BRAD AVAKIAN
COMMISSIONER

CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

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

BLUE GRYPHON, LLC and FLORA TURNBULL, individually as aider and abettor under ORS 659A.030(1)(g),	Case No. **20-15**
	FINDINGS OF FACT CONCLUSIONS OF LAW OPINION ORDER
Respondents.	

SYNOPSIS

Complainant was suspended and discharged because he reported that Blue Gryphon, the adult foster care home that employed him, had an inadequate food supply for its residents. The forum awarded Complainant $1,620 in back pay and $20,000 for his emotional and mental suffering. The forum also required Respondent Turnbull, Blue Gryphon's manager and sole member, to undergo approved training on Oregon's whistleblower laws.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on September 22-23, 2015, at BOLI's Eugene office, located at 1400 Executive Parkway, Eugene, Oregon.

The Agency was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Lewis Garchow ("Complainant") was present throughout the hearing and was not represented by counsel. Respondents were represented by Marianne Dugan, attorney at law. Respondent Turnbull was present throughout the hearing.

The Agency called Complainant; Matthew Butler, Senior Investigator, BOLI Civil Rights Division; and Katie Haynes as witnesses. Respondents called Flora Turnbull as their only witness.

The forum received into evidence:

a) Administrative exhibits X1 through X26, X28, X29, and X31 through X33;

b) Agency exhibits A1 through A16, A18,[1] and A20 through A22.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[2] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 28, 2013, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent Blue Gryphon LLC. On August 21, 2013, the complaint was amended to name Respondent Flora Sacha Turnbull as an aider and abettor. On May 12, 2014, the complaint was amended a second time to include the citation of ORS 659A.030(1)(g). After investigation, the Agency issued a Notice of Substantial Evidence Determination on May 28, 2014, in which it found substantial evidence that Respondent Blue Gryphon had engaged in unlawful employment practices in violation of ORS 659A.199, ORS 659A.230, and ORS 659A.233, and that Respondent Turnbull violated ORS 659A.030(1)(g) by aiding, abetting, inciting, compelling, or coercing Blue Gryphon's violations. (Exs. A1, A4, A5, A22)

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[1] Exhibit A18 is a single-spaced, typed statement by Katie Haynes that is two pages long. The entire document was received except for the last 3 paragraphs on the 2nd page.

[2] The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact – The Merits.

2) On December 16, 2014, the forum issued a Notice of Hearing to Respondents, the Agency, and Complainant stating the time and place of the hearing as March 31, 2015, beginning at 9:00 a.m., at BOLI's Eugene office. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges ("Charges"), a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

3) Summarized, the Agency's Charges alleged that Respondents suspended, then fired Complainant, an employee of Blue Gryphon, because he made a good faith complaint of a food shortage at Blue Gryphon that he believed was evidence of a violation of a state or federal law, rule or regulation, in violation of ORS 659A.199 and OAR 839-010-0100(1). The Charges requested damages for physical, mental and emotional distress in an amount "estimated to be at least $30,000," lost wages estimated to be at least $42,640, and that Respondent Turnbull be trained, at her expense, on the correct interpretation and application of Oregon laws pertaining whistleblowing. (Ex. X2)

4) On December 31, 2014, the ALJ granted Respondents' request for a 10 day extension to file an answer to the Charges. On January 13, 2015, Respondent Turnbull filed a letter stating that she had been the sole member of Blue Gryphon LLC and would act as the authorized representative in this case. On the same day, Respondent Turnbull filed a request for a second extension until January 23, 2015, to file an answer. The Agency did not object and the ALJ granted the motion. (Exs. X4, X6, X7)

5) On January 22, 2015, Respondents, through Turnbull, filed an answer in which they denied engaging in the unlawful employment practices alleged in the Charges. (Ex. X8)

6) On January 26, 2015, the ALJ issued two interim orders. The first, entitled "Requirements for Filing Motions and Other Documents," explained the Forum's filing requirements, including the method by which documents must be filed and the timeline for filing documents. The second order required case summaries to be filed no later than March 17, 2015, and set out the requirements for what each participant must include in their case summary. (Exs. X9, X10)

7) On February 27, 2015, the Agency filed a motion for a protective order covering the first 162 pages of a Protective Services report issued by Lane County Mental Health. On March 5, 2015, the ALJ issued a protective order covering those documents. (Exs X11, X12)

8) On March 13, 2015, attorney Marianne Dugan notified the forum that she would be representing Respondents. Simultaneously, Dugan moved for a postponement of the hearing based on pre-existing conflicts in her schedule. The Agency did not object, and on March 23, 2015, ALJ granted Respondents' motion. (Exs. X13 through X16, X18)

9) On April 6, 2015, the ALJ issued an interim order resetting the hearing to begin on September 22, 2015, at 9:00 a.m. In the same order, the ALJ changed the due date for case summaries to September 7, 2015. On June 15, 2015, the ALJ changed the case summary due date to September 8, 2015, in recognition that September 7 was Labor Day, a legal holiday. (Exs. X19, X20)

10) On September 8, 2015, the Agency moved for a second protective order covering the remaining 174 pages of the draft Protective Services report issued by Lane

County Mental Health. On September 9, 2015, the ALJ granted the Agency's motion and issued a second protective order. (Exs. X22, X24)

11) On September 8, 2015, the Agency filed its case summary, including 22 exhibits. (Ex. X23)

12) On September 9, 2015, Respondents sent a copy of its case summary to the forum via e-mail. (Ex. X27b)

13) On September 11, 2015, the Agency filed a motion to exclude Respondents' case summary in its entirety and to prohibit Respondents from calling witnesses listed in its case summary at hearing. (Ex. X25)

14) On September 14, 2015, the ALJ issued an interim order entitled "Timeline for Respondents to Respond to Agency's Motion to Exclude" in which the ALJ stated that Respondents' response, should they choose to file one, must be filed no later than 5 p.m. on September 16, 2015. The order required Respondents to e-mail a courtesy copy of the response to the ALJ and Ms. Casey by the same deadline. The ALJ sent the order to Respondents' attorney by first-class mail and e-mail. (Ex. X26)

