; and (8) respondent’s compliance with the law in allowing complainant to have two “service” cats. ----- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 91-92 (2012).***

When no provisions in ORS 659A.855 or any other statute in ORS chapter 659A offered no guidance as to factors the forum should consider in deciding whether to assess the maximum civil penalty or a lesser amount, and the agency’s administrative rules interpreting the housing discrimination provisions of ORS chapter 659A similarly lent no guidance, the forum took guidance from 24 CFR §180.671 that sets out specific guidelines for an ALJ to use when evaluating the appropriate amount of civil penalty in an FHA case. Those factors are: (i)

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Whether that respondent has previously been adjudged to have committed unlawful housing discrimination; (ii) that respondent's financial resources; (iii) the nature and circumstances of the violation; (iv) the degree of that respondent's culpability; "(v) the goal of deterrence; and (vi) other matters as justice may require. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 91-92 (2012).***

### 34.0 PUBLIC ACCOMMODATION

#### 34.1 --- "Place of Public Accommodation"

The forum concluded that respondents' bakery was a "place of public accommodation" at all material times when the undisputed facts showed that the bakery was a place or service offering goods and services – wedding cakes and the design of those cakes – to the public. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 160 (2015), appeal pending.***

ORS 659A.400(1)(a) defines "place of public accommodation" as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." Respondent's retail convenience store fit within this definition, which respondent admitted in her answer to the formal charges. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 31 (2014), appeal pending.***

A bar that offers drinks, dancing, food, and games, that is a neighborhood bar open to everyone, and where everyone is allowed in is a "place of public accommodation" under ORS 659A.400 in the absence of any evidence to show that any of the exceptions in ORS 659A.400(2) apply. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 241 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

#### 34.2 --- "Full and Equal"

When respondents denied complainants a wedding cake based on their sexual orientation, their act was more than the denial of the product. It was, and is, a denial of complainants' freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do...or be. Respondent's conduct was a clear and direct statement that complainants lacked an identity worthy of being recognized. The denial of these basic freedoms to which all are entitled devalues the human condition of the individual, and in doing so, devalues the humanity of us all. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 124 (2015), appeal pending.***

In a public accommodation civil rights case, respondents argued that a complainant who was not present when services were denied lacked standing. The forum rejected this argument as reliant on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In the case at hand, the "full and equal accommodation" sought by complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. Because the wedding cake was intended to equally benefit both complainants, the forum held that they both had the same cause of action against respondents under ORS 659A.403 and .406. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 162-63 (2015), appeal pending.***

"Full and equal" means the same accommodations, advantages, facilities and privileges accorded to persons in general. When a bar owner's communication specified that the aggrieved persons were not welcome on Friday nights and Friday nights were the only nights they went to the bar, the fact that the communication was confined to Friday nights was irrelevant. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 243 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

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A bar owner's voice-mail request that certain persons not come back to his bar, followed by a second voice-mail stating that he was losing money due to those persons' use of his bar as their gathering place would be interpreted by a reasonable person as a statement that the persons were not welcome at his club and is the functional equivalent of "denying" full and equal accommodations, advantages, facilities and privileges to the persons. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 242-43 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 34.3 --- "Notice & Communication"

Respondent's verbal statements made in the television and radio interviews that were publicly broadcast constituted a "communication" that was "published" under ORS 659A.409. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 (2015), appeal pending.***

Once a bar owner communicated to customers that they were not welcome, the aggrieved persons were not required to actually enter the bar after hearing those communications in order to establish a violation of ORS 659A.403(3). --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 242 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

Using definitions from Webster's dictionary, the forum found that when a bar owner used voice-mails to commit an unlawful practice in violation of ORS 659A.403, he violated ORS 659A.409 by issuing a notice and communication as described in that statute and that the bar for which he worked also violated the statute because he was acting as its agent in leaving the voice-mails. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 246-47 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 34.4 --- ORS 659A.403

The requirement in ORS 659A.403 that respondents bake a wedding cake for complainants, a same sex couple, was not compelled speech that violated the free speech clause of the First Amendment to the U. S. Constitution. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 192 (2015), appeal pending.***

The application of ORS 659A.403 to respondents so as to require them to provide a wedding cake for complainants did not constitute compelled speech that violated Article I, section 8 of the Oregon Constitution. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 187-91 (2015), appeal pending.***

Respondents argued that their Article I, section 8, rights were violated by the agency's application of ORS 659A.403 because that application, in requiring them to provide a wedding cake to complainants, unlawfully compelled respondents to engage in expression of a message they did not want to express. The forum found that there were no Oregon cases in which compelled speech was the issue. In the absence of Oregon case law, the forum relied on a line of cases decided by the U.S. Supreme Court involving the First Amendment and compelled speech for guidance. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 187-88 (2015), appeal pending.***

ORS 659A.403 is not a statute that "obviously" prohibits expression. Rather, it is a "speech-neutral" statute that prohibits specific actions that may involve expression without specifying a particular form of expression. Accordingly, the forum found that ORS 659A.403 is not subject to Article I, section 8 overbreadth scrutiny. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 187 (2015), appeal pending.***

In a public accommodation, same sex civil rights case, respondents argued that ORS 659A.403 expressly regulates expression because the word "deny" in section (3) shows that, when properly interpreted, "the statute prohibits *communication* that services are being denied

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for a prohibited reason, which implicates both speech and opinion.” The forum rejected respondents’ “expansive interpretation,” finding that under this interpretation, all laws implicating any form of communication whatsoever would be facially unconstitutional under Article I, Section 8. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 184-85, (2015), appeal pending.***

ORS 659A.403 is a law focused on proscribing the pursuit or accomplishment of a forbidden result – in this case, discrimination by places of public accommodations against individuals belonging to specifically enumerated protected classes. As such, it is not a law written in terms directed to the substance of any “opinion” or any “subject” of communication and is not susceptible to a *Robertson* category one facial challenge. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 184 (2015), appeal pending.***

Respondents argued that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against respondents because that statute, on its face and as applied, unlawfully infringes on Respondents’ right of conscience and right to free exercise of religion. Respondents further argued that the forum should apply the U. S. Supreme Court’s “strict scrutiny” test. The forum rejected respondents’ arguments and applied Supreme Court’s *Smith* “neutrality” test, finding that the case was not a “hybrid” case because neither respondents’ free exercise nor free speech claims were independently viable and the two claims together were not greater than the sum of their parts and that, under the *Smith* test, ORS 659A.403 is a “valid and neutral law of general applicability” and therefore constitutional under the First Amendment’s free exercise clause, both facially and as applied. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 179-82 (2015), appeal pending.***

Respondents, who are Christians and had a sincerely held belief that the Bible forbade them from “proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.” They argue that Article I, sections 2 and 3 gave them the unfettered right to refuse to provide a cake for complainants’ same-sex wedding ceremony because doing so would have compelled them to act contrary to their sincerely held religious beliefs. Respondents also argued that the statutes underlying the agency’s formal charges were facially unconstitutional under the Oregon Constitution in that they violate respondents’ fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of respondents and persons similarly situated. The forum rejected respondents’ arguments, holding that ORS 659A.403 is a law that is part of a general regulatory scheme, expressly neutral and neutral among religions, and as such is constitutional under Article I, sections 2 and 3. The forum also found that there is also “an overriding governmental interest” present, explicitly expressed by Oregon’s legislature in ORS 659A.003. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 173-78 (2015), appeal pending.***

In a public accommodation civil rights case, the forum held that ORS 659A.403 to be constitutional “as applied.” --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 178 (2015), appeal pending.***

In a public accommodation sexual orientation case, the prima facie elements of the agency’s 659A.403 case were: 1) complainants were a homosexual couple and were perceived as such by respondents; 2) Sweetcakes, respondents’ business, was a place of public accommodation; 3a) A. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to complainants; 3b) M. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to complainants; and 4) the denials were on account of complainants’ sexual orientation. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 166 (2015), appeal pending.***

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When there was no evidence that M. Klein, a respondent in a partnership, took any action to deny the full and equal accommodations, advantages, facilities and privileges of respondents' business to complainants, the forum concluded that M. Klein did not violate ORS 659A.403. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 166 (2015), appeal pending.***

In a public accommodation civil rights case, respondents argued that a complainant who was not present when services were denied lacked standing. The forum rejected this argument as reliant on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In the case at hand, the "full and equal accommodation" sought by complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. Because the wedding cake was intended to equally benefit both complainants, the forum held that they both had the same cause of action against respondents under ORS 659A.403 and .406. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 162-63 (2015), appeal pending.***

### **34.5 --- ORS 659A.406**

In a public accommodation civil rights case, respondents argued that a complainant who was not present when services were denied lacked standing. The forum rejected this argument as reliant on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In the case at hand, the "full and equal accommodation" sought by complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. Because the wedding cake was intended to equally benefit both complainants, the forum held that they both had the same cause of action against respondents under ORS 659A.403 and .406. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 162-63 (2015), appeal pending.***

### **34.6 --- ORS 659A.409**

In an Article I, section 8, challenge, the forum concluded that ORS 659A.409 is not subject to an as-applied challenge. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122, (2015), appeal pending.***

In a public accommodation, same sex civil rights case, respondents asserted that ORS 659A.409 prohibits respondents from "express[ing] their own position" and amounts to "a speech code." To the contrary, the language of ORS 659A.409 focuses on the discriminatory effect that accompanies certain speech "published, circulated, issued or displayed" on behalf of a place of public accommodation. It does not cover expressions of personal opinion, political commentary, or other privileged communications unrelated to the business of a place of public accommodation, and its breadth is narrowly tailored to address the effects of the speech at issue. As such, it is facially constitutional under Article I, Section 8. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122, (2015), appeal pending.***

The Oregon Supreme Court has established a basic framework, with three categories, for determining whether a law violates Article I, Section 8 of the Oregon Constitution. Under the first category, the court begins by determining whether a law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." If it is, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and "the proscribed means [of causing those effects] include speech or writing," or whether it is "directed only against causing the forbidden effects." Oregon

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courts examine a statute in the second category for “overbreadth.” If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth. If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. If the law focuses only on forbidden effects, an individual can challenge the law as applied to that individual's circumstances. ORS 659A.409 falls in the second category because it is “directed in terms against the pursuit of a forbidden effect” and “the proscribed means [of causing that effect] include speech or writing.” ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 184, (2015), appeal pending.***

ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face under Article I, sections 2 and 3 of the Oregon Constitution. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121 (2015), appeal pending.***

In a public accommodation, same sex civil rights case, the forum found ORS 659A.409 to be constitutional under Article I, sections 2 and 3 of the Oregon Constitution, as applied in the case because respondents’ statements announcing their clear intent to discriminate in future, just as they had done with complainants, was not a religious practice but was conduct motivated by their religious beliefs. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121 (2015), appeal pending.***

ORS 659A.409 is an integral part of the anti-discrimination public accommodation laws in ORS chapter 659A. ORS 659A.409 is constitutional on its face. It was also constitutional as applied because the commissioner only applied it to respondents’ language that indicated respondents’ clear intent to discriminate in future just as they had done with complainants. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 123 (2015), appeal pending.***

The commissioner rejected respondents’ affirmative defenses that ORS 659A.409 violates the Oregon Constitution on its face and as applied. ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face. It is also constitutional as applied in this case because respondents’ statements announcing their clear intent to discriminate in future, just as they had done with complainants, was not a religious practice but was conduct motivated by their religious beliefs. Furthermore, engagement in constitutionally protected expression while engaging in otherwise punishable conduct does not insulate the unlawful conduct from the usual consequences that accompany it. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121-22 (2015), appeal pending.***

The commissioner rejected respondents’ affirmative defenses that ORS 659A.409 violates the United States Constitution on its face and as applied. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122 (2015), appeal pending.***

Respondents both violated ORS 659A.409 by making statements in publicly broadcast television and radio interviews, after they violated ORS 659A.403 by refusing to make a wedding cake for complainants’ same sex wedding, to the effect that their religious faith kept them from making wedding cakes for same sex marriages. The commissioner awarded no damages because there was no evidence in the record that complainants suffered because of those statements. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 117-21 (2015), appeal pending.***

Respondent’s verbal statements made in the television and radio interviews that were publicly

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broadcast constituted a “communication” that was “published” under ORS 659A.409. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 (2015), appeal pending.***

### 34.7 --- Defenses

When a bar owner decided to ask the aggrieved persons not to return to his bar on account of his perception that the bar was losing business because the aggrieved persons’ sexual orientation caused people to think his bar was targeted to transgendered and gay persons, the decline in sales at the bar when the aggrieved persons were present was not a defense. The request not to return to the bar was based on the aggrieved persons’ sexual orientation, and thereby violated ORS 659A.403(3). --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 244 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

The fact that the aggrieved persons stated they did not want to “take over” respondents’ bar facility is not an excuse for the violation of civil rights caused by emails communicated by respondent to the aggrieved persons to the effect that they were not welcome at his bar. --- ***In the Matter of Blachana, LLC, 32 BOLI 220, 255 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 34.8 --- Damages

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person’s testimony, if believed, is sufficient to support a claim for mental suffering damages. In public accommodation cases, the duration of the discrimination does not determine either the degree or duration of the effects of discrimination. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 129 (2015), appeal pending.***

In a public accommodation, same sex civil rights case in which respondents refused to make a wedding cake for complainants’ same sex wedding, complainant RBC was awarded \$75,000 in damages for emotional distress, based on a number of factors. Prior to the cake tasting, LBC, the other complainant, had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of “permanency and commitment.” After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding, wanting a wedding that was as “big and grand” as they could afford. Obtaining a cake from respondents like the one RBC purchased for her mother’s wedding two years earlier was part of that grand scheme. RBC’s emotional suffering began at the January 17, 2013, cake tasting when RBC and her mother were told by respondent A. Klein that respondents did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that her mother, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. RBC subsequently became hysterical and kept apologizing to her mother. When her mother returned to the car after confronting A. Klein and told RBC that A. Klein had called her “an abomination,” this made RBC cry even more. RBC, who was brought up as a Southern Baptist, interpreted AK’s use of the word “abomination” her mean that God made a mistake when he made her, that she wasn’t supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying. On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she