15) On September 14, 2015, BOLI's contested case coordinator received a hard copy of Respondents' case summary that was postmarked on September 12, 2015. (Ex. X27)

16) On September 17, 2015, the Agency filed a renewed motion to exclude Respondents' case summary in its entirety. That same day, Respondents filed a response to the Agency's motion and a supplemental case summary in an envelope bearing a postmark dated September 17, 2015. (Ex. X30)

17) On September 18, 2015, ALJ issued an interim order granting the Agency's motion to exclude Respondents' case summary and to prohibit Respondents from calling witnesses listed in their case summary. That order is reprinted below:

"On September 11, 2015, the Agency filed a motion to exclude evidence submitted in Respondents' 'untimely filed case summary' and to refuse to allow witnesses listed in Respondents' case summary to testify on Respondents' behalf. On September 14, 2015, I issued an interim order in response to the Agency's motion that included the following language:

> 'Due to the short time remaining before hearing, Respondents' response, should they choose to file one, must be filed no later than later than 5 p.m. on September 16, 2015. In addition to hand-delivering or mailing a response by that time, Respondents are also ordered to send a courtesy copy of their response by email to me and Ms. Casey no later than 5 p.m. on September 16, 2015.'

My interim order was mailed to Respondents' counsel on September 14, 2015, and e-mailed to Respondents' counsel at 11:39 a.m. that same day.

"In response, Respondents' counsel e-mailed a response to the Agency's motion to exclude at 9:33 p.m. on September 16, 2015, that also included a supplemental case summary. Respondents' response was not hand-delivered on September 16, 2015. As Respondents' counsel attached no certificate of service to her response and BOLI's contested case coordinator had not received Respondents' response by the time I issued this order, I have no way of knowing at this time if her response was postmarked on September 16, 2015.

"On September 17, 2015, the Agency filed a renewed motion to exclude in response to Respondents' September 16 e-mail, asking the forum to disregard Respondents' response because it was untimely.

"ANALYSIS

"On March 23, 2015, I issued an amended interim order requiring case summaries to be filed. My order was mailed to Cristin Casey, the Agency's administrative prosecutor, and Marianne Dugan, Respondents' counsel. The first paragraph of that order was printed in bold and read as follows:

> '**IMPORTANT: Your Case Summary must be filed no later than Friday, April 10, 2015. Your case summary is filed when it is postmarked or hand-delivered to the Bureau's address printed on the first page of the Notice of Hearing. If you do not file a case summary, you may not be able to call witnesses or present evidence at the contested case hearing.**'

The second to last paragraph in the order, also printed in bold, read as follows:

"The administrative law judge may refuse to admit evidence that has not been disclosed in response to this order unless (a) the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so, or (b) excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8). If the administrative law judge admits evidence not provided in response to this order, the administrative law judge may grant a continuance to allow an opportunity for the other participants to respond.'

"On April 6, 2015, I issued an interim order resetting the hearing to September 22, 2015, and changing the case summary due date to September 7, 2015. On June 15, 2015, I issued an interim order changing the case summary due date to Tuesday, September 8, 2015, in recognition of the fact that September 7 is a holiday.

"On September 4, 2015, I conducted a brief telephonic prehearing conference with Ms. Casey and Ms. Dugan at 2 p.m., during which I reaffirmed that case summaries were due on September 8, 2015.

"The Agency hand-delivered its case summary to BOLI's contested case coordinator on September 8, 2015, and mailed it on the same date to Ms. Dugan.

"On September 9, 2015, at 9:23 a.m., Ms. Dugan sent an e-mail to myself, BOLI ALJ Furnanz, and Ms. Casey in which she stated: 'I wanted to let you and opposing counsel know that I was delayed in completing the case statement which was due yesterday but will send via e-mail by end of day.' At 9:07 p.m. that evening, Ms. Dugan e-mailed a copy of Respondents' case summary to me, ALJ Furnanz, Ms. Casey, and BOLI's contested case coordinator. The case summary listed eight witnesses and was unaccompanied by any exhibits.

"On September 11, 2015, the Agency filed its motion to exclude evidence submitted in Respondents' 'untimely filed case summary' and further requested that witnesses listed in Respondents' case summary not be allowed to testify. In support of its motion, the Agency argued that:

- Respondents' case summary had not been timely filed;
- The statement by Respondents' counsel that she was 'delayed' in filing Respondents' case summary did not constitute a 'satisfactory' reason;
- Respondents' counsel did not request an extension of time to file a case summary;
- The Agency would be prejudiced if Respondents' witnesses were allowed to testify. In support of this argument, the Agency provided documentary evidence that (a) on March 25, 2015, it sent a written informal discovery request to Respondents' counsel asking for '[t]he names, addresses, phone numbers and dates of employment for all

> employees working for Blue Gryphon, LLC from May 2011 through April 2013'; and (b) that the only response received by the Agency was Respondent Flora Turnbull's April 20, 2015, statement 'I am afraid I have not been able to locate any of the information requested at this time.' Respondents' supplemental case summary that was e-mailed to the forum at 9:33 p.m. on September 16, 2015, confirms that most or all of the witnesses listed on Respondents' case summary were former employees and coworkers of Complainant.

"On September 14, 2015, BOLI's contested case coordinator received Respondents' case summary in an envelope that was postmarked September 12, 2015, and apparently mailed by Respondent Flora Turnbull, as her name and return address are handwritten on the envelope. This was the same case summary that was e-mailed by Respondents' counsel on September 9, 2015.

"As noted earlier, Respondent's counsel did not e-mail a response to the Agency's motion to exclude until 9:33 p.m. on September 16, 2015, four and one-half hours after it was due pursuant to my September 14, 2015, interim order.

"In Respondents' response to the Agency's motion to exclude, they argue the following:

> 'There is no prejudice to the agency. Because respondents' counsel sent the case summary via e-mail it was actually received by the agency before respondents' counsel received the agency's case summary, which was only sent by mail. As with any procedure as opposed to jurisdictional rule that should end the inquiry.
>
> 'Excluding evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8), because the witnesses listed by respondents have information that presents an independent picture of the circumstances and facts that are being presented by the agency.
>
> '* * * * *
>
> 'As to the reason for the delay, that falls on counsel's shoulders and should not be used to punish the Respondents. Counsel's primary practice is in federal court, where electronic filing and service are now the norm. Counsel was preparing to leave the state for one-week trip (leaving the morning of September 9 and returning late today, September 16), and unfortunately did not make note of the mailing/postmark requirements until after leaving town. As noted above, because the case summary was e-mailed to the agency and the ALJ, it was received by those entities before undersigned counsel received the agency's case summary. The purpose of the timeliness requirement therefore should be deemed to have been met, and the witnesses should be allowed.'

Respondents' response does not address the Agency's argument that the Agency will be prejudiced by the fact that, almost six months ago, it requested the identity and contact information for the persons whom Respondents now propose to call as witnesses and was told that Respondents were unable to locate any of that information.

"The forum considers the Agency's motion and Respondents' response in light of OAR 839-050-0210(5), which provides:

> 'The administrative law judge may refuse to admit evidence that is not been disclosed in response to a case summary order, unless the participant failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417 (8). If the administrative law judge admits evidence not provided in response to a case summary order, the administrative law judge may grant a continuance to allow opportunity for the other participants to respond.'

"Respondents' arguments fail for the reasons set out below.

"As an initial matter, Respondents' response to the Agency's motion to exclude is untimely. It was filed late and no extension was requested. Even if it had been timely filed, it would fail because of the reasons discussed below.

"The forum's filing requirements were prominently and explicitly spelled out to Respondents and the Agency in a series of interim orders. A copy of the forum's contested case rules, including OAR 839-050-0210(5), was also served on Respondents with the Notice of Hearing. The failure of Respondents' counsel to notice the forum's 'mailing/postmark requirements' before leaving town and the fact that her primary practice is in federal court, where filing requirements differ, is not a 'satisfactory' reason under OAR 839-050-0210(5) for not familiarizing herself with the forum's requirements and meeting those requirements, particularly when they were prominently set out in the very order requiring the filing of case summaries. OAR 839-050-0050(1) explicitly states that 'the [ALJ] may disregard any document that is filed with the Forum beyond the established number of days for filing,' while OAR 839-050-0050(2) sets out the procedure for requesting an extension of time for filing a document and gives the ALJ discretion to permit a participant to make an oral motion for an extension of time. Knowing her travel schedule, Respondents' counsel could have made an oral motion for an extension of time to file Respondents' case summary during the prehearing conference on September 4 or even as late as September 8. In conclusion, while unfortunate for Respondents because they must bear the brunt, that consequence does not make counsel's failure to familiarize herself with and meet the forum's procedural rules a 'satisfactory' reason.

"The forum's obligation set out in ORS 183.417(8) to conduct a 'full and fair inquiry' does not extend to requiring the forum to ignore its own procedural rules. One reason for those rules, including filing deadlines, is to ensure that the 'full and fair' requirement of ORS 183.417(8) is met. Also, the 'full and fair' provision in ORS 183.417(8) requires the forum to apply that concept equally to Respondents and the Agency. In their case summary, Respondents propose to call eight witnesses whose identities were not disclosed to the Agency until September 9, 2015, on the grounds that Respondents did not have that information, despite the Agency's written request to Respondents' counsel for that information on March 25, 2015. Respondents' counsel has provided no explanation whatsoever for this failure. Respondents argue that they should be allowed to call these witnesses because they 'have information that presents an independent picture of the circumstances and facts that are being presented by the agency,' thereby implying that a 'full' hearing cannot be held without that the testimony of those witnesses. However, the word 'full,' as used in ORS 183.417(8), does not gives all participants the absolute right, regardless of any other procedural rules in place to insure fairness, to present every bit of evidence that is in any way relevant to the issues in a case. If so, an ALJ in a contested case proceeding could never exclude any proffered evidence that was in any way relevant to a case. Under these circumstances, when Respondents are represented by counsel, when informal discovery directly related to the case summary was requested by the Agency and withheld until the case summary was filed, and when forum's filing requirements were prominently and explicitly stated in the forum's order requiring case summaries, I find that allowing these eight witnesses to testify would be manifestly unfair and prejudicial to the Agency, that granting a continuance and further delaying the hearing will not cure the problem, and that granting the Agency's motion does not contravene the 'full and fair' requirement in ORS 183.417(8).

"In conclusion, the Agency's motion is **GRANTED**. None of the witnesses listed in Respondents' case summary will be allowed to testify unless their testimony is solely for the purpose of impeachment."

(Ex. X29)

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

19) At the conclusion of Respondents' case-in-chief, Respondents filed a written motion to dismiss, which the ALJ denied. (Ex. X32; Statement of ALJ)

20) During the hearing, the ALJ took judicial notice of OAR 309-040-0385 and OAR 411, Division 50, as renumbered.

21) Over Respondents' hearsay objection, the forum received Exhibit A21, a partial draft report prepared by Karen Howell, Adult Abuse Investigator for Lane County following her investigation of Blue Gryphon. However, the forum has given it little weight except to confirm that an investigation took place because (1) it is only a draft report, whereas Turnbull credibly testified that a final report has been issued that is different than the draft; (2) names are blanked out in the report; (3) the Agency called no witness to authenticate or explain the document; and (4) the Agency offered no explanation why no witness was called to authenticate or explain the document. (Ex. A21)

22) On October 23, 2015, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondents filed exceptions on November 2, 2015. The Agency did not file any exceptions. Respondents' exceptions are addressed in the Opinion section of this Final Order.