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and LBC deserved to be married like a heterosexual couple. She spent most of that day in her room, trying to sleep. In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and her brother have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during her cake tasting at another bakery because of Klein's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on her mother to contact potential wedding vendors, RBC still experienced some anxiety over possible rejection because her wedding was a same-sex wedding. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 125-27 (2015), appeal pending.***

In a public accommodation, same sex civil rights case in which respondents refused to make a wedding cake for complainants' same sex wedding, complainant LBC was awarded \$60,000 in damages for emotional distress, based on a number of factors. Prior to the January 17, 2013, cake tasting with respondents, she had been asking RBC, the other complainant, to marry her for nine years. LBC was "flabbergasted" when she learned that respondents had refused to make a cake for complainants and called RBC an "abomination" and became very upset and very angry. Based on her religious background, she understood the term "abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life." Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect RBC's mother's relatively recent acceptance of RBC's sexual orientation. LBC, who views herself as RBC's protector, tried unsuccessfully to comfort RBC and lost her temper because she could not "fix" things. LBC was then frustrated because she unable to comfort one of their foster daughters, who was extremely agitated from events at school that day, and who repeatedly called out for RBC, with whom she had a special bond. That night, LBC was very upset, cried a lot, and was hurt and angry. In the days immediately following January 17, 2013, LBC experienced anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to respondents' denial of service. She felt sorrow because she could not protect RBC and because RBC was no longer sure she wanted to be married. LBC's excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 127-28 (2015), appeal pending.***

Complainant was awarded \$60,000 in mental suffering damages based on respondent's refusal to let her shop at respondent's market with her service dogs on three consecutive days based on the following: (1) complainant felt angry, insulted, and perturbed, became really upset, and "max[ed] from her PTSD; (b) complainant felt "unwelcome"; (c) complainant experienced "trauma" from not being able to take her service dogs into DSM and "went through a stage where the world hated her and she couldn't do nothing" and became even more reticent about leaving her home, only leaving when she had no choice; (d) it took weeks after the denials for complainant to get back to "normal"; (e) as a result of respondent's post-denial harassment of complainant, complainant felt personally threatened and her emotional and mental suffering and distress continued long after she moved to a different neighborhood located a considerable distance from DSM; (f) complainant feared that her service dog's training would suffer when respondent, or someone driving respondent's vehicle, followed her and her granddaughter; (g) she received an eviction notice from her current residence because respondent, or someone working in conjunction with respondent, drove to her apartment complex and took photographs of her neighbor's car and complainant's apartment; and (h) after receiving affidavits from respondent's attorneys that included photographs of her current apartment, she had a

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reasonable belief that she was being “stalked,” which exacerbated her PTSD and she no longer felt “safe anywhere” and she felt “very, very angry” to know that she had been followed, and she felt “frustrated and violated,” that her “private life was being invaded upon,” and felt less safe in her home. ---- *In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 38-39 (2014), appeal pending.*

In a case where persons were denied service at a bar based upon their sexual orientation, the forum considered, in assessing damages for emotional distress and physical suffering of between \$20,000 and \$50,000 for each individual, the effects recited by each aggrieved person including importance of the social gatherings at the bar; feelings of anger, devastation, disappointment, sadness, sleep loss, hurt, depression, upset and humiliation; self-doubt about responsibility for the denial of service; effect on other interpersonal behavior and relationships, including temperament and loss of sense of safety and self-confidence; weight change; stress; reminders of other discrimination and fear that others would have adverse reactions on the basis of sexual orientation. ---- *In the Matter of Blachana, LLC, 32 BOLI 220, 249-53 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).*

### 34.9 --- Generally

Within Oregon’s public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. The ability to enter public places, to shop, to dine, to move about unfettered by bigotry. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 124 (2015), appeal pending.*

Free enterprise provides great opportunity for entrepreneurs to take an idea, create a business and achieve whatever success they can. It is a system open to all but, to participate fairly, businesses must follow the laws that apply to each of them equally. A business that disregards the law erodes the free marketplace for both law abiding businesses and patrons alike. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 123-24 (2015), appeal pending.*

## V. OTHER BASES OF DISCRIMINATION

- 40.0 ACCESS TO EMPLOYER-OWNED HOUSING
- 41.0 BONE MARROW DONATION
- 42.0 BREATHALYZER, POLYGRAPH, AND OTHER TESTS
- 43.0 EXPUNGED JUVENILE RECORD
- 44.0 FAMILIAL RELATIONSHIP
- 45.0 FAMILIAL STATUS
- 46.0 GENETIC INFORMATION
- 47.0 LEGISLATIVE TESTIMONY
- 48.0 LIMITING ELIGIBILITY FOR EMPLOYEE HEALTH OR BENEFIT PLAN
- 49.0 REPORTING PATIENT ABUSE
- 50.0 REQUIRED PAYMENT FOR MEDICAL EXAMINATIONS
- 51.0 SOURCE OF INCOME
- 52.0 UNEMPLOYMENT HEARING TESTIMONY
- 53.0 USE OF TOBACCO DURING NONWORKING HOURS
- 54.0 WHISTLEBLOWING BY PUBLIC EMPLOYEES (ORS 659A.203)

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### **55.0 WHISTLEBLOWING – INITIATING OR AIDING ADMINISTRATIVE, CRIMINAL OR CIVIL PROCEEDINGS (ORS 659A.230)**

#### **55.1 --- Generally**

#### **55.2 ---- Prima Facie Case**

The agency's prima facie case with respect to the allegation that complainant was discharged for cooperating with law enforcement conducting a criminal investigation consisted of the following elements: (1) respondent was an employer as defined by statute; (2) respondent employed complainant; (3) complainant, in good faith, cooperated with any law enforcement agency conducting a criminal investigation; (4) respondent discharged complainant; (5) respondent discharged complainant because he, in good faith, cooperated with any law enforcement agency conducting a criminal investigation. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 155 (2014).*

In a whistleblowing case in which the agency alleged that complainant was discharged for reporting in good faith activity she believed to be criminal, the agency's prima facie case consisted of the following elements: (1) respondent was an employer as defined by statute; (2) respondent employed complainant; (3) complainant, in good faith, reported criminal activity or activity she believed to be criminal; (4) respondent discharged complainant; (5) respondent discharged complainant because she, in good faith, reported criminal activity. ---- *In the Matter of Columbia Components, Inc., 32 BOLI 257, 279 (2013).*

In a whistleblowing case in which the agency alleged that complainant was discharged for reporting in good faith activity she believed to be criminal, the third element of the agency's prima facie case requires that complainant must make a "report" and that complainant must in "good faith" belief the activity she was reporting is criminal activity or complainant's employer must believe that complainant reported activity that complainant "believed to be criminal." ---- *In the Matter of Columbia Components, Inc., 32 BOLI 257, 279 (2013).*

#### **55.3 --- Making a "Report"**

#### **55.4 --- "Civil Proceeding"**

Having "brought a civil proceeding," in the context of Oregon's whistleblower statutes, encompasses both (1) "good faith complaints made by employees against their employers that result in an administrative agency bringing a civil proceeding against that employer" and (2) a good faith complaint to or cooperation by an employee with a regulatory agency that has the authority to initiate enforcement action such as license revocation, civil penalties, or injunctive relief against the employer, regardless of whether a formal contested case hearing or civil court action is held. ---- *In the Matter of Columbia Components, Inc., 32 BOLI 257, 282 (2013).*

#### **55.5 --- "Criminal Activity"**

In a whistleblowing case in which the agency alleged that complainant was discharged for reporting in good faith activity she believed to be criminal, the forum was unable to conclude that respondent only that complainant was reporting activity that complainant "believed to be criminal" when there was no evidence in the record to show that respondent believed that the activity complainant complained about was criminal activity. ---- *In the Matter of Columbia Components, Inc., 32 BOLI 257, 279-80 (2013).*

#### **55.6 --- "Good Faith"**

The forum found that cooperation with law enforcement was in good faith due to the following facts: The evidence was undisputed that a deputy sheriff initiated a criminal investigation of J. Bassett's August 2010 "gunshot incident" on January 30, 2011. The deputy's investigation appeared to have been instigated by the resurrection of Deputy Frank's December 23, 2010, incident report describing Frank's contact with Osorio and his coworkers on September 9, 2010. On February 2, 2011, Kennedy contacted and interviewed complainant for

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the purpose of obtaining a statement from complainant about the “gunshot incident.” Complainant told Kennedy that J. Bassett had fired a gun and described the incident in detail that is consistent with the accounts given by other eyewitnesses and J. Bassett’s own admissions to Kennedy concerning the incident. After listening to J. Bassett’s explanation of why he had fired his pistol, Kennedy seized four firearms in J. Bassett’s residence, arrested him, and took him to the Klamath County jail where J. Bassett was lodged for Unlawful Use of a Weapon in Menacing. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 155 (2014).***

In a whistleblowing case in which the agency alleged that complainant was discharged for reporting in good faith activity she believed to be criminal, the forum was unable to conclude that complainant had a good-faith belief that she was reporting criminal activity when agency produced no evidence, other than complainant’s unreliable testimony, to support a conclusion that complainant had a good faith belief. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 279 (2013).***

### **55.7 --- Terms and Conditions**

### **55.8 --- Discharge/Constructive Discharge**

Respondents disputed that there was a discharge and assert that complainant was not discharged because complainant left Klamath Falls and moved back to California. However, the forum concluded that there was a discharge when (1) the facts showed that complainant was told that work would be available for him at a California location, (2) complainant and respondent later had a conversation in which respondent offered to drive complainant, with his wife and kids, to Klamath Falls; and (3) a day or two later, complainant received a call and was told to report to work on Monday, February 6, 2011. The offer of work, along with the absence of any evidence to show that complainant had said he was quitting his employment, showed that complainant was still considered an employee when he was told that he was fired. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 155-56 (2014).***

The fifth element of the agency’s prima facie case requires proof of a causal connection between complainant’s discharge and his good faith cooperation with a law enforcement investigation. Respondent’s expressed anger over complainant’s cooperation with the police, coupled with the fact that he called complainant and fired him only an hour or so after speaking with the sheriff’s deputy, established the necessary causal connection between complainant’s protected activity and his discharge. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 156 (2014).***

The agency’s allegation that complainant was discharged because of his testimony in a criminal trial failed because there was no evidence that complainant ever gave testimony before a grand jury or in any actual criminal trial. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 156 (2014).***

In a whistleblowing case in which the agency alleged that complainant was discharged for reporting in good faith activity she believed to be criminal, the forum concluded that complainant quit for personal reasons and was not discharged as alleged by the agency. ---- ***In the Matter of Columbia Components, Inc., 32 BOLI 257, 280 (2013).***

### **55.9 --- “Perceived” Whistleblowers**

## **56.0 WHISTLEBLOWING FOR REPORTING EVIDENCE OF A VIOLATION OF A STATE OR FEDERAL LAW, RULE, OR REGULATION (ORS 659A.199)**

### **56.1 --- Generally**

ORS 659A.199, adopted in 2009, does not identify a person or entity or limit the category of persons or entities to whom an employee must report information in order to attain the status of protected whistleblower under the provisions of ORS 659A.199. Had the

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legislature intended to create such a limitation, it knows how to do that and could have done so. The forum's inclusion of such a limitation in its interpretation of ORS 659A.199 would also violate the provision of ORS 174.010(1) that prohibits a judge from "insert[ing] what has been omitted" when interpreting a statute. In conclusion, the forum held that BOLI's inclusion of the phrase "to anyone" in OAR 839-010-0100(1) was a valid exercise of BOLI's rulemaking authority and not *ultra vires*. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 241-42 (2015).***

### 56.2 ---- Prima Facie Case

The agency's prima facie case consists of the following elements: (1) respondent was an employer as defined by statute; (2) respondent employed complainant; (3) complainant, in good faith, reported information to someone that he believed was evidence of a violation of a state rule; (4) respondent suspended, then discharged complainant; (5) respondent suspended and discharged complainant because of his report(s). ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 233 (2015).***

### 56.3 --- Making a "Report"

The forum rejected respondent's argument that since complainant only raised the issue that respondent's foster home "needed" food and never complained of a "current" food shortage, complainant never actually blew the whistle. This is a red herring. Although he may not have intended to become a whistleblower at that time, complainant became a whistleblower entitled to the protection of ORS 659A.199 when he told respondent that he had authorized the purchase of food because respondent's foster home "needed" food, a circumstance that he believed violated Oregon adult foster home rules. Using respondents' reasoning, no one reporting past circumstances, no matter how egregious, would be entitled to protection as a whistleblower. That is not the law. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 237 (2015).***

Under ORS 659A.199, an employee "reports" information when the employee communicates information to anyone that the employee believes is evidence of a violation of state law. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 233 (2015).***

Complainant, who worked in a foster care home, made three communications that qualified as "reports" of information under ORS 659A.199: (1) he told a nurse that respondent lacked adequate food; (2) he told respondent's owner that he authorized food purchases because respondent "needed" food; and (3) he called Lane County Protective Services and reported respondent's food shortage. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216-17, 234 (2015).***

Under ORS 659A.199, an employee reports information when the employee communicates information to anyone that the employee believes is evidence of a violation of state law. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 96 (2015).***

Complainant's complaints to the Better Business Bureau, her immediate supervisor, respondent, and BOLI that she was not being paid for her work all satisfied the reporting requirement of ORS 659A.199. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 96 (2015).***

Complainant was made an on-call employee because she complained to the Better Business Bureau and to her coworkers about her pay, and that she was fired because she went to BOLI to make a wage claim. Those complaints were good faith reports containing evidence of a violation of state law. As such, respondent's reduction of complainant's hours and discharge of complainant also violated ORS 659A.199 and OAR 839-010-0100(1). ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 96 (2015).***

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### 56.4 --- Evidence of a Violation

The agency proved by a preponderance of the evidence that complainant believed respondent's food shortage was a violation of Oregon administrative rules governing adult foster homes. Although the OARs do not require foster homes to maintain a two-week supply of food as asserted by complainant, they clearly require foster homes to serve three nutritious meals a day, including fresh fruit and vegetables when in season, and to maintain perishable foods for a minimum of two days. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216-17, 233 (2015).***