24) On November 3, 2015, Respondents moved for an extension of time to file more detailed exceptions. On November 6, 2015, Respondents' motion was denied because it was untimely and Respondents failed to show good cause for their untimely filing.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Blue Gryphon LLC was an Oregon limited liability company that operated a mental health foster home caring for residents diagnosed with severe and persistent illness and engaged or utilized the personal services of one or more employees. Respondent Flora Turnbull was Blue Gryphon's sole member and managed Blue Gryphon. (Testimony of Turnbull; Exs. X2, X8)

2) Respondent Turnbull registered Blue Gryphon with the Oregon Secretary of State Corporation Division in March 2010 in response to Lane County's request to set up a foster home for individuals who, because of the severity and nature of their mental health, could not be cared for at any other foster home in Lane County at the time. Lane County contracted with Blue Gryphon to pay a set amount for each resident. Blue Gryphon's profit, if any, was the amount left over from Lane County's contract payments each month, less expenses. (Testimony of Turnbull)

3) Blue Gryphon commenced operations in March 2010. It continued to operate until April 22, 2013, when Lane County stopped funding Blue Gryphon and transferred its residents to other facilities. Throughout its existence, Blue Gryphon housed five residents, the maximum number permitted in adult foster homes by Oregon law. (Testimony of Turnbull; Ex. A12)

4) Acting on the advice of her accountant, Turnbull used her personal checking and credit accounts to manage Blue Gryphon's finances, receiving all payments from Lane County into her personal accounts and paying all of Blue Gryphon's expenses from her personal accounts. (Testimony of Complainant, Turnbull)

5) In or around May 2011, Turnbull hired Complainant, who had previously worked as a caregiver, to be a full-time care provider and provide direct care support for Blue Gryphon's residents. Complainant was initially paid $11 per hour. (Testimony of Complainant, Turnbull)

6) At some point in 2012, Complainant was promoted to assistant manager and given a raise to $15 per hour. (Testimony of Complainant, Turnbull)

7) Up to January 2013, Complainant was assistant manager at Blue Gryphon. At that time, Anthony Culver, Turnbull's "fiancé/partner," returned to work and assumed some of Complainant's duties. Complainant's pay was reduced to $12 per

hour. From January 2013 until Turnbull's vacation in March 2013, Complainant worked as Blue Gryphon's medical appointments coordinator. During this time, his regular work schedule was 8 a.m. to 5 p.m., Sunday through Thursday. (Testimony of Complainant, Turnbull)

8) Complainant worked approximately 45 hours per week[3] throughout his employment with Blue Gryphon. (Testimony of Complainant)

9) One of Blue Gryphon's responsibilities was to provide meals and food for its five residential clients. Blue Gryphon planned meal menus a week in advance and provided three meals a day, plus snacks. Before 2013, Turnbull set Blue Gryphon's monthly food budget at $1200. In 2013, she reset it to $800 a month and instituted a new practice of having Blue Gryphon's staff make a bulk purchase of food at Costco once a month and make weekly shopping trips for perishable foods and other items of food that had been eaten by residents and were needed. In part, the new practice was to address the problem that had arisen with staff randomly buying food while food already purchased went bad. (Testimony of Complainant, Turnbull)

10) Blue Gryphon's residents were able to snack on food from the kitchen during the day, usually accompanied by staff to keep residents from gorging themselves.[4] (Testimony of Turnbull)

11) Turnbull gave Complainant and three other Blue Gryphon employees a credit/debit card to be used for purchasing food for Blue Gryphon's residents. In

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[3] Complainant testified that he worked 8 a.m. – 5 p.m., five days a week, for a total of 45 hours a week. Respondents offered no evidence to show that Complainant was given a meal break or that he did not work 45 hours per week. Consequently, the forum has relied on Complainant's testimony as to the total hours he worked per week.

[4] Turnbull testified that there were times when an unaccompanied resident had gone into the kitchen and eaten a package of meat that weighed as such as several pounds.

addition, Turnbull gave Complainant the authority to do billing, sign and deposit checks. (Testimony of Complainant, Turnbull)

12) In the last week of March 2013, Turnbull decided to go on vacation with Culver to California for a week and asked Complainant to work as interim manager in their absence. Turnbull raised Complainant's pay to $15 per hour while she was gone. (Testimony of Complainant, Turnbull)

13) Before Turnbull left for vacation on March 23 or 24,[5] she and Culver inspected Blue Gryphon's cupboards and refrigerators and determined that the food supply was adequate for the time they would be gone. Turnbull also arranged with Gina Armijo, Complainant's coworker, to make her regular weekly shopping trip for perishables on Monday, March 25. Apart from Armijo's expected shopping trip, Turnbull asked Complainant not to spend more than $20 on food while she was gone. (Testimony of Turnbull)

14) On March 28, 2013, while Turnbull was still on vacation, Armijo, who was making lunch for Blue Gryphon's residents, told Complainant that there was no food at Blue Gryphon with which to make lunch. Complainant was aware that administrative rules governing Oregon foster care homes require that foster homes have sufficient food to feed their residents. As interim manager, he believed it was his responsibility to ensure that Blue Gryphon's residents had sufficient food to eat. Accordingly, he instructed Armijo to go to the store and buy food for lunch. Armijo did this, spending between $20 and $30 to purchase enough food for lunch, dinner, "and some extras." Prior to this time, Blue Gryphon had never run out of food during Complainant's employment. (Testimony of Complainant)

[5] Turnbull testified that she left for vacation on the "weekend" and returned on March 30.

15) After Armijo bought the food, she told Complainant that Turnbull had called her and was "pretty upset" that she had spent the money. (Testimony of Complainant)

16) Between March 28 and March 30, 2013, Complainant and Turnbull exchanged the following text messages:

> **March 28, 5:51 p.m.** (*Turnbull→Complainant*): "Someone spent a bunch of money today, almost 30, I don't have that. I had said don't spend more than 20 this week and that already happened. More than 30. We're barely making it here. Who's doing that? "
>
> **March 28, 6:31 p.m.** (*Complainant→Turnbull*): "I'm sorry that Gina over spent. The house needed food. I don't know what else to say Flora."
>
> **March 29, 8:27 a.m.** (*Turnbull→Complainant*): "ABSOLUTELY NO MORE SPENDING AT ALL UNTIL I GET BACK. FROM NOW ON ANY SPENDING WILL NEED TO BE PRE-AUTHORIZED BY ME EVERY TIME. IF THERE IS ANY PETTY CASH IT SHOULD BE DEPOSITED IN BANK IMMEDIATELY. Eddie[6] knows he needs to buy his own lunch anyway, as do staff. I need that check to be dropped off today. Please let me know when you do that."
>
> **March 29, 8:31 a.m.** (*Complainant→Turnbull*): "Understood."
>
> **March 29, 8:42 a.m.** (*Turnbull→Complainant*): "Is there any petty cash?"
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> **March 29, 8:59 a.m.** (*Complainant→Turnbull*): "There is $16.37 that I will deposit when Raquel comes on shift."
>
> **March 29, 9:03 a.m.** (*Turnbull→Complainant*): "Cool, thanks. Now we get to eat today."
>
> **March 30, 7:32 a.m.** (*Complainant→Turnbull*): "Yes I did the receipt in on your desk."

(Testimony of Complainant, Turnbull; Ex. A16)

17) When Turnbull texted Complainant on March 29 to say "absolutely no more spending," she did so because it seemed to her that "things were really out of control again" relative to grocery spending and she was very concerned because there

[6] "Eddie" was one of Blue Gryphon's residents.

had already been five grocery purchases during her vacation that she hadn't known about, including two purchases totaling $30 on March 28. At that time, Turnbull was feeling financially stressed because the room tax on the hotel she was staying in during her vacation was considerably more than she had expected and she was concerned about her checking account being "overdrafted." (Testimony of Turnbull)

18) On March 29, Complainant decided he no longer wanted any responsibility for Turnbull's credit card and cut it up into small pieces, putting the pieces in Turnbull's desk drawer. (Testimony of Complainant)

19) Katie Haynes is a nurse who has a contract through the State of Oregon with their long-term care nursing program to service senior and disabled clients upon referral from caseworkers. In early 2013, one of Haynes's diabetic clients lived at Blue Gryphon. Haynes visited that client at least once a month. On March 29, 2013, Haynes visited Blue Gryphon and talked with Complainant, who was "quite upset" and told her his concern that there wasn't enough food for the weekend. Haynes reminded Complainant that he was a "mandatory reporter" and that what he described to her was "neglect." Haynes inspected Respondent's refrigerator and saw there were only a couple packs of chicken, four cups of milk, and no fresh fruit or vegetables. She did not check in the cupboards for non-perishables. Complainant and Haynes agreed that, as mandatory reporters, they needed to report the food shortage. After she left Blue Gryphon, Haynes began making phone calls to agencies, including Lane County Protective Services, who referred her to the State of Oregon. Haynes then called several state agencies, eventually made a report "to some state agency," and requested an immediate inspection because she believed there was not enough food at Blue Gryphon for the weekend. (Testimony of Haynes)

20) On March 29, Complainant also called Lane County Protective Services and reported that there was not enough food at Blue Gryphon for its residents. (Testimony of Complainant; Ex. A1)

21) On March 31, 2013, Turnbull, who was upset that Complainant had discussed a food shortage with staff but not told her there was a current need for food, phoned Complainant and asked Complainant for an explanation of why he spent the money on food. Complainant responded that it was because they needed food for the house. Turnbull asked repeatedly "Why would you do this?" and Complainant repeatedly answered "because we needed food in the house." Turnbull became upset and began yelling; Complainant also got upset and hung up. Turnbull called back immediately and asked the same question again and Complainant hung up again. During their conversation, Complainant did not tell Turnbull that the house "still" needed food. Following their conversation, Turnbull sent the following text message to Complainant at 4:04 p.m.:

> "It is not healthy for the residents to have a staff there with such a negative attitude and making such questionable judgment calls, especially when refusing to even explain the reasoning behind your choices. So consider yourself suspended for now and we'll have to talk about where to go from there."

(Testimony of Complainant, Turnbull; Ex. A16)

22) After receiving Turnbull's text message on March 31, Complainant left his work keys in Respondent's staff house, gathered his belongings, and left. He never returned to work after March 31. Had Complainant continued work after March 31, he would have returned to his job of medical appointments coordinator. (Testimony of Complainant, Testimony of Butler; Ex. A14)

23) While Turnbull was on vacation, no one told her that there was a "current" lack of food. During Turnbull's vacation, there were no days in which a Blue Gryphon resident missed a meal. (Testimony of Turnbull)

24) On April 4, 2013, Karen Howell, Lane County Protective Services investigator for mental health programs, called Turnbull and told her that there would be an investigation. Turnbull's first thought was that Complainant had made a complaint in retaliation for being suspended. Later that day, Howell visited Turnbull at Blue Gryphon. During her visit, Howell told Turnbull that an "outside" person, not a staff person or a resident, had made a complaint, and that the main complaint was not having enough food in the house. (Testimony of Turnbull, Butler; Ex. A15)

25) On April 4, 2013, Complainant and Turnbull exchanged the following text messages:

> **April 4, 4:38 p.m.** (*Turnbull→Complainant*): "If you have any keys or anything else belonging to the house, you need to return them immediately. You are not welcome on the premises yourself. Give whatever you have to another employee to return."
>
> **April 4, 4:40 p.m.** (*Complainant→Turnbull*): "I left all the keys I had at the house. I expect my check to be mailed tomorrow."
>
> **April 4, 4:45 p.m.** (*Turnbull→Complainant*): "I don't know where these keys are. You are still suspended unless you want to resign, either way at this point you will not be paid until regular payroll with everyone else."

(Testimony of Complainant, Turnbull; Ex. A16)

26) Complainant talked to Howell after her visit to Blue Gryphon, and Howell told Complainant that she had left Blue Gryphon at 4:30 p.m. on April 4, 2013. (Testimony of Complainant)

27) Prior to filing his complaint with BOLI, Complainant did not tell Turnbull that he was making a report to Lane County. (Testimony of Complainant)

28) Prior to his discharge, Complainant had never been disciplined or written up and believed he was a "valued employee." (Testimony of Complainant)

29) Between March 31 and April 4, Complainant was "really upset" that he had been suspended and felt "really bad." He believed he had been suspended because he had authorized Armijo's March 28 food purchases. Three of Blue Gryphon's residents had been at Blue Gryphon for Complainant's entire tenure and a fourth resident had been there for a year at the time of Complainant's suspension and he had developed relationships with them. It was hard for him not to see them and not to be able to say goodbye to anyone. (Testimony of Complainant)