Complainant was made an on-call employee because she complained to the Better Business Bureau and to her coworkers about her pay, and that she was fired because she went to BOLI to make a wage claim. Those complaints were good faith reports containing evidence of a violation of state law. As such, respondent's reduction of complainant's hours and discharge of complainant also violated ORS 659A.199 and OAR 839-010-0100(1). ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 96 (2015).***

### 56.5 --- "Good Faith"

The "good faith" requirement in ORS 659A.199 is met when the whistleblower has a reasonable belief that the information reported has occurred and that the information, if proven, constitutes evidence of a violation of a state or federal law, rule or regulation. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216-17, 234 (2015).***

Based on credible testimony that respondent had no perishable foods available for lunch on March 28 and no perishable foods in the house on March 29, both violations of OAR 411-050-0645(4) and OAR 309-040-0385, the forum concluded that complainant had a reasonable belief that the food shortage he reported had occurred and that the information he reported, if proven, constituted evidence of a violation of a state rule, thereby meeting the "good faith" requirement in ORS 659A.199. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216-17, 234 (2015).***

The "good faith" requirement in ORS 659A.199 is met when the whistleblower has a reasonable belief that the information reported has occurred and that the information, if proven, constitutes evidence of a violation of a state or federal law, rule or regulation. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 93 (2015).***

Information reported by complainant that caused her to be fired consisted of her complaints that she had not been paid for her work. At the time of her complaint, complainant had worked through three of respondent's weekly payday cycles and was told by the Better Business Bureau that she was legally entitled to a paycheck and paystub for her work. This satisfied the "good faith" requirement in ORS 659A.199. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 93 (2015).***

### 56.6 --- Terms and Conditions

The forum concluded that respondent's stated reason for suspending complainant – his abusive attitude over the prior six months – was pretextual because: (1) respondent, not complainant, initiated whatever yelling took place during the phone call that occurred immediately before his suspension; (2) respondent was not a credible witness; (3) respondent was clearly upset that complainant's expenditure for food for respondent's foster home residents posed an imminent threat to respondent's vacation plans; and (4) there is no credible evidence that respondent had repeatedly warned complainant in the past for "abusive" behavior or that he had actually engaged in that behavior in the past. These facts, combined with respondent's testimony that complainant was unable to give her a satisfactory explanation as to why respondent's residents "needed food," led the forum to conclude that respondent suspended complainant because he reported a food shortage to respondent. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 236-37 (2015).***

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Complainant was made an on-call employee because she complained to the Better Business Bureau and to her coworkers about her pay, and that she was fired because she went to BOLI to make a wage claim. Those complaints were good faith reports containing evidence of a violation of state law. As such, respondent's reduction of complainant's hours and discharge of complainant also violated ORS 659A.199 and OAR 839-010-0100(1). ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 96 (2015).***

### **56.7 --- Discharge/Constructive Discharge**

Based on respondent's testimony about her initial conclusion that complainant had made a complaint to a county agency about a food shortage in respondent's foster care home, the fact that the agency's representative told respondent that the complaint was about a lack of food – the very issue complainant had reported to respondent before his suspension, and the fact that he was discharged eight minutes after the agency's representative left respondent's facility, the forum concluded that respondent discharged complainant because respondent believed he had blown the whistle to Lane County about respondent's food shortage. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 237-38 (2015).***

The forum concluded that complainant was discharged based on the content of respondent's text message to complainant instructing him to return his keys and stay away from respondent's premises, coupled with her testimony that she had suspended him five days earlier until she could talk with him and her failure to talk with him again prior to his discharge. -- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 234 (2015).***

Complainant was made an on-call employee because she complained to the Better Business Bureau and to her coworkers about her pay, and that she was fired because she went to BOLI to make a wage claim. Those complaints were good faith reports containing evidence of a violation of state law. As such, respondent's reduction of complainant's hours and discharge of complainant also violated ORS 659A.199 and OAR 839-010-0100(1). ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 96 (2015).***

### **56.8 --- “Perceived” Whistleblowers**

### **57.0 VETERANS' PREFERENCE**

#### **57.1 --- “Veteran”**

#### **57.2 --- “Disabled Veteran”**

#### **57.3 --- “Transferable Skill”**

#### **57.4 --- “Public Employer”**

Respondent Multnomah County Sheriff's Office is and was at all material times a public body subject to the requirement to provide a veterans' preference. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 230 (2014), appeal pending.***

### **57.5 --- Entitlement to Veterans' Preference**

The commissioner has the authority to issue an appropriate cease and desist order and to award money damages for emotional and mental suffering sustained, and to protect the rights of complainant and others similarly situated. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 231 (2014), appeal pending.***

In order to be entitled to the veterans' preference, various foundational qualifications must be met: The employer must be a “public employer,” the position for which the applicant applies must be a “civil service position,” and the applicant must be a “veteran” or “disabled veteran.” ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 235 (2014), appeal pending.***

### **57.6 --- Method by which Preference to be Applied**

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In ORS 408.230(2)(b), the term “application examination” refers to an examination that may be used to initially screen candidates, as well as one that is not restricted to initial screening.. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 233-34 (2014), appeal pending.***

### 57.6.1 --- Scored Applicant Rankings

When numerical scores are used, five preference points must be provided to a veteran and 10 preference points must be provided to a disabled veteran at the stage of screening initial applications and at the stage of the application examination. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 235 (2014), appeal pending.***

### 57.6.2 --- Non-Scored Applicant Rankings

To the extent respondent’s method of granting a veterans’ preference was to consider complainant the number one candidate going into the promotion process, that method was insufficient for that stage of the promotion process. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 231 (2014), appeal pending.***

If no numerical scoring system is used, a different type of preference must be given. For an application examination that consists of an interview, an evaluation of the veteran’s performance, experience or training, a supervisor’s rating or any other method of ranking an applicant that does not result in a score, the employer shall give a preference to the veteran or disabled veteran. An employer that does not use a numerical scoring application examination shall devise and apply methods by which the employer gives special consideration in the employer’s hiring decision to veterans and disabled veterans. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 235 (2014), appeal pending.***

The method by which respondent chose the person to fill the open lieutenant’s position did not involve a method of ranking applicants that resulted in a score. Consequently, the statute requires, apparently as a substitute for the application of the points that would be used in a scored system, that respondent needed to devise and apply methods by which it would give special consideration in its decision to hire veterans and disabled veterans. Aside from the specific requirement to provide the interview required, the only other requirement imposed upon respondent during the hiring process was to grant the veterans’ preference at each stage of the application process. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 237 (2014), appeal pending.***

Respondent’s website discussed “points,” but said nothing about affording a preference in the absence of a scored examination. The evidence of the veterans’ preference policy, assuming respondent had one, must therefore come from the pleadings, testimony, and documents. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 238 (2014), appeal pending.***

Making a veteran the number one candidate might well qualify as a sufficient preference, but that preference must have a meaning, understood and applied by the employer in the real world. It must, to borrow Governor Kulongoski’s phrase from the legislative history, be more than mere lip service. The inconsistency and contradictions in respondent’s evidence—about exactly what it meant to be number one, how it would apply, and who would apply it—all led to the conclusion that, in fact, there was no method by which the preference was applied. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 242 (2014), appeal pending.***

The simple policy complainant was to be considered the “top candidate” or “the number one candidate” as he went into the process—was substantively inadequate to provide the preference required by the statute. ---- ***In the Matter of Multnomah County Sheriff’s Office, 33 BOLI 220, 242-43 (2014), appeal pending.***

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The context of the entire veterans' preference statute demonstrates that this special consideration is to be a substitute for the five point (for non-disabled veterans), or ten point (for disabled veterans), preference given to scored exams. The mere fact that the preference in an unscored examination process substitutes for preferences with different weights leads to the conclusion that the preference must have some weight itself. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 243 (2014), appeal pending.***

A veterans' preference, even when applied in a hiring process that does not involve a scored test or exam, must provide something more than simply being the top candidate going into the process, a formulation that can be characterized as a barely measurable head start. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 243 (2014), appeal pending.***

### **57.7 --- "Special Consideration" in ORS 408.230(2)**

Respondent did not grant a veterans' preference to a sergeant in the hiring process for a lieutenant job because it did not devise and apply methods to afford the sergeant special consideration as a disabled veteran. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 231 (2014), appeal pending.***

To the extent respondent's method of granting a veterans' preference was to consider complainant the number one candidate going into the promotion process, that method was insufficient for that stage of the promotion process. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 231 (2014), appeal pending.***

The text of ORS 408.230 (2)(c) merely requires that the public employer devise and apply methods by which "special consideration" is given to veterans and disabled veterans in the employer's hiring decision. No explanatory guidance is given as to what is sufficient to constitute "special consideration." ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 243 (2014), appeal pending.***

### **57.8 --- Devising a Plan to Apply Veterans' Preference**

The inconsistencies in the evidence prevented the forum from finding that respondent actually devised and applied a method or methods for applying veterans' preference during, or as a result of, the stage of the process when the application materials were evaluated. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 241 (2014), appeal pending.***

"Devise" is a term of ordinary meaning not defined in the Veterans' Preference statute, and its ordinary meaning is therefore used in determining how it should be interpreted in the statute. The first definition in Webster's Third New International Dictionary, at 619 (2002) fits in this context. It is "to form in the mind by new combinations of ideas, new applications of principles, or new applications of parts; formulate by thought." ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 241 (2014), appeal pending.***

The forum was not convinced that a policy for veterans' preference was formed in the mind of respondent or its manager responsible for its implementation. In order to actually be devised, or "formed in the mind," the policy must be coherent and it must be stable. Moreover, the forum expected that if the plan had actually been devised, that it would have been similarly understood by the persons who were implementing it. At a minimum, the people involved in the hiring would understand their own roles in implementing it. In this case, the description of the plan, and when it was implemented, and when it was communicated, all varied from person to person and from time to time. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 241 (2014), appeal pending.***

### **57.9 --- Application of Veterans' Preference**

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It is respondent's responsibility to comply with the statute, even when the statute might be ambiguous. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 243 (2014), appeal pending.***

### **57.10 --- Providing Reasons for Employer's Decision to not Appoint Veteran**

Respondent violated the veterans' preference statute; it did not devise and apply a method, either in the first stage or in the final stage of the hiring process, to apply veterans' preference in the decision for promotion to a lieutenant position. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 245-46 (2014), appeal pending.***

The law only requires that complainant be hired if, after application of the preference, the results of his application examination are equal to or higher than the results for the other applicants. Other than that requirement, the preference is not a requirement that a public employer appoint a veteran or disabled veteran to a civil service position. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 247 (2014), appeal pending.***

### **57.11 --- Remedies for violations**

The Veterans' Preference statute itself, ORS 408.225, et seq provides for no remedy. It does, however, provide that a violation of the statute is an unlawful employment practice under ORS 659A, and it directs a person claiming to be aggrieved to file a complaint under ORS 659A.820. A complaint filed under ORS 659A.820 can lead to formal charges and a contested case hearing. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 246 (2014), appeal pending.***

Back pay is awarded to compensate for loss of past wages and benefits. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 246 (2014), appeal pending.***

Front pay can be awarded to represent continued accrual of damages after the record of the case closes. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 246 (2014), appeal pending.***

The forum applied a *per se* rule that when a veterans' preference is not given, on account of a failure to devise a method to apply the veterans' preference, a veteran's failure to obtain the job or promotion is deemed to flow from the failure to abide by the law. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 247 (2014), appeal pending.***

Generally speaking, the laws enforced pursuant to ORS 659A.820 are laws prohibiting discrimination in one form or another, and are often similar to federal statutes. Moreover, the Legislature looked to federal law in enacting the Veterans' Preference Law, although they are not identical. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 248 (2014), appeal pending.***

Federal law and precedent are instructive, though not binding. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 248-49 (2014), appeal pending.***

The forum agreed that imposing the injunctive relief requested in the charging document was an appropriate remedy, except that the training and development of a policy need be undertaken only for hiring or promotion based on ranking of applicants that does not result in a score, which was the only policy shown to be deficient. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 249 (2014), appeal pending.***

Back pay was not awarded when the formal charges did not specifically request any back pay or lost wages. ----- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 249 (2014), appeal pending.***

When analyzing whether front pay should be awarded, the forum noted that complainant's pay during his first year after failing to receive the promotion was, because of

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overtime, actually higher than what he would have received had he received the promotion. Moreover, average pay for sergeants was higher than for lieutenants, and for at least one year-over-year comparison, the average increase in pay for sergeants, again because of overtime, was higher than for lieutenants. And despite the fact that lieutenants are exempt from overtime pay, the evidence established that lieutenants frequently work overtime. Based on the evidence presented, the forum could not find, in the absence of considerable speculation, that complainant would suffer any loss of income on account of his failure to receive the promotion to lieutenant. ---- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 249 (2014), appeal pending.***

With respect to emotional distress damages, the forum noted that stress was more than just the stress derived from going through litigation. It arose from the fact that complainant's co-workers, who were his superiors, and in some cases his supervisors, were parties to the unlawful practices; and he had to work with them as part of his duties. ---- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 249 (2014), appeal pending.***

The forum awarded \$50,000 in emotional distress damages. Although complainant brought in no medical expert evidence or any evidence from co-workers or family, he did testify that he was affected emotionally, that he lost 20 pounds, that he was more easily irritated, and that the lack of a veterans' preference affected his relationship with his family. The forum was particularly affected by complainant's testimony that he felt his military service to his country was being discarded and overlooked. ---- ***In the Matter of Multnomah County Sheriff's Office, 33 BOLI 220, 249 (2014), appeal pending.***

## VI. COMPLAINT AND HEARING PROCESS

### 60.0 COMPLAINT OF UNLAWFUL EMPLOYMENT PRACTICE

#### 60.1 --- GENERALLY

#### 60.2 --- Commissioner's Complaint

### 61.0 COMPLAINT OF DISCRIMINATION IN HOUSING OR PUBLIC ACCOMMODATION

#### 61.1 --- Commissioner's Complaint

Neither OAR 839-050-0170(1) nor OAR 839-050-0020(3) required that formal charges filed pursuant to a commissioner's complaint under ORS 659A.825 on behalf of the Rose City T-Girls, and/or those 'similarly situated', must join as complainants the individuals for whom the formal charges sought emotional distress damages. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