30) When Complainant received Turnbull's April 4 text messages, he believed he had been fired because of Turnbull's statement telling him that he could not return to the premises and to return his keys. Because of the coincidence in timing between Turnbull's 4:38 p.m. text message and Howell's 4:30 p.m. departure, he believed he had been fired because of his complaint to Lane County Protective Services. He felt "confused," "angry," and "sad." He questioned whether it was "worth it" to make the complaint. He questioned "what [he] was going to do" in the future. He began looking for day work, but it took him "nine months to a year" to find work. During that time, he collected unemployment benefits that were "substantially less" than his pay at Blue Gryphon. At the time of the hearing, he was still upset over his termination. (Testimony of Complainant; Observation of ALJ)

31) Shortly after April 4, Complainant was contacted by Lane County Mental Health and referred to a night job that he turned down because he cannot work nights. (Testimony of Complainant)

32) It was a financial hardship for Complainant to be out of work. Complainant lost a vehicle and was behind on his rent for a while. (Testimony of Complainant)

33) Blue Gryphon was shut down on April 22, 2013, and did not reopen. At that time, Complainant had actively sought, but not found, another job. (Testimony of Turnbull)

34) Had Complainant not been suspended and discharged, he would have worked another 15 days in total, earning $1,620 gross wages (9 hours x $12 per hour x 15 days = $1,620). (Testimony of Complainant, Turnbull; Calculation of ALJ)

35) The Oregon Administrative Rules applicable to food and meals at Blue Gryphon and other adult foster homes in Oregon are OAR 411-050-0645(4) and OAR 309-040-0385. In pertinent part, they read as follows:

OAR 411-050-0645(4)

"MEALS.

"(a) Three nutritious meals must be served daily at times consistent with those in the community. Each meal must include food from the basic groups according to the United States Department of Agriculture (USDA's) My Plate and include fresh fruit and vegetables when in season.

"* * * * *

"(d) There must be no more than a 14-hour span between the evening and morning meals. Snacks do not substitute for a meal in determining 14-hour span. Nutritious snacks and liquids must be offered to fulfill each resident's nutritional requirements."

OAR 309-040-0385

"Food services

"(1) Well-balanced Diet. Three nutritious meals will be served daily times consistent with those in the community. Meals will be planned and served in accordance with the recommended dietary allowances found in the United States Department of Agriculture Food Guide Pyramid or as directed by a prescriber.* * *

"* * * * *

"(5) Supply of Food. Adequate supplies of Staple foods, for a minimum of one week, and perishable foods, for a minimum of two days, will be maintained on the premises."

(Judicial Notice)

Credibility Findings

36) Matthew Butler and Katie Haynes were credible witnesses and the forum has credited their testimony in its entirety. (Testimony of Butler, Haynes)

37) Complainant testified in a calm, straightforward manner concerning the events that led him to file his complaint with BOLI and the emotional and mental suffering he experienced as a result of his suspension and termination. His testimony was consistent with his prior statements and the exhibits offered and received as evidence. The forum found Complainant to be a credible witness, with one exception. He testified that in March 2013 he was aware of an Oregon Administrative Rule for foster homes that required that "a home must maintain at least two weeks food at all times," whereas neither the Agency nor Complainant was able establish the existence of such a rule. Aside from that, the forum has credited his testimony in its entirety, crediting Complainant's testimony whenever it conflicted with Turnbull's for reasons explained in Turnbull's credibility finding. (Testimony of Complainant)

38) Flora Turnbull testified at length about Complainant's extensive performance problems from October 2012 to March 31, 2013, including how he abused her and his coworkers, and claimed to have given him repeated warnings. She also testified that his abusive speech towards her over the phone on March 31 was the last straw in Complainant's history of abusive behavior and the reason for his suspension. However, this testimony was inconsistent with her actual behavior towards Complainant during this time period, which included keeping him on as manager from October 2012 through December 2013, trusting him with her credit card and Blue Gryphon's finances, and making him interim manager during her March 2013 vacation. She produced no documentation of Complainant's alleged extensive performance problems, testifying that she did not document any disciplinary actions with regard to any employee. She

presented no witnesses to support her case in chief, although this may have been a function of her failure to file a timely case summary, and called no impeachment witnesses. In addition, she made some key inconsistent statements. In her answer, she stated "[f]rom the first day I heard about the complaints and the investigation, April 4th, until mid-May when I spoke with the BOLI investigator, I absolutely believed that it was not the complainant or any other staff person who had made any complaints, because that is what I was told." In contrast, she told Butler and also testified that her initial thought in response to Howell's April 4 phone call was that Complainant had made the complaint in retaliation for being suspended. Because of Turnbull's inconsistent statements about her belief concerning who filed the complaint with Lane County, the conflict between her testimony and her actions concerning Complainant's performance, and her failure to produce any evidence corroborating her testimony, the forum has only credited her testimony when it was either undisputed or corroborated by other credible testimony. (Testimony of Turnbull)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Blue Gryphon was an employer as defined in ORS 659A.001(4) that employed Complainant.

2) The actions, statements, and motivations of Flora Turnbull, Blue Gryphon's owner and sole member, are properly imputed to Blue Gryphon.

3) Complainant, acting in good faith and while employed by Blue Gryphon, reported information that he believed was evidence of a violation of a state rule to Turnbull and Lane County Protective Services.

4) Blue Gryphon, acting through Turnbull, suspended Complainant on March 31, 2013, because of his good faith report to Turnbull that he had authorized the

expenditure of Blue Gryphon's money on March 28, 2013, because the house "needed food," thereby violating ORS 659A.199 and OAR 839-010-0100(1).

5) Blue Gryphon, acting through Turnbull, discharged Complainant from employment on April 4, 2013, because he made a good faith report to Lane County Protective Services that Blue Gryphon had inadequate food for its residents, thereby violating ORS 659A.199 and OAR 839-010-0100(1).

6) Respondent Turnbull violated ORS 659A.030(1)(g) by suspending, then discharging Complainant on behalf of Respondent Blue Gryphon.

7) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. ORS 659A.800 to ORS 659A.865.

8) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant back pay and money damages for emotional and mental suffering sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

Introduction

In its Formal Charges, the Agency alleges that Blue Gryphon, through Turnbull, violated ORS 659A.199 and OAR 839-010-0100 by suspending, then discharging Complainant, and that Turnbull violated ORS 659A.030(1)(g) by aiding and abetting Blue Gryphon to commit these acts. The Agency seeks to recover back pay and damages for emotional distress on Complainant's behalf.

Blue Gryphon Violated ORS 659A.199 and OAR 839-010-0100(1).

ORS 659A.199(1) provides, in pertinent part:

> "It is an unlawful employment practice for an employer to discharge, demote, suspend * * * an employee * * * for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."

OAR 839-010-0100(1), BOLI's administrative rule interpreting ORS 659A.199, provides in pertinent part:

> "ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging, demoting, suspending* * * an employee * * * for the reason that the employee has in good faith reported information <u>to anyone</u> that the employee believes is evidence of a violation of any state or federal law, rule or regulation." (Emphasis added)

The Agency's prima facie case consists of the following elements: (1) Blue Gryphon was an employer as defined by statute; (2) Blue Gryphon employed Complainant; (3) Complainant, in good faith, reported information to someone that he believed was evidence of a violation of a state rule; (4) Blue Gryphon suspended, then discharged Complainant; (5) Blue Gryphon suspended and discharged Complainant because of his report(s). *Cf. In the Matter of Cleopatra's, Inc.*, 26 BOLI 125, 132 (2005).

Elements (1) and (2) are undisputed.

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). The Agency proved by a preponderance of the evidence that Complainant believed Blue Gryphon'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. OAR 411-050-0645(4), OAR 309-040-0385. 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. *Id.*, at 93. Complainant credibly testified that Blue Gryphon had no perishable foods available for lunch on March 28 and Complainant and Haynes both credibly testified that Blue Gryphon had no perishable foods in the house on March 29. Both circumstances violate OAR 411-050-0645(4) and OAR 309-040-0385. Based on this credible testimony, the forum concludes 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. Finally, Complainant made three communications that qualify as "reports" of information under ORS 659A.199: (1) He told Katie Haynes that Blue Gryphon lacked adequate food; (2) He told Turnbull that he authorized Armijo's food purchases because Blue Gryphon "needed" food; and (3) He called Lane County Protective Services and reported Blue Gryphon's food shortage. These facts satisfy the third element of the Agency's prima facie case.

Element (4) relates to the adverse actions – the suspension and discharge -- allegedly taken against Complainant. It is undisputed that Blue Gryphon suspended Complainant on March 31, 2013. However, Respondents argue that Complainant was never discharged, in that Howell, during her visit to Blue Gryphon on April 4, 2013, told Turnbull that she could not change any employee's employment status until her investigation was complete. The Agency argues that the content of Turnbull's text message to Complainant at 4:38 p.m. on April 4, coupled with her testimony about her

state of mind, shows that Complainant was discharged. Turnbull's text message read as follows:

> "If you have any keys or anything else belonging to the house, you need to return them immediately. You are not welcome on the premises yourself. Give whatever you have to another employee to return."

Turnbull's testimony about her state of mind on March 31 when she suspended Complainant lends further context:

> "I just wanted him to calm down and explain to me what happened. It was my intention to see what he had to say and try and still try to work it out. * * * I had come to a conclusion that if he didn't really have a better explanation, a good explanation for what had happened, and if he couldn't really work on the issues, I was going to let him go at that point but I still wanted to talk to him and see what he had to say."

There is no evidence that Complainant and Turnbull talked again before her April 4 text message in which she ordered him to turn in his keys and told him that he was not welcome on the premises. Based on above, the forum concludes that Complainant was discharged on April 4, 2013.

Element (5) requires the Agency to prove a nexus between Complainant's whistleblower protected class status and his suspension and discharge. The forum analyzes Complainant's suspension and discharge separately.

Complainant's March 31, 2013, Suspension

The evidence is clear that Turnbull suspended Complainant because she was upset with him. The forum's job is to decide why Turnbull was upset and determine if her resulting decision to suspend Complainant violated the law. A review of the chain of events leading up to Complainant's suspension, combined with the immediate circumstances of his suspension, reveals the answer.

The starting point in the forum's analysis is the undisputed fact that Turnbull's and Blue Gryphon's finances were one and the same, operating out the same account.

There is nothing unlawful about this arrangement, but it meant that all money spent on behalf of Blue Gryphon had an immediate and direct impact on Turnbull's personal finances. Complainant started work for Blue Gryphon in May 2011 as a caregiver who was paid $11 per hour. In 2012 he was promoted to assistant manager and his pay increased to $15 per hour. In January 2013 he was demoted to the position of appointments coordinator when Anthony Culver, Turnbull's fiancé/partner, returned to work and assumed some of Complainant's duties. At that time, Complainant's pay was reduced to $12 per hour. About the same time, Turnbull reduced Blue Gryphon's food budget from $1200 per month to $800 per month and created a new shopping arrangement because she perceived that money was being spent for food that was not eaten by Blue Gryphon's residents. On March 23 or March 24, 2013, Turnbull and Culver left for a one week vacation to California. Before leaving, Turnbull appointed Complainant as interim manager during her absence and raised his pay to $15 per hour. She also instructed him not to spend more than $20 for food while she was gone.

On March 28, Complainant's coworker Armijo reported that there was no food at Blue Gryphon with which to make lunches for the residents. In response, Complainant authorized Armijo to spend up to $30 to purchase perishables. About the same time, Turnbull found out that the room tax for her vacation hotel was far more than she had expected. Her reaction to Blue Gryphon's food expenditure was immediate, as shown in her first text message to Complainant:

> **March 28, 5:51 p.m.** (*Turnbull→Complainant*): "Someone spent a bunch of money today, almost 30, I don't have that. I had said don't spend more than 20 this week and that already happened. More than 30. *We're barely making it here.* Who's doing that?" (Emphasis added)

In response, Complainant texted the following:

> **March 28, 6:31 p.m.** (*Complainant→Turnbull*): "I'm sorry that Gina over spent. The house needed food. I don't know what else to say Flora."