The forum denied respondents' motion to make the formal charges more definite and certain by identifying the persons alleged to be aggrieved, finding that the original complaint filed with the CRD was in fact a "commissioner's complaint" filed pursuant to ORS 659A.825, and that due process requirements of OAR 839-50-0060(1) were met. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

The agency was required to provide, through discovery, a copy of the commissioner's complaint filed under ORS 659A.825. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 223 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### 62.0 INVESTIGATION; SUBSTANTIAL EVIDENCE DETERMINATION

#### 62.1 --- Generally

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### 62.2 --- Conciliation

### 62.3 --- Cease and Desist Orders (Prior to Hearing)

### 62.4 --- Civil Penalties (ORS 659A.855)

In a case in which the forum found a total of five violations of ORS 659A.403, 659A.406 and 659A.409, and in the absence of promulgated rules to guide the forum in deciding whether to assess the maximum civil penalty of \$1,000 for each violation, or a lesser amount, the forum found that \$1,000 is an appropriate civil penalty for each violation and awarded a total of \$5,000 in civil penalties. ---- *In the Matter of Blachana, LLC, 32 BOLI 220, 253 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).*

### 62.5 --- Request for Contested Case Hearing

## 63.0 CONTESTED CASE PROCESS

### 63.1 --- Formal/Specific Charges

### 63.2 --- Cease and Desist Orders (After Hearing)

### 63.3 --- Dismissal of Charges

## 64.0 ELECTION OF REMEDIES

## VII. ESTABLISHING DISCRIMINATION

## 70.0 AGENCY'S BURDEN OF PROOF

### 70.1 --- Generally

### 70.2 --- Specific Intent

Specific intent can be shown by direct or circumstantial evidence. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012).*

The different or unequal treatment theory of discrimination requires comparators and the mixed motive theory of discrimination requires dual motives. When the pleadings alleged neither, the forum applied the specific intent theory, which provides that unlawful discrimination occurs when a respondent "knowingly and purposefully discriminates against an individual because of that individual's membership in a protected class." ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83-84 (2012).*

### 70.3 --- Different or Unequal Treatment

The different or unequal treatment theory of discrimination requires comparators and the mixed motive theory of discrimination requires dual motives. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83 (2012).*

### 70.4 --- Pretext

### 70.5 --- Harassment

### 70.6 --- Discharge/Constructive Discharge

### 70.7 --- Adverse Impact

### 70.8 --- Mixed Motive

The different or unequal treatment theory of discrimination requires comparators and the mixed motive theory of discrimination requires dual motives. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 83 (2012).*

## 71.0 KEY ROLE

## 72.0 EVIDENCE

### 72.1 --- Generally

### 72.2 --- Statistics

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### 73.0 RESPONDENTS

#### 73.1 --- Aider/Abettor

When the agency's formal charges alleged that A. Klein aided and abetted M. Klein's violation of ORS 659A.403(3) and the forum concluded that M. Klein did not violate ORS 659A.403(3) as alleged, the forum held that A. Klein could not be held liable as an aider and abettor. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 167 (2015), appeal pending.***

An owner of an LLC who commits acts rendering the LLC liable for an unlawful employment practice may be found to have aided and abetted the LLC's unlawful employment practice. Aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." When a respondent LLC's sole owner and member was solely responsible for complainant's suspension and discharge, the forum concluded that she violated ORS 659A.030(1)(g) by suspending and discharging complainant on behalf of the LLC, making her jointly and severally liable with the LLC for all damages awarded by the forum. ---- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238 (2015).***

As an aider and abettor, respondent's president was jointly and severally liable with HBE, complainant's corporate employer, for all of HBE's unlawful employment practices. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 98 (2015).***

When the conclusion by Schoene, HBE's president, that complainant had "quit" was in fact Schoene's conclusion to discharge Complainant from HBE's employment, that decision made Schoene liable as an aider and abettor to complainant's discharge. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 97 (2015).***

Complainant's work schedule was changed to on-call during her exchange of text messages on December 27, 2012, with her immediate supervisor concerning her unpaid wages. Although complainant did not speak directly with Schoene, respondent HBE's corporate president, about her complaints on December 27 and there was no direct evidence that Schoene made the decision on December 27 to change Complainant's employment status to on-call, the following circumstantial evidence led the forum to conclude that Schoene made that decision. First, there was no evidence that complainant's immediate supervisor had the unilateral authority to change complainant's employment status, whereas Schoene, as HBE's president and manager, clearly had the ultimate authority to make employment decisions. Second, complainant's immediate supervisor discussed complainant's complaints with Schoene before she texted complainant with the message that her job status was changed to on-call. Third, Schoene's attitude towards complainant's complaints about her wages was decidedly hostile. Based on the above, the forum finds that Schoene aided and abetted HBE by making the decision to change complainant's status to on-call, thereby violating ORS 659A.030(1)(g). --- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 97 (2015).***

A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. ---- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 97 (2015).*** See also *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 166-67 (2012); In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012); In the Matter of Cyber Center, Inc., 32 BOLI 11, 35 (2012).*

Aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the

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accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.” ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 97 (2015)***. See also *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 166-67 (2012)*; *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94,137 (2012)*; *In the Matter of Cyber Center, Inc., 32 BOLI 11, 35 (2012)*.

It is an unlawful employment practice for any person, whether an employer or an employee, to aid, abet the doing of any of the acts forbidden under this chapter or to attempt to do so. Aiding and abetting, in the context of an unlawful employment practice, means to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission. In this case, J. Bassett aided and abetted MBI's violation by participating in the assault on Guevara and Calderon on January 10, 2011. As MBI's corporate president, H. Maltby aided and abetted MBI's violation by failing to take immediate and appropriate corrective action in response to that assault. As a consequence, H. Maltby and J. Bassett were found to be jointly and severally liable for MBI's violation. --- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 151, 156 (2014)***.

In the context of discrimination by a place of public accommodation, the individual who, while acting on behalf of the business, made the decision to ask the aggrieved persons to not come back to the bar and who communicated that decision, was found to have aided and abetted the business entity in its violation of ORS 659A.403, and thereby violated ORS 659A.406. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 245 (2013)***, affirmed ***Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015)***.

As an aider and abettor to respondent's sexual harassment and discharge of complainant, respondent's president was jointly and severally liable with respondent for all damages awarded by the forum. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012)***.

When there was no direct evidence that respondent's president participated in the decision to discharge complainant, the forum inferred his participation based on three facts. First, complainant sent the e-mail that resulted in her discharge to him and he received it and told respondent's general manager about it. Second, as respondent's president, he had the unquestionable authority to fire complainant. Third, in his earlier statements to an investigator, he said nothing to indicate that anyone else was responsible for the decision to discharge complainant. The active role of respondent's president in sexual harassing and discharging complainant made him an aider and abettor under ORS 659A.030(1)(g). ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 167 (2012)***.

When an individual respondent who was a professional corporation's sole owner and president, as well as complainant's immediate supervisor, was the primary actor in three distinct unlawful employment actions against complainant, the individual respondent was held jointly and severally liable as an aider and abettor for all three actions. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012)***.

An individual respondent who was the vice president, one third share owner, and CEO of the respondent corporation that employed complainant throughout complainant's employment was found to have aided and abetted the respondent corporation in discharging complainant when he participated in making the joint decision to discharge complainant. ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 35 (2012)***.

An individual respondent who was the vice president, one third share owner, and CEO of the respondent corporation that employed complainant throughout complainant's employment was found not to have aided and abetted the respondent corporation in demoting complainant and cutting her pay when the agency did not prove, by a preponderance of the evidence, that he

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played an active role in complainant's demotion and resultant pay cut. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 35-36 (2012).***

### **73.2 --- Corporation Association**

### **73.3 --- Coworker**

### **73.4 --- Employment Agency**

### **73.5 --- Franchisor**

### **73.6 --- Labor Organization**

### **73.7 --- Limited Liability Company**

### **73.8 --- Owner of Real Property**

### **73.9 --- Partnership**

Partners in a partnership are jointly and severally liable for any violations of ORS chapter 659A related to their business. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 160 (2015), appeal pending.***

### **73.10 --- Public Accommodation**

### **73.11 --- Public Employer**

### **73.12 --- Sole Proprietor**

### **73.13 --- Successor in Interest**

### **73.14 --- Supervisor**

### **73.15 --- Temporary Employment Agencies**

### **73.16 --- Trusts**

## **74.0 RESPONDENTS' LIABILITY FOR ACTS OF OTHERS**

### **74.1 --- Agent**

When a member of a limited liability company was acting as the company's agent when he violated ORS 659A.409, the company also violated the statute. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 248 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### **74.2 --- Coworker**

### **74.3 --- Legal Representative**

### **74.4 --- Partner**

M. Klein, as a joint owner and partner of A. Klein, was held jointly and severally liable for any damages awarded to complainants stemming from A. Klein's violation of ORS 659A.403. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 166 (2015), appeal pending.***

### **74.5 --- Proxy**

The conduct of respondent's owner, who was also a corporate officer, was properly imputed to respondent on the basis that he was respondent's proxy, making respondent strictly liable for his sexual harassment and discharge of complainant. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 167 (2012).***

### **74.6 --- Supervisor**

When respondent's general manager was a supervisor with immediate authority over complainant who sexually harassed complainant, and respondent's owner and president was aware of much of the sexual harassment of complainant and was an active participant in some of it, based on OAR 839-005-0030(5)(b), the forum concludes that respondent's president should have known of all of the general manager's sexual harassment and imputes this knowledge to respondent, making respondent liable for the general manager's sexual

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harassment. The forum did not consider the affirmative defenses set out in OAR 839-005-0030(5)(b) because respondent failed to plead them in the answer. ---- *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012).*

### 74.7 --- Other

### 75.0 CONTINUING VIOLATION

The forum adopted the federal standard for a continuation policy: A hostile environment claim is composed of a series of separate acts that collectively constitute one unlawful employment practice. The timely filing provision only requires that a Title VII plaintiff file a charge within a certain number of days after the unlawful practice happened. It does not matter that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for purposes of determining liability. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 153-54 (2014).*

Even under a continuing violation theory, a respondent's subsequent unlawful employment practices cannot reel in prior discriminatory acts that have not been found to be unlawful employment practices. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 154 (2014).*

## VIII. DEFENSES TO CHARGES OF DISCRIMINATION

### 80.0 AFFIRMATIVE ACTION

### 81.0 BONA FIDE SENIORITY SYSTEM

### 82.0 BONA FIDE EMPLOYEE BENEFIT PLAN

### 83.0 BONA FIDE OCCUPATIONAL REQUIREMENT

#### 83.1 --- Generally

#### 83.2 --- Age

#### 83.3 --- Sex

#### 83.4 --- Other

"Bona fide occupational requirement" is not available as an affirmative defense under ORS 659A.030(1)(b) in a case alleging failure to accommodate based on a complainant's religious beliefs. ---- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 131 (2012).*

### 84.0 COLLECTIVE BARGAINING AGREEMENTS

### 85.0 CORRECTIVE ACTION AND PREVENTIVE MEASURES

### 86.0 COUNTERCLAIMS

Respondents counterclaimed that BOLI, through its actions in prosecuting the case, (1) had "knowingly and selectively acted under color of state law to deprive respondents of their fundamental constitutional and statutory rights on the basis of religion" in violation of ORS 659A.403 and "deprived respondents of fundamental rights and protections guaranteed by the First and Fourteenth amendments to the United States Constitution," thereby generating liability under 42 USC § 1983; and (2) BOLI's commissioner violated ORS 659A.409 by publishing, circulating, issuing, or displaying communications on Facebook and in print media "to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or the discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409." Respondents sought damages in the amount of \$100,000 for economic damages, \$100,000 for non-economic damages, court costs, and reasonable attorney fees. The forum held that the authority of state agencies is limited to that granted to them by the legislature, and that although ORS

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659A.850(4) gives the commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding, there is no corresponding statute that authorizes the commissioner to award the damages sought by respondents in their counterclaims and no authority for the commissioner to award damages, attorney fees, and costs except to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421. The forum concluded that it lacked jurisdiction to adjudicate respondents' counterclaims and could neither grant nor deny them, with the only relief available to respondents through this forum being dismissal of any charges not proven by the agency under ORS 659A.850(3). ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 170 (2015), appeal pending.***

### 87.0 ESTOPPEL

Estoppel is a legal doctrine whereby one party is foreclosed from proceeding against another when one party has made "a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." In order to establish estoppel against a state agency, a party must have relied on the agency's representations and the party's reliance must have been reasonable. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171-72 (2015), appeal pending.***

Respondents plead that the state of Oregon, including BOLI, was estopped from compelling respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions. Respondents did not identify any false representation made by BOLI or any other state agency upon which respondents relied in refusing to provide a wedding cake to complainants. Although the Oregon Constitution did not recognize same-sex marriages in January 2013, the respondents' affidavits established that the refusal was because of respondents' religious convictions stemming from Biblical authority, not on their reliance on Oregon's Constitutional provision rejecting same-sex marriage or their attempt to enforce that provision. The forum rejected respondents' estoppels defense, holding that respondents had presented no facts, articulated no legal theory, and cited no case law to support their argument that BOLI should be estopped from litigating this case based on the doctrine of estoppels, and granted the agency summary judgment on this issue. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171-72 (2015), appeal pending.***

### 88.0 EXHAUSTION/ELECTION OF REMEDIES

### 89.0 FAILURE TO MITIGATE

A respondent has the burden of proving that a complainant failed to mitigate his or her damages. To meet that burden, a respondent must prove that a complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and which the complainant was qualified. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 138-39 (2012).*** See also *In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).*

### 90.0 INDEPENDENT CONTRACTOR

### 91.0 LACHES

### 92.0 LACK OF JURISDICTION

In a housing case, when the agency's formal charges plead that a complainant's minor daughter was an "aggrieved person" who was entitled to damages, the commissioner lacked jurisdiction to pursue the allegations related to complainant's minor daughter because she never signed a complaint as required by the agency's administrative rule. ---- ***In the Matter of Kenneth Wallstrom, 32 BOLI 63, 87 (2012).***

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### 93.0 LEGITIMATE NONDISCRIMINATORY REASON/PRETEXT

In a housing case, the agency could prove specific intent by showing that respondent's reason for expelling complainant – so that his daughter could move in -- was a pretext for discrimination because it was untrue. ---- *In the Matter of Kenneth Wallstrom, 32 BOLI 63, 84 (2012)*.

Based on negative statements made by respondent's owner and general manager related to complainant's pregnancy and respondent's lack of credibility with regard to its proffered legitimate, nondiscriminatory reasons for demoting complainant and cutting her pay, the forum concluded that respondent demoted complainant and cut her pay because of her sex/pregnancy. ---- *In the Matter of Cyber Center, Inc., 32 BOLI 11, 32 (2012)*.

### 94.0 PRECLUSION

#### 94.1 --- Claim Preclusion

#### 94.2 --- Issue Preclusion

### 95.0 PREEMPTION BY FEDERAL LAW

### 96.0 STANDING

In a public accommodation civil rights case, respondents argued that a complainant who was not present when services were denied lacked standing. The forum rejected this argument as reliant on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In the case at hand, the “full and equal accommodation” sought by complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. Because the wedding cake was intended to equally benefit both complainants, the forum held that they both had the same cause of action against respondents under ORS 659A.403 and .406. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 162-63 (2015), appeal pending*.

### 97.0 STATUTE OF LIMITATIONS

### 98.0 UNCONSTITUTIONALITY

#### 98.1 --- Generally

When both state and federal constitutional claims are raised, the forum followed example established by Oregon courts of first evaluating the state claim. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 173 (2015), appeal pending*.

The commissioner has the authority to decide the constitutionality of statutes. In BOLI contested cases, the commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision set forth in the proposed order and subject to ratification by the commissioner in the final order. Accordingly, the ALJ had the initial authority to rule on the constitutional issues raised by respondents in their motion for summary judgment. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171 (2015), appeal pending*.

#### 98.2 --- Oregon Constitution

##### 98.2.1 --- Article I, sections 2 & 3

Respondents, who are Christians and had a sincerely held belief that the Bible forbade them from “proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.” They argue that Article I, sections 2 and 3 gave them the unfettered right to refuse to provide a cake for complainants' same-sex wedding ceremony because doing so would have compelled them to act contrary to their sincerely held religious beliefs. Respondents also argued that the statutes underlying the

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agency's formal charges were facially unconstitutional under the Oregon Constitution in that they violate respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of respondents and persons similarly situated. The forum rejected respondents' arguments, holding that ORS 659A.403 is a law that is part of a general regulatory scheme, expressly neutral and neutral among religions, and as such is constitutional under Article I, sections 2 and 3. The forum also found that there is also "an overriding governmental interest" present, explicitly expressed by Oregon's legislature in ORS 659A.003. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 173-78 (2015), appeal pending.***

In a public accommodation civil rights case, the forum held ORS 659A.403 to be constitutional "as applied." --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 178 (2015), appeal pending.***

Respondents plead that the state of Oregon, including BOLI, was estopped from compelling respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions. Respondents did not identify any false representation made by BOLI or any other state agency upon which respondents relied in refusing to provide a wedding cake to complainants. Although the Oregon Constitution did not recognize same-sex marriages in January 2013, the respondents' affidavits established that the refusal was because of respondents' religious convictions stemming from Biblical authority, not on their reliance on Oregon's Constitutional provision rejecting same-sex marriage or their attempt to enforce that provision. The forum rejected respondents' estoppel defense, holding that respondents had presented no facts, articulated no legal theory, and cited no case law to support their argument that BOLI should be estopped from litigating this case based on the doctrine of estoppels, and granted the agency summary judgment on this issue. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 171-72 (2015), appeal pending.***

The commissioner rejected respondents' affirmative defenses that ORS 659A.409 violates the Oregon Constitution on its face and as applied. ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face. It is also constitutional as applied in this case because respondents' statements announcing their clear intent to discriminate in future, just as they had done with complainants, was not a religious practice but was conduct motivated by their religious beliefs. Furthermore, engagement in constitutionally protected expression while engaging in otherwise punishable conduct does not insulate the unlawful conduct from the usual consequences that accompany it. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121-22 (2015), appeal pending.***

ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face under Article I, sections 2 and 3 of the Oregon Constitution. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121 (2015), appeal pending.***

In a public accommodation, same sex civil rights case, the forum found ORS 659A.409 to be constitutional under Article I, sections 2 and 3 of the Oregon Constitution, as applied in the case because respondents' statements announcing their clear intent to discriminate in future, just as they had done with complainants, was not a religious practice but was conduct motivated by their religious beliefs. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121 (2015), appeal pending.***

Engaging in constitutionally protected expression while engaging in otherwise punishable conduct does not insulate the unlawful conduct from the usual consequences that accompany it.

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**---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 121 (2015), appeal pending.***

In a religious discrimination case, an employer's lack of knowledge that his conduct created an intimidating, hostile, or offensive work environment is an affirmative defense under sections 2 and 3 of Article I of the Oregon Constitution. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 117 (2012).***

### **98.2.2 --- Article I, section 8**

The application of ORS 659A.403 to respondents so as to require them to provide a wedding cake for complainants did not constitute compelled speech that violated Article I, section 8 of the Oregon Constitution. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 187-91 (2015), appeal pending.***

Respondents argued that their Article I, section 8, rights were violated by the agency's application of ORS 659A.403 because that application, in requiring them to provide a wedding cake to complainants, unlawfully compelled respondents to engage in expression of a message they did not want to express. The forum found that there were no Oregon cases in which compelled speech was the issue. In the absence of Oregon case law, the forum relied on a line of cases decided by the U.S. Supreme Court involving the First Amendment and compelled speech for guidance. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 187-88 (2015), appeal pending.***

ORS 659A.403 is not a statute that "obviously" prohibits expression. Rather, it is a "speech-neutral" statute that prohibits specific actions that may involve expression without specifying a particular form of expression. Accordingly, the forum found that ORS 659A.403 is not subject to Article I, section 8 overbreadth scrutiny. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 187 (2015), appeal pending.***

In a public accommodation, same sex civil rights case, respondents argued that ORS 659A.403 expressly regulates expression because the word "deny" in section (3) shows that, when properly interpreted, "the statute prohibits *communication* that services are being denied for a prohibited reason, which implicates both speech and opinion." The forum rejected respondents' "expansive interpretation," finding that under this interpretation, all laws implicating any form of communication whatsoever would be facially unconstitutional under Article I, Section 8. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 184-85, (2015), appeal pending.***

In an Article I, section 8, challenge, the forum concluded that ORS 659A.409 is not subject to an as-applied challenge. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122, (2015), appeal pending.***

In a public accommodation, same sex civil rights case, respondents asserted that ORS 659A.409 prohibits respondents from "express[ing] their own position" and amounts to "a speech code." To the contrary, the language of ORS 659A.409 focuses on the discriminatory effect that accompanies certain speech "published, circulated, issued or displayed" on behalf of a place of public accommodation. It does not cover expressions of personal opinion, political commentary, or other privileged communications unrelated to the business of a place of public accommodation, and its breadth is narrowly tailored to address the effects of the speech at issue. As such, it is facially constitutional under Article I, Section 8. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122, (2015), appeal pending.***

The Oregon Supreme Court has established a basic framework, with three categories, for determining whether a law violates Article I, Section 8 of the Oregon Constitution. Under the first category, the court begins by determining whether a law is "written in terms directed to the

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substance of any ‘opinion’ or any ‘subject’ of communication.” If it is, then the law is unconstitutional, unless the scope of the restraint is “wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and “the proscribed means [of causing those effects] include speech or writing,” or whether it is “directed only against causing the forbidden effects.” Oregon courts examine a statute in the second category for “overbreadth.” If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth. If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. If the law focuses only on forbidden effects, an individual can challenge the law as applied to that individual's circumstances. ORS 659A.409 falls in the second category because it is “directed in terms against the pursuit of a forbidden effect” and “the proscribed means [of causing that effect] include speech or writing.” --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 184, (2015), appeal pending.***

ORS 659A.403 is a law focused on proscribing the pursuit or accomplishment of a forbidden result – in this case, discrimination by places of public accommodations against individuals belonging to specifically enumerated protected classes. As such, it is not a law written in terms directed to the substance of any “opinion” or any “subject” of communication and is not susceptible to a *Robertson* category one facial challenge. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 184 (2015), appeal pending.***

### 98.3 --- U.S. Constitution

#### 98.3.1 --- First Amendment (free exercise)

Respondents argued that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against respondents because that statute, on its face and as applied, unlawfully infringes on Respondents' right of conscience and right to free exercise of religion. Respondents further argued that the forum should apply the U. S. Supreme Court's “strict scrutiny” test. The forum rejected respondents' arguments and applied Supreme Court's *Smith* “neutrality” test, finding that the case was not a “hybrid” case because neither respondents' free exercise nor free speech claims were independently viable and the two claims together were not greater than the sum of their parts and that, under the *Smith* test, ORS 659A.403 is a “valid and neutral law of general applicability” and therefore constitutional under the First Amendment's free exercise clause, both facially and as applied. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 179-82 (2015), appeal pending.***

ORS 659A.409 is constitutional, both facially and as applied, under the free exercise clause of the U. S. Constitution. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122 (2015), appeal pending.***

The commissioner rejected respondents' affirmative defenses that ORS 659A.409 violates the free exercise clause of the United States Constitution on its face and as applied. --- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 122 (2015), appeal pending.***

Respondents counterclaimed that BOLI, through its actions in prosecuting the case, (1) had “knowingly and selectively acted under color of state law to deprive respondents of their fundamental constitutional and statutory rights on the basis of religion” in violation of ORS 659A.403 and “deprived respondents of fundamental rights and protections guaranteed by the

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First and Fourteenth amendments to the United States Constitution,” thereby generating liability under 42 USC § 1983; and (2) BOLI’s commissioner violated ORS 659A.409 by publishing, circulating, issuing, or displaying communications on Facebook and in print media “to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or the discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.” Respondents sought damages in the amount of \$100,000 for economic damages, \$100,000 for non-economic damages, court costs, and reasonable attorney fees. The forum held that the authority of state agencies is limited to that granted to them by the legislature, and that although ORS 659A.850(4) gives the commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding, there is no corresponding statute that authorizes the commissioner to award the damages sought by respondents in their counterclaims and no authority for the commissioner to award damages, attorney fees, and costs except to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421. The forum concluded that it lacked jurisdiction to adjudicate respondents’ counterclaims and could neither grant nor deny them, with the only relief available to respondents through this forum being dismissal of any charges not proven by the agency under ORS 659A.850(3). ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 170 (2015), appeal pending.***

### 98.3.2 --- First Amendment (free speech)

The requirement in ORS 659A.403 that respondents bake a wedding cake for complainants, a same sex couple, was not compelled speech that violated the free speech clause of the First Amendment to the U. S. Constitution. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 192 (2015), appeal pending.***

ORS 659A.409 is an integral part of the anti-discrimination public accommodation laws in ORS chapter 659A. ORS 659A.409 is constitutional on its face. It was also constitutional as applied because the commissioner only applied it to respondents’ language that indicated respondents’ clear intent to discriminate in future just as they had done with complainants. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 123 (2015), appeal pending.***

## 99.0 UNDUE HARDSHIP TO ACCOMMODATE

### 99.1 --- Disability

Although the reasonable accommodation sought in this case was for complainant to be allowed occasional tardies due to severe pain, the actual accommodation required was an excused absence for one day when complainant was eight minutes tardy to work. In evaluating respondent’s undue hardship defense, the forum focused on that specific instance rather than viewing the accommodation sought as a free pass for unlimited, unpredictable tardies. Although respondent presented evidence that, as a general matter, a driver’s tardiness could cause respondent to have to pay overtime to another driver to make a guaranteed delivery for free, there was no evidence as to the specific impact of complainant’s eight minute tardy on December 13, 2010. Therefore, respondent did not carry its burden of proof and the forum found that respondent committed an unlawful employment practice by disciplining complainant for his December 13, 2010, tardy. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 33-34 (2014).***

### 99.2 --- Religion

When complainant requested the accommodation that she be allowed to attend alternative, equivalent required training that had no religious content, there is no evidence in the record that alternative, equivalent training existed, and the training was based specifically on the writings of L. Ron Hubbard, the forum concluded that the possibility that alternative, equivalent

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training existed was remote and declined to speculate on whether complainant's attendance at an alternative, equivalent training that had no religious content would have involved more than *de minimus* costs for respondents. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 131 (2012).***

The standard of proving undue hardship under ORS 659A.030 for any violations not covered under ORS 659A.033 is whether the proposed accommodation imposed "more than *de minimus* costs." This is an affirmative defense that respondents have the burden of proving. When respondents provided no quantifiable evidence that complainant's failure to attend a required symposium would have affected respondents' income negatively, that she had problems working as part of the "team" using respondents' business technologies before her termination, and no other evidence to assist the forum in determining the potential income loss claimed by respondents as a result of complainant's failure to attend a required symposium the forum concluded that respondents failed to satisfy their burden of proof to show that the costs of excusing complainant from attending the symposium would have been more than *de minimus*. -- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 130-31 (2012).***

The standard of proving undue hardship under ORS 659A.030 for any violations not covered under ORS 659A.033 is whether the proposed accommodation imposed "more than *de minimus* costs." This is an affirmative defense that respondents have the burden of proving. ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 130 (2012).***

### 99A OTHER

In their answer, respondents plead "failure to state ultimate facts sufficient to constitute a claim" as an affirmative defense. As a procedural matter, the forum viewed this defense as a straightforward denial of the allegations in the pleadings rather than as an affirmative defense. -- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 (2015), appeal pending.***

## IX. REMEDIES

### 100.0 ATTORNEY FEES

#### 101.0 BACK PAY

##### 101.1 --- Purpose

The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful employment practices. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238 (2015).*** See also *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 98 (2015); In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76 (2015); In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 37 (2014); In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157 (2014); In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012); In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012); In the Matter of Cyber Center, Inc., 32 BOLI 11, 36 (2012).*

##### 101.2 --- Calculation

###### 101.2.1--- Generally

Back pay awards are calculated to make a complainant whole for injuries suffered as a result of discrimination. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238 (2015).*** See also *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 98 (2015); In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76 (2015); In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157-58 (2014); In the Matter of Oak Harbor Freight*

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*Lines, Inc.*, 33 BOLI 1, 37 (2014); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 138 (2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 36 (2012).

Complainant's credible testimony established that, had she not been fired, she would have continued to work for respondent from November 10, 2013, the date of her discharge, until on or about July 29, 2014. While employed by respondent, complainant was paid \$9 per hour, worked an average of 32 hours per week, and received an average of \$10 in tips per hour. At a minimum, her wage would have increased to \$9.10 per hour as of January 1, 2014. Between November 10 and December 31, 2013, she would have earned \$4,256 in wages and tips. Between January 1 and July 29, 2014, she would have earned \$18,336 in wages and tips. In total, she would have earned \$22,592 in wages and tips, had she not been terminated. Between November 10, 2013, and July 29, 2014, she earned \$500 in mitigation of her wage loss. Subtracting \$500 from \$22,592, the forum concluded that \$22,092 was the amount of wages and tips complainant lost as a result of her termination and awarded her that amount in lost wages and tips. --- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 76 (2015).**

The forum must have a basis for calculating back pay before it can make an award. The forum did not award back pay when there was a lack of evidence from which to calculate the award. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett*, 33 BOLI 121, 158 (2014).**

Although the agency amended its formal charges at hearing to substitute the sum "\$11,250" in lost wages for the sum "\$14,000," the forum was not limited in its award because the amendment did not delete the nonrestrictive phrase "at least" that prefaced the sum "\$14,000" in the formal charges. ---- ***In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 169 (2012).**

Complainant claimed back pay for two days to compensate him for his April 20-21, 2011, suspension without pay. His claim rested on the assumption that he would not have been suspended but for respondent's unlawful employment practices. Respondent's attendance policy provides for the suspension of an employee after the employee's "5<sup>th</sup> Occurrence" within a "rolling nine (9) month period." As of April 20, 2011, complainant had accrued 6.5 occurrences. Of those occurrences, only his December 13, 2010, tardy, counted as a .5 occurrence, was attributable to an unlawful employment practice by respondent. There is no evidence to show that complainant would not have been suspended for the remaining 6 occurrences that were not protected by OFLA or Oregon's disability laws. Accordingly, the forum was unable to conclude that complainant's two-day suspension was caused by his December 13, 2010, protected tardy, and found complainant is not entitled to any back pay. --- ***In the Matter of Oak Harbor Freight Lines, Inc.*, 33 BOLI 1, 37 (2014).**

Respondent argued that the agency's failure to offer complainant's tax returns as evidence should lead to an inference that complainant's claim for back pay is excessive. The forum disagreed, finding that the agency was under no obligation to offer complainant's tax returns to support of its claim for back pay, and its failure to do so, in the absence of a discovery order, did not require the forum to draw any inference whatsoever. If respondent wanted complainant's tax returns in the record, it could have sought them through discovery, then moved for a discovery order that would have been granted, had the agency refused to provide them. ---- ***In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 37 (2012).**

Rather than speculate as to the number of hours complainant might have worked, had she not been demoted, the forum awarded complainant back pay at the rate of \$1.60 per hour for the 27.75 hours she actually worked after her demotion. ---- ***In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 37-38 (2012).**

### 101.2.2--- Deductions

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### 101.2.3--- Duration

Had complainant not been suspended and discharged, he would have presumably returned to his job as medical appointments coordinator at \$12 per hour and worked another 15 days in total until respondent closed its doors, earning \$1,620 in gross wages (9 hours x \$12 per hour x 15 days = \$1,620). Through complainant's credible testimony, the agency established that he began looking for replacement work shortly after his discharge, satisfying the forum's reasonable diligence standard. The forum awards complainant \$1,620 in lost wages. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238-39 (2015).***

The forum awarded complainant back pay and tips for seven days of work between December 27, 2012, and January 5, 2013, based on the fact that complainant did not know she had been fired until January 5, 2013, and therefore had no obligation to look for replacement work during that time period. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 100 (2015).***

While employed by respondent, complainant was paid a salary of \$45,000 a year, or \$3,750 a month. She had no earnings between her discharge and starting her new job. During that period of time, she would have earned \$11,250 (\$3,750 x 3 months), had she not been discharged. Her starting salary at her new job was \$30,000 a year, or \$2,500 a month. She received a raise to \$35,000 a year beginning December 1, 2010, or \$2,920 a month, and also received \$450 in commissions in December 2010. Since January 1, 2011, she has been paid at least \$45,000 a year, and the forum awarded her back pay in the amount of \$13,880 in back pay up to January 1, 2011. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 169 (2012).***

To compute complainant's back pay entitlement from July 1 to October 31, 2009, the forum averaged the number of hours she worked in the eight weeks beginning March 28 and ending May 29, 2009 (31.6 hours), multiplied it by the 17 weeks in the period of time extending from July 1 to October 31, 2009 (17 weeks x 31.6 hours = 537.2 hours), then multiplied that figure by \$10 per hour (537.2 hours x \$10 per hour = \$5,372). To calculate complainant's lost tips, the forum multiplied the 17 weeks by \$400, complainant's average weekly tips (17 weeks x \$400 = \$6,800). In total, complainant suffered a loss of back pay and tips of \$12,172 from July 1 to October 31, 2009. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 38 (2012).***

Complainant did not look for work for the first month after her discharge. Even though her lack of initiative may have been largely due to the depression she felt after being fired, her failure to look for work disqualified her from a back pay award for that period of time. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 38 (2012).***

The forum rejected the agency's argument that complainant was entitled to a back pay award from April 1 through April 15, 2010, based on the proposition that complainant, who was discharged because of her sex/pregnancy, would have returned to work for respondent, had she remained employed, after taking 12 weeks of OFLA leave. The forum based its rejection on the agency's failure to prove that respondent had enough employees to be an OFLA "covered employer" and the lack of evidence in the record that any other respondent employees were allowed to take a continuous five month leave from work for any reason, then return, or that respondent had a policy allowing such a leave. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 39 (2012).***

### 101.2.4--- Duty to Mitigate

In their exceptions, respondents argued that complainant had failed to mitigate his wage loss by refusing to accept a night job for work similar to his job with respondent. The forum rejected this argument, holding that even assuming that complainant had occasionally worked a night shift in the past, his regular shift throughout his employment with respondents was 8 a.m. to 5 p.m. Complainant also credibly testified that, at the time of his discharge, he was not able

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to work a night job. Under these circumstances, complainant was not required to accept a night shift job in order to meet the forum's standard of using reasonable diligence to find other suitable employment. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 242 (2015).***

A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238 (2015).*** See also *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76 (2015); In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157 (2014); In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 168 (2012); In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 138 (2012); In the Matter of Cyber Center, Inc., 32 BOLI 11, 36 (2012).*

The agency argued that OAR 839-003-0090(3) gives the forum the discretion to award damages for back wages "even if there was no evidence that Complainant sought employment." That rule provides: "In order to recover damages for lost wages, the aggrieved person will generally be required to mitigate damages by seeking employment." The agency argued that the inclusion of the word "generally" gives the forum the unfettered discretion to award back pay, regardless of whether a discharged complainant seeks work. The forum rejected this argument, stating that it has never adopted this absolute position in evaluating a back pay claim and would not do so now. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 99-100 (2015).***

Complainant did not mitigate her damages when she was unemployed for 11 months after her discharge and the only credible evidence of her job search was the fact that she started another job 11 months after her discharge. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 99 (2015).***

A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. Typically, the agency proves that a complainant exercised reasonable diligence through complainant's testimony, often coupled with documentation, about jobs for which the complainant applied or inquired about. At a minimum, there must be some credible evidence that the complainant actively sought work. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 98 (2015).***

Through complainant's credible testimony, the agency established that she diligently sought other suitable employment after her discharge and had not yet found such employment at the time of the hearing. ---- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76 (2015).***

Through complainant's credible testimony and documentation of her job search, the agency established that she diligently sought other suitable employment after her discharge, eventually finding another job that started on November 1, 2010. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 169 (2012).***

The forum rejected respondent's argument that complainant did not mitigate her damages when complainant credibly testified she looked for work she diligently and unsuccessfully sought employment in central Oregon before pursuing her option in Texas. Respondents provided no evidence that any dental jobs were available in central Oregon which, with reasonable diligence, complainant could have discovered and for which she was qualified. - ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 138 (2012).***

The forum rejected respondent's argument that complainant did not mitigate her damages when complainant credibly testified she looked for work between July 1 and October 31, 2009, and from April 1 through April 15, 2010. Although her testimony was not overly specific as to specific jobs that she applied for, her testimony that she actively sought work was not impeached. In rebuttal, respondents offered no evidence of any other job openings for

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which complainant was qualified and did not apply. ----- *In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).*

### 101.2.5--- Raises

### 101.2.6--- Setoff

### 101.2.7--- Tips

When respondent disputed complainant's testimony that she averaged \$400 per week in tips, the forum relied on complainant's credible, un rebutted testimony and the lack of contravening evidence to determine her average tips, stating that respondent could have presented rebuttal testimony concerning complainant's average tips but did not do so. ---- *In the Matter of Cyber Center, Inc., 32 BOLI 11, 37 (2012).*

## 102.0 BACK BENEFITS

### 102.1 --- Insurance

### 102.2 --- Retirement Plan

### 102.3 --- Vacation

### 102.4 --- Other

## 103.0 CEASE AND DESIST ORDERS

### 103.1 --- Generally

The forum found that the nonmonetary remedies sought by the agency would be a futile exercise of the forum's authority because respondent was no longer doing business in Oregon and there was no indication in the record that respondent had any intention of resuming business in Oregon in the future. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157 (2014).*

The commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ----- *In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 172 (2012).*

In a constructive discharge case, a prevailing complainant is entitled to the same damages she would have received, had he or she been fired. ----- *In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 137 (2012).*

### 103.2 --- Cessation of Unlawful Practice

In a whistleblower case involving an employer and an aider and abettor, the forum ordered respondents to cease and desist from violating the provisions of ORS 659A.199, OAR 839-010-0100, and ORS 659A.030(1)(g) relating to unlawful employment discrimination against whistleblowers. ----- *In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 243 (2015).*

The forum found that the nonmonetary remedies sought by the agency would be a futile exercise of the forum's authority because respondent was no longer doing business in Oregon and there was no indication in the record that respondent had any intention of resuming business in Oregon in the future. ---- *In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157 (2014).*

### 103.3 --- Mandatory Training

In its formal charges, the agency asked that respondent be required to participate in training on the correct interpretation and application of Oregon laws pertaining to whistleblowing and retaliation. The forum held that respondent violated Oregon's whistleblowing and retaliation laws and required the requested training. ----- *In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 240 (2015).* See also *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 101 (2015).*

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In its formal charges, the agency asked that respondent be required to participate in training on the correct interpretation and application of Oregon laws pertaining to injured workers. The forum held that respondent violated Oregon's injured worker laws and required the requested training. ---- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76-77 (2015).***

In its formal charges, the agency asked that respondents be required to provide training to its managers, professional staff and employees who work in Oregon or supervise or manage employees working in Oregon on the OFLA's requirements, provided by BOLI's Technical Assistance for Employers Unit or other training agreeable to the agency. Since the forum did not find an OFLA violation, it did not order this training. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 38 (2014).***

The forum found that the nonmonetary remedies sought by the agency would be a futile exercise of the forum's authority because respondent was no longer doing business in Oregon and there was no indication in the record that respondent had any intention of resuming business in Oregon in the future. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 157 (2014).***

In its formal charges in a sexual harassment/retaliation case, the agency asked that respondents be required to have "its managers, professional staff and employees participate in training on understanding and avoiding workplace harassment and other discrimination based on protected class, provided by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency." The forum ordered that respondent and its employees to participate in training "on understanding and avoiding sexual harassment and ORS 659A.030(1)(f) retaliatory behavior in the work place. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 172-73 (2012).***

In a religious discrimination case, the forum required respondent to undergo training specifically tailored to recognize and prevent discrimination in the workplace based on religion. The forum denied the agency's request to require respondent to attend training on recognizing and preventing discrimination related to all protected classes, holding that "requiring training related to all protected classes cuts an overly broad swath." ---- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 142 (2012).***

In a sex/pregnancy demotion and discharge case, the forum required respondent to undergo training specifically tailored to prevent future similar unlawful practices related to the protected class of sex/pregnancy. The forum denied the agency's request to require respondent to attend training on recognizing and preventing discrimination related to all protected classes, holding that "requiring training related to all protected classes cuts an overly broad swath." ---- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 44-45 (2012).***

### **104.0 CORRECTION OF RECORDS**

### **105.0 OUT-OF-POCKET EXPENSES**

Economic loss that is directly attributable to an unlawful employment practice is recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. The forum awarded no damages for out-of-pocket expenses when there was no evidence presented at hearing that would give the form a basis for calculating such an award. Although complainant testified that respondent provided him with health insurance and that he had to pay for doctor's expenses out-of-pocket after he was fired, he did not testify as to the amount he had to spend. ---- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 158 (2014).***

This forum has consistently held that out-of-pocket expenses that are directly attributable to an unlawful practice are recoverable from a respondent as a means to eliminate the effects of any unlawful practice found. ---- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI***

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### **144, 169 (2012).**

Complainant credibly testified that she had to pay out to \$200 in late fees to credit card companies in 2010 because of her inability to make timely payments in the months following her discharge. She also credibly testified that her credit rating took a major beating as a direct result of those late payments, and as a result, she will have to pay an extra \$3,000 in interest over the life of a car loan that she obtained in September 2012. The forum found that both of these expenses were a direct result of respondents' unlawful practices and awards complainant \$3,200 in reimbursement for out-of-pocket expenses. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 169-70 (2012).***

The forum rejected respondents' argument that complainant chose to take a job in Texas and respondents should not bear the cost of this choice. By not working, complainant was losing \$2500+ in gross wages every month. Given complainant's unsuccessful job search in central Oregon, her financial responsibilities, and the likelihood of employment in Texas and certainty of a temporary place to live in Texas, complainant's choice was reasonable. Although her moving expenses were significant, those expenses only equaled four months of lost wages, and complainant stood to lose far more with no employment prospects in central Oregon in her profession. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 100, 150 (2012).***

The forum awarded complainant \$10,600 in moving expenses based on complainant's credible testimony that it cost her \$10,600 to move to Texas to obtain replacement employment, an amount that was allowed as a deduction by the IRS. Her moving expenses included renting a moving truck and car trailer, gasoline for the truck, hotel expenses, food expenses, and gasoline for the car she drove to Texas separate from the moving truck. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 139 (2012).***

The forum awarded complainant \$54 in out-of-pocket medical expenses to compensate her for the costs of a doctor's visit that would have been covered by respondent's insurance, had complainant not been constructively discharged. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 138-39 (2012).***

### **106.0 FRONT PAY**

### **107.0 INTEREST**

### **108.0 MENTAL SUFFERING DAMAGES**

#### **108.1 --- Generally**

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. In public accommodation cases, the duration of the discrimination does not determine either the degree or duration of the effects of discrimination. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 129 (2015), appeal pending.***

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. ----- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 238-39 (2015).*** See also ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 100 (2015); In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76 (2015); In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 37 (2014), appeal pending; In the***

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*Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 159 (2014); In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 37 (2014); In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 170 (2012); In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 140 (2012); In the Matter of Kenneth Wallstrom, 32 BOLI 63, 89 (2012); In the Matter of Cyber Center, Inc., 32 BOLI 11, 39 (2012).*

This forum has long held that respondents must take complainants “as they find them.” -- **--- In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 37 (2014), appeal pending.**

When there are several aggrieved persons, each person’s claim is addressed individually. ---- **In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).**

The forum primarily based its award for mental suffering damages on complainant’s own compelling testimony. ---- **In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 170 (2012).**

The forum rejected respondent’s contention that any mental suffering award to complainant should be diluted by the concurrent mental suffering she experienced due to related to family problems, stating it has consistently held in prior final orders when calculating mental suffering damage awards that respondents must take complainants “as they find them.” - ---- **In the Matter of Kenneth Wallstrom, 32 BOLI 63, 90 (2012).**

A case with two respondents – a corporate respondent and its CEO, who was named as an aider/abettor – and involving two separate discriminatory acts – complainant’s demotion/pay cut and her discharge, but in which one respondent was liable for only one of the two acts, the forum will make a separate award of damages for each act. ---- **In the Matter of Cyber Center, Inc., 32 BOLI 11, 39 (2012).**

### 108.2 --- Basis of Discrimination

#### 108.2.1--- Age

#### 108.2.2--- Disability

Complainant was awarded \$60,000 in mental suffering damages based on respondent’s refusal to let her shop at respondent’s market with her service dogs on three consecutive days based on the following: (1) complainant felt angry, insulted, and perturbed, became really upset, and “max[ed] from her PTSD; (b) complainant felt “unwelcome”; (c) complainant experienced “trauma” from not being able to take her service dogs into DSM and “went through a stage where the world hated her and she couldn't do nothing” and became even more reticent about leaving her home, only leaving when she had no choice; (d) it took weeks after the denials for complainant to get back to “normal”; (e) as a result of respondent's post-denial harassment of complainant, complainant felt personally threatened and her emotional and mental suffering and distress continued long after she moved to a different neighborhood located a considerable distance from DSM; (f) complainant feared that her service dog’s training would suffer when respondent, or someone driving respondent's vehicle, followed her and her granddaughter; (g) she received an eviction notice from her current residence because respondent, or someone working in conjunction with respondent, drove to her apartment complex and took photographs of her neighbor’s car and complainant’s apartment; and (h) after receiving affidavits from respondent’s attorneys that included photographs of her current apartment, she had a reasonable belief that she was being “stalked,” which exacerbated her PTSD and she no longer felt “safe anywhere” and she felt “very, very angry” to know that she had been followed, and she felt “frustrated and violated,” that her “private life was being invaded upon,” and felt less safe in her home. ---- **In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 38-39 (2014), appeal pending.**

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The State of Oregon considers access by individuals with a disability to places of public accommodation to be a fundamental human right, and denial of that right is an affront to a disabled individual's fundamental human dignity. ---- ***In the Matter of Kara Johnson dba Duck Stop Market, 34 BOLI 2, 38-39 (2014), appeal pending.***

The agency contended that complainant was still experiencing emotional and physical suffering from respondent's unlawful employment practices at the time of the hearing. The evidence concerning complainant's emotional and physical suffering caused by respondent's alleged unlawful employment practice consisted exclusively of testimony about the stress caused by his April 20-21, 2011, suspension. However, the record was devoid of any evidence of emotional and physical suffering specifically attributable to complainant's December 13, 2010, unexcused tardy, the lone unlawful employment practice found by the forum. As the forum had no evidentiary basis from which to calculate an appropriate award for emotional and physical suffering damages, the forum did not award any damages. ---- ***In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 37 (2014).***

### **108.2.3--- Injured Worker**

Complainant was awarded \$120,000 for emotional and mental suffering based on an intense feeling of betrayal by respondent; severe financial stress caused by loss of income and anxiety from that stress; embarrassment; the loss of many friends; emotional pain from her daughter's heartbreak caused by loss of her relationship with respondent's family; major loss of self-esteem; a belief that all the people she knew in her community would think she was fired because she "did something wrong"; feeling bad and loss of self-pride because she has had to use the money from child support payments to pay ordinary household expenses, had to borrow money from her elderly parents and her older daughter to send her younger daughter on a school trip, and has had to tell her daughter they cannot afford things because of complainant's lack of income; and the continued serious effects on complainant's emotional well-being at the time of the hearing. ---- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 77 (2015).***

The evidence of Complainant's emotional and mental suffering was her own compelling testimony. Complainant testified at length and in considerable detail about the emotional and mental suffering she experienced as a result of her termination. Complainant is a person who has always prided herself in her work and being a loyal employee and felt especially that way towards respondent. She testified convincingly that she did everything she could to mitigate the effects of her workplace injury on Respondent, to the extent of even offering to pay part of her medical bill. She continued to work through considerable physical pain, working extra shifts for employees who had unexpected absences, and manually coating the entire outside of respondent's business with a protective coating. She had never been fired from a job before and has always been self-sufficient. At one point while she was testifying about the effects of her termination, she became so distraught that the ALJ had to temporarily adjourn the hearing so that she could recover enough to continue her testimony. Based on her testimony and demeanor, the forum had no doubt that, at the time of the hearing, complainant still experienced the types of suffering related to her termination that she testified about. ---- ***In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill, 34 BOLI 67, 76-77 (2015).***

### **108.2.4--- Marital Status**

### **108.2.5--- National Origin**

### **108.2.6--- Opposition to Safety Hazard**

### **108.2.7--- Opposition to Unlawful Practice**

Complainant was fired for her complaints about unpaid wages. The forum awarded her \$10,000 emotional and mental suffering based on her testimony that she loved working for respondent and would have continued working there, had she been allowed to do so; she felt

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angry and “emotionally distraught” after her employment status was changed to on-call and later felt depressed because she was never called back to work; she was evicted from her apartment, had to move in with her mom as a result of being unemployed, and had difficulty finding another apartment because of her eviction; her car was repossessed; and she filed for and received minimal unemployment benefits that did not cover her expenses, and did not start work at a job equivalent to her job with respondent until almost a year later. ----- ***In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene, 34 BOLI 80, 100 (2015).***

### 108.2.8--- Race or Color

The forum concluded that \$50,000 was an appropriate award for complainant's physical, emotional, and mental suffering related to an assault, and the *per se* work hostile work environment he experienced during the remainder of his employment. ----- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 159 (2014).***

### 108.2.9--- Race, Religion, Color, Sex, National Origin, Marital Status or Age of Person with Whom Individual Associates

Calderon was entitled to damages related to the January 10, 2011, assault and the *per se* hostile work environment he experienced from that date until his discharge in October 2011, knowing the whole time that H. Maltby had taken no action against J. Bassett because of the assault. Calderon, like Guevara experienced fear and sleeplessness because of the assault. He was injured more seriously than Guevara and had to miss a weeks' work because of his injury. Like Guevara, he had to work with the knowledge that Jimmy, the person who had participated in his assault and whom he knew possessed and used firearms, continued to work for MBI and live in the shack directly across the dirt road from the greenhouses in which Calderon worked. Based on the above, the forum concluded that \$100,000 was an appropriate award for Calderon's physical, emotional, and mental suffering related to the January 10, 2011, assault and the hostile work environment he experienced thereafter. ----- ***In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett, 33 BOLI 121, 160 (2014).***

### 108.2.10--- Religion

The forum awarded complainant \$325,000 for the emotional, mental, and physical suffering she experienced as a result of respondents' unlawful employment practices based on the following: (1) complainant suffered an increase in anxiety, stress, upset stomach, diarrhea, sleep problems, and weight loss over her last week of work and had become an “emotional wreck” because of respondents' unlawful employment practices. When she quit, she left the office very upset and crying. She saw two doctors the next week who prescribed medication for her anxiety and sleeplessness and noted the medical conditions listed above. Complainant credibly testified that she experienced stress for months after leaving respondent's employment because of significant financial issues caused by a lack of income and moving expenses, concern over her future, and worry over her lack of health insurance for herself and her children. She also had to borrow \$5,000 from her mother to make ends meet, then live with her sister and her sister's family when she first moved to Texas to find alternative employment; (2) complainant has wanted to see a doctor on a number of occasions since her discharge for numerous medical conditions but has not seen a doctor because she cannot afford it due to the fact that her Texas employers have not provided medical insurance; and (3) complainant has suffered additional stress and sadness because her 13-year-old daughter remained in central Oregon when complainant moved to Texas, and complainant has only been able to see her on school breaks, whereas she saw her daughter most days while she worked for respondent. As a result, complainant has missed experiencing much of her daughter's life that she would have experienced, had she remained employed by respondent. ----- ***In the Matter of Dr. Andrew Engel, DMD, PC, 32 BOLI 94, 140-41 (2012).***

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### 108.2.11--- Retaliation

### 108.2.12--- Sex

The forum awarded complainant \$150,000 for the emotional, mental, and physical suffering she experienced as a result of respondents' unlawful employment practices based on the following: (1) complainant experienced verbal sexual harassment from respondent's president/owner and general manager that focused on their graphic inquiries and speculations about complainant's sex life and attempts to date her. The conduct took place over a three-month period, beginning in the first week of her employment and ending on the last day of her employment, with at least 12 specific incidents. Although there was no physical abuse, the toll on complainant's psyche was severe and compounded by the fact that her harassers refused to take her complaints seriously; (2) complainant was 27 years old, a single mother with a six year old daughter, and had worked at good paying jobs her entire adult life. Most of her jobs had been in environments where most of the employees were men, and she had never before been subjected to unwelcome sexual conduct. She had never before been fired. She quit a good job to come to work for respondent after being solicited to do so by respondent's president/owner; (3) respondent's unwelcome sexual conduct upset her and made her feel awkward, uncomfortable, and embarrassed during her employment. The embarrassment was magnified by the general manager's sexually-related post on her Facebook that could have been viewed by as many as 200 of complainant's friends. Respondent's president/owner's attempts to date her caused her additional discomfiture because she did not want to mingle with her boss on a social basis. She stopped wearing makeup and began wearing different clothes to work. Compared to previous jobs where she had energy at the end of each day, she went home after each day at respondent feeling completely emotionally exhausted, leaving her with less energy to spend quality time with her daughter after work. She became over-sensitized after she found sexually offensive emails on her computer, was more easily offended, and lost the ability to distinguish whether the sexual conduct behaviors should actually have offended her or if she felt offended because she had become over-sensitized; (4) complainant cried when she was fired, leaving respondents' office in tears, and often talked to her sister about her unfair discharge, repeatedly questioning her judgment in sending the e-mails to respondent's president/owner that resulted in her discharge; (5) complainant could no longer pay all her bills after she was fired. She was accustomed to earning a good salary, and it was very hard for her to transition from earning a good salary to being "very poor" and "not having any money." She suffered the humiliation and embarrassment of having to call her ex-husband and asking to borrow \$1200 to help pay living expenses. She also had to borrow \$200 from her parents. She lost weight and her "face broke out," making her believe she looked unhealthy; (6) complainant's credit rating took a major beating as a direct result of the late payments she made on her credit accounts as a direct result of being fired. The bank closed her checking account when she overdraw her checking account and she had to go to an ATM cash machine to get money to pay her bills until she could open another checking account. The drop in her credit rating caused her to have to pay a high interest rate on a September 2012 car loan; (7) before complainant was fired, she slept 8-9 hours per night. After she was fired, she found herself awake at nights at first, then began sleeping 11-12 hours per night. She began having nightmares that respondent's general manager was shooting her, based on his statements about keeping a gun in his car. Before working for respondent, she had never had a panic attack. After her discharge, she experienced fear and anxiety and had several panic attacks, the last as recently as September 2012; (8) complainant has always been socially outgoing, but stopped going to social events after her discharge because she could no longer afford it and just did not want to see anyone. She did not attend a good friend's wedding because she could not afford to buy an appropriate dress. She no longer scheduled "play dates" with her daughter because she could not afford them. Her aloofness brought her additional grief because her friends, many of whom she had been friends with since her early teen years, did not understand; and (9) at complainant's new job, she found herself wondering what the male employees were saying about her behind her

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back. After her experience at respondent, she decided not to "friend" any of her co-workers on Facebook, something many of her co-workers found strange. When a male co-worker wanted to be friends with her, her immediate reaction was to decide she would not be friends with him, feeling "terrified that he was going to like me or fall in love with me or start to give me things" because of her experience with respondent's president/owner. At her new job, her first supervisor was a woman. When that woman was replaced by a male, complainant found the transition difficult because of her experiences while working for respondent. ----- ***In the Matter of Crystal Springs Landscapes, Inc., 32 BOLI 144, 170-72 (2012).***

Complainant was promoted to assistant night manager after working as a server for respondent for three months. She was happy about her promotion and her pay raise to \$10 per hour, the highest hourly wage she has ever been paid. She continued to be "extremely happy" about working in that job. While she worked as assistant night manager, she was never counseled or disciplined about her work performance. She was also happy to learn she was pregnant. When respondent's general manager told complainant that she was being demoted to her former position as a server and that her pay was being cut to minimum wage because he didn't feel she would be sufficiently available to work because of her pregnancy, she became very upset and cried. She remained upset, and her demotion caused problems at home with boyfriend and their finances. As assistant night manager, complainant wore black pants and a black shirt. After her demotion, she had to wear a red shirt like the respondent's other servers, which made her feel degraded, a feeling accentuated when long-time customers asked her why she was wearing a red shirt. She was discharged nine days after her demotion. There was no evidence in the record to show that the emotional and mental suffering complainant experienced as a direct result of her demotion and pay cut continued after her discharge. Based on these facts, the forum awarded complainant \$20,000 for the emotional and mental suffering she experienced as a result of her demotion and pay cut. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 39-40 (2012).***

The forum awarded complainant \$120,000 to compensate her for the emotional and mental suffering she experienced as a result of her discharge due to her sex/pregnancy, based on the following: (1) complainant is an independent person who has always been employed and has never had trouble finding a job. Being fired when she was pregnant, in her words, was the "most degrading, unhappy time probably in a long-time time that I've ever had \* \* \* It went from a happy moment to an 'Oh my God, what am I going to do, I have to get on food stamps now, now I'm back on welfare \* \* \*'; (2) She was "beyond upset" for a couple of months after she was fired and was depressed and didn't want to go anywhere. She went from being excited about being pregnant to being depressed after she was fired and just wanted to be left alone. She cried a lot and was nervous about how she would support her baby and herself; (3) during complainant's subsequent job search, she believed no one would hire her because she was obviously pregnant and found this degrading. At the time of hearing, she still felt frustrated that she was fired instead of being able to keep her job until she went on family leave and still thought about her discharge frequently and it still bothered her; (4) she felt "belittled" by her discharge. Complainant and her boyfriend, who was unemployed at the time, "bickered" a lot more after she was fired because of the financial stress caused by the loss of her job and also because a baby was on the way. She experienced stress because she and her boyfriend were both unemployed and concerned over the responsibility of having a child and how they would pay for the expenses associated with having a child; (5) She considered, but did not seek counseling for her depression after she was fired because she had no money to pay for counseling services; and (6) To make ends meet, complainant had to apply for food stamps after she was fired, which made her feel embarrassed and degraded. She also had to get financial help from her mother to pay for baby-related expenses. ----- ***In the Matter of Cyber Center, Inc., 32 BOLI 11, 40-41 (2012).***

The lack of medical consultation of the failure to seek counseling goes to the severity of

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mental suffering, not necessarily to its existence. ----- *In the Matter of Cyber Center, Inc., 32 BOLI 11, 41 (2012).*

### 108.2.13--- Sexual Orientation

The agency asked the forum to award damages to complainants for emotional suffering they experienced as a result of the media and social media attention generated by their case from January 29, 2013, the date a respondent posted one complainant's DOJ complaint on his Facebook page, up to the date of hearing. The agency's theory of liability was that since respondents brought the case to the media's attention and kept it there by repeatedly appearing in public to make statements deriding complainants, it was foreseeable that this attention would negatively impact complainants, making respondents liable for any resultant emotional suffering experienced by complainants. The agency also argued that respondents were liable for negative third party social media directed at complainants because it was a foreseeable consequence of the media attention. The commissioner concluded that complainants' emotional harm related to the denial of service continued throughout the period of media attention and that the facts related solely to emotional harm resulting from media attention did not adequately support an award of damages. ---- *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 128-29 (2015), appeal pending.*

In a public accommodation, same sex civil rights case in which respondents refused to make a wedding cake for complainants' same sex wedding, complainant RBC was awarded \$75,000 in damages for emotional distress, based on a number of factors. Prior to the cake tasting, LBC, the other complainant, had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of "permanency and commitment." After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding, wanting a wedding that was as "big and grand" as they could afford. Obtaining a cake from respondents like the one RBC purchased for her mother's wedding two years earlier was part of that grand scheme. RBC's emotional suffering began at the January 17, 2013, cake tasting when RBC and her mother were told by respondent A. Klein that respondents did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that her mother, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. RBC subsequently became hysterical and kept apologizing to her mother. When her mother returned to the car after confronting A. Klein and told RBC that A. Klein had called her "an abomination," this made RBC cry even more. RBC, who was brought up as a Southern Baptist, interpreted AK's use of the word "abomination" her mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying. On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of that day in her room, trying to sleep. In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and her brother have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during her cake tasting at another bakery because of Klein's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on her mother to contact potential wedding vendors, RBC still experienced some anxiety over

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possible rejection because her wedding was a same-sex wedding. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 125-27 (2015), appeal pending.***

In a public accommodation, same sex civil rights case in which respondents refused to make a wedding cake for complainants' same sex wedding, complainant LBC was awarded \$60,000 in damages for emotional distress, based on a number of factors. Prior to the January 17, 2013, cake tasting with respondents, she had been asking RBC, the other complainant, to marry her for nine years. LBC was "flabbergasted" when she learned that respondents had refused to make a cake for complainants and called RBC an "abomination" and became very upset and very angry. Based on her religious background, she understood the term "abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life." Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect RBC's mother's relatively recent acceptance of RBC's sexual orientation. LBC, who views herself as RBC's protector, tried unsuccessfully to comfort RBC and lost her temper because she could not "fix" things. LBC was then frustrated because she unable to comfort one of their foster daughters, who was extremely agitated from events at school that day, and who repeatedly called out for RBC, with whom she had a special bond. That night, LBC was very upset, cried a lot, and was hurt and angry. In the days immediately following January 17, 2013, LBC experienced anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to respondents' denial of service. She felt sorrow because she could not protect RBC and because RBC was no longer sure she wanted to be married. LBC's excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred. ---- ***In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 127-28 (2015), appeal pending.***

In a case where persons were denied service at a bar based upon their sexual orientation, the forum considered, in assessing damages for emotional distress and physical suffering of between \$20,000 and \$50,000 for each individual, the effects recited by each aggrieved person including importance of the social gatherings at the bar; feelings of anger, devastation, disappointment, sadness, sleep loss, hurt, depression, upset and humiliation; self-doubt about responsibility for the denial of service; effect on other interpersonal behavior and relationships, including temperament and loss of sense of safety and self-confidence; weight change; stress; reminders of other discrimination and fear that others would have adverse reactions on the basis of sexual orientation. ---- ***In the Matter of Blachana, LLC, 32 BOLI 220, 249-53 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).***

### **108.2.14--- Violation of Leave Laws**

#### **108.2.15--- Whistleblower**

The forum awarded complainant \$20,000 in emotional distress damages based on the following: complainant was "really upset" and felt "really bad" about his suspension, particularly because he reasonably believed respondent had suspended him for whistleblowing; he felt "confused," "angry," and "sad" and questioned the wisdom of making his complaint, an action he was legally obligated to take because of his status as a mandatory reporter; he had formed close, long-term relationships with the residents of respondent's foster care home and it was particularly hard for him not to see them and not to be able to say goodbye; he questioned what his future would look like; and at the time of the hearing, two years after his discharge, he was still upset over his termination. ---- ***In the Matter of Blue Gryphon, LLC, and Flora Turnbull, 34 BOLI 216, 239 (2015).***

#### **108.2.16--- Public Accommodation**

In a case where persons were denied service at a bar based upon their sexual

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orientation, the forum considered, in assessing damages for emotional distress and physical suffering of between \$20,000 and \$50,000 for each individual, the effects recited by each aggrieved person including importance of the social gatherings at the bar; feelings of anger, devastation, disappointment, sadness, sleep loss, hurt, depression, upset and humiliation; self-doubt about responsibility for the denial of service; effect on other interpersonal behavior and relationships, including temperament and loss of sense of safety and self-confidence; weight change; stress; reminders of other discrimination and fear that others would have adverse reactions on the basis of sexual orientation. --- *In the Matter of Blachana, LLC, 32 BOLI 220, 249 (2013), affirmed Blachana, LLC v. Bureau of Labor and Industries, 273 Or App 806, 359 P3d 574 (2015).*

108.2.17--- Other

109.0 POSTINGS

110.0 REFERENCES

111.0 REINSTATEMENT

112.0 SURVIVAL OF DAMAGE AWARD

## X. OREGON FAMILY LEAVE ACT

115.0 UNLAWFUL ACTS

115.1 --- Denial of Leave

After establishing that complainant was an "eligible employee" who was denied use of OFLA leave, the forum must determine whether or not complainant was denied OFLA leave to which he was entitled. Complainant was entitled to take OFLA leave based on his serious health condition. Similarly, respondent was entitled to deny OFLA leave to complainant for any absences or tardies for which respondent was entitled to request medical verification and for which complainant failed to provide the requested verification. This covered all of complainant's absences and the tardy related to his OFLA condition, except for his November 2-4, 2010, absence for which respondent was entitled to ask for subsequent medical verification and complainant provided a medical note. The forum concluded that respondent did not violate ORS 659A.183(1) and OAR 839-009-0320(3) in the manner alleged in the formal charges because complainant was not "entitled" to OFLA leave based on the application of the exceptions in OAR 839-009-0260(9). --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 27 (2014).*

115.2 --- Failure to Restore to Previous Position of Employment

115.3 --- Harassment

115.4 --- Retaliation

116.0 PRIMA FACIE CASE

116.1 --- Unlawful Denial of Leave

116.2 --- Failure to Restore to Previous Position of Employment

116.3 --- Harassment

116.4 --- Retaliation

116.5 --- Discharge/Constructive Discharge

120.0 DEFINITIONS

120.1 --- "Covered Employer"

120.2 --- "Eligible Employee"

120.3 --- "Serious Health Condition"

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### 121.0 PURPOSES FOR WHICH LEAVE MAY BE TAKEN

#### 121.1 --- Caring for Family Member with Serious Health Condition

#### 121.2 --- Sick Child Care

#### 121.3 --- Newly Born, Adopted, or Placed Child

#### 121.4 --- Recovering from or Seeking Treatment for Employee's Own Serious Health Condition

#### 121.5 --- Inability to Perform Essential Job Function

### 122.0 LENGTH OF LEAVE

#### 122.1 --- Generally

#### 122.2 --- Use of Paid Leave

#### 122.3 --- Teachers

### 123.0 NOTICE TO EMPLOYER

### 124.0 MEDICAL VERIFICATION

#### 124.1 --- Generally

Since respondent grouped complainant's consecutive day absences together as a single occurrence for disciplinary purposes and all of complainant's multiple consecutive day absences were related to his OFLA condition, the forum treated each OFLA-related absence that were counted as an "occurrence" as one request by respondent for a medical certification. --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 23 (2014).*

Under the OFLA, employers may require an employee who requests OFLA leave to provide medical verification of the need for the leave if the leave is for a purpose described in ORS 659A.159(1)(b) to (d). The forum concluded that respondent's policy requiring a "medical note" for each OFLA intermittent leave absence is the legal equivalent of a request for "medical verification" and was so in the application of its policy to complainant. Absent the circumstances set out in OAR 839-006-0260(9), respondent's policy, as applied, violated the OFLA. --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 26 (2014).*

#### 124.2 --- Application of BOLI's "30-day" rule

Respondent was entitled to request medical verification from complainant every 30 days. The forum regarded respondent's requirement of a medical note as a request for "medical verification." --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 23 (2014).*

When the initial 30 day period began on November 2, 2010, BOLI's 30-day rule permitted respondent to ask complainant for medical verification for absence on December 13, 2010, January 17-28, 2011, and March 2-4, 2011. Accordingly, respondent's requests for a medical note regarding those absences did not violate ORS 659A.168 or OAR 839-006-0260. Therefore, the forum only considered medical verification requests related to absences on November 2-4, 2010, and March 31-April 1, and April 5, 2011. --- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 24 (2014).*

#### 124.3 --- Application of BOLI's "changed circumstances" rule

Under OAR 839-009-0260(9)(a), respondent was entitled to request medical verification from complainant for his absences on March 31, April 1, and April 5, 2011, if circumstances described by the previous medical verification had changed significantly (e.g., the duration or frequency of absences, the severity of conditions, or complications). BOLI's rule provides that any evaluation of a change in duration or frequency and duration of absences is to be conducted with reference to the circumstances described by the previous medical verification. -- *In the Matter of Oak Harbor Freight Lines, Inc., 33 BOLI 1, 24 (2014).*

When complainant's original medical verification did not state that his OFLA condition might involve absences for an entire day or more that did not involve a doctor's appointment,

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respondent was entitled to ask for medical verification for absences on which complainant did not involve a doctor's appointment. ---- *In the Matter of Oak Harbor Freight Lines, Inc.*, 33 BOLI 1, 25 (2014).

### 125.0 RESTORATION TO POSITION OF EMPLOYMENT

### 126.0 RETALIATION

### 127.0 REMEDIES

#### 127.1 --- Back Pay and Benefits

#### 127.2 --- Mental Suffering Damages

#### 127.3 --- Expenses

### 128.0 PREVIOUS OREGON LEAVE LAWS

#### 128.1 --- Parental Leave Under *Former* ORS 659.360

### 129.0 INTERACTION WITH FEDERAL LEAVE LAWS

## XI. OTHER REQUIREMENTS

### 130.0 RECORD KEEPING

### 131.0 REQUIRED POSTINGS