Turnbull's reaction to Complainant's response and the financial impact on her vacation plans is clearly revealed in the next series of text messages between Complainant and Turnbull:

> **March 29, 8:27 a.m.** (*Turnbull→Complainant*): "ABSOLUTELY NO MORE SPENDING AT ALL UNTIL I GET BACK. FROM NOW ON ANY SPENDING WILL NEED TO BE PRE-AUTHORIZED BY ME EVERY TIME. IF THERE IS ANY PETTY CASH IT SHOULD BE DEPOSITED IN BANK IMMEDIATELY. Eddie knows he needs to buy his own lunch anyway, as do staff. I need that will check to be dropped off today. Please let me know when you do that."
>
> **March 29, 8:31 a.m.** (*Complainant→Turnbull*): "Understood."
>
> **March 29, 8:42 a.m.** (*Turnbull→Complainant*): "Is there any petty cash?"
>
> **March 29, 8:59 a.m.** (*Complainant→Turnbull*): "There is $16.37 that I will deposit when Raquel comes on shift."
>
> **March 29, 9:03 a.m.** (*Turnbull→Complainant*): "Cool, thanks. Now *we get to eat today*." (Emphasis added)

The next event was Turnbull's March 31 phone call to Complainant in which she demanded to know why it was necessary for Complainant to authorize Blue Gryphon's March 28 expenditure for food. Complainant's explanation was that the residents needed food. After that call, Turnbull sent Complainant yet another text message stating:

> "It is not healthy for the residents to have a staff there with such a negative attitude and making such questionable judgment calls, especially when refusing to even explain the reasoning behind your choices. So consider yourself suspended for now and we'll have to talk about where to go from there."

At hearing, Turnbull explained her reason for using the phrase "questionable judgment calls:"

> **Q**: "What questionable judgment call was that; to buy food?"
> **A**: No, it was to tell me that food was needed and then to give Gina a list of things to buy without ever talking to me when we had talked many times about authorizing extra purchases with me first. And then he didn't respond to me the entire day when I was trying to find out why; he never responded."

Turnbull testified that she suspended Complainant because of the abusive attitude he displayed during their March 31 phone conversation. She described Complainant's abusive behavior over the previous six months in detail and testified that she just could not take it any longer. The forum does not believe Turnbull's stated reason for suspending Complainant because: (1) Turnbull, not Complainant, initiated whatever yelling took place during the March 31 phone call;[7] (2) Turnbull was not a credible witness;[8] (3) Turnbull was clearly upset that Complainant's expenditure for food for Blue Gryphon's residents posed an imminent threat to Turnbull's vacation plans; and (4) there is no credible evidence that Turnbull 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 Turnbull's testimony that Complainant was unable to give her a satisfactory explanation as to why Blue Gryphon's residents "needed food," lead the forum to conclude that Turnbull suspended Complainant because he reported Blue Gryphon's need for food to Turnbull.

Respondents argue that since Complainant only raised the issue that Blue Gryphon "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 Turnbull that he had authorized the purchase of food because Blue Gryphon "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.

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[7] *See* Finding of Fact #21 – The Merits.

[8] *See* Finding of Fact #38 – The Merits.

Complainant's April 4, 2013, Discharge

When Turnbull suspended Complainant on March 31, 2013, she was upset at him because of the money he spent in her absence and the reason – "needed food" – why he authorized the expenditure. At that point, she still wanted to talk to him again and had not made a decision to discharge him. Between March 31 and Complainant's discharge, the only intervening circumstance was Howell's April 4 phone call to Turnbull and visit to Blue Gryphon. Turnbull testified that her first reaction to Howell's phone call was to think that Complainant had retaliated against her for his suspension by making the complaint. During her subsequent visit, Howell told Turnbull that she was investigating a complaint of lack of food in the house and that an "outside" person made the complaint. Howell left Blue Gryphon at 4:30 p.m. Eight minutes later, Turnbull sent a text message to Complainant in which she told him to turn in his keys and stay off Blue Gryphon's property, a communication that the forum has concluded was Complainant's discharge. Turnbull testified that she had no reason to think that Complainant made the complaint that spurred Howell's investigation based on Howell's "outside person" statement. However, based on Turnbull's testimony about her initial conclusion that Complainant made the complaint, the fact that Howell told Turnbull that the complaint was about a lack of food – the very issue Complainant had reported to Turnbull before his suspension, and the timing[9] of Turnbull's text message, the forum does not believe Turnbull and concludes that Turnbull discharged Complainant because Turnbull believed he had blown the whistle to Lane County about Blue Gryphon's lack of food. That discharge violated ORS 659A.199 and OAR 839-010-0100.

[9] *See In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166 (2012)(the forum relied on the fact of complainant's discharge the day after she explicitly rejected respondent's sexual conduct as an element supporting her retaliation claim).

Turnbull Aided & Abetted Blue Gryphon in Violation of ORS 659A.030(1)(g)

In this case, Blue Gryphon was an Oregon limited liability company and Turnbull was Blue Gryphon's sole owner and member. 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. *In the Matter of Alpine Meadows Landscape,* 19 BOLI 191, 213-14 (2000). 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 the Matter of Hey Beautiful Enterprises, Ltd.,* 34 BOLI 80, 97 (2015), citing *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). Here, Turnbull was solely responsible for Complainant's suspension and discharge. Accordingly, the forum concludes that Turnbull violated ORS 659A.030(1)(g) through Blue Gryphon's suspension and discharge of Complainant. This makes her jointly and severally liable with Blue Gryphon for all damages awarded by the forum.

Damages

The Agency seeks to recover lost wages, estimated to be $42,640, and damages for "physical, mental and emotional distress" in an amount "estimated to be at least $30,000."

A. Lost Wages and Tips

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of From the Wilderness,* 30 BOLI 227, 290 (2009). The purpose of back pay awards in an employment

discrimination case is to compensate a complainant for the loss of wages and benefits that he or she would have received but for the respondent's unlawful employment practices. Awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of Trees, Inc.*, 28 BOLI 218, 251 (2007). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence to find other suitable employment. *In the Matter of Rogue Valley Fire Protection*, 26 BOLI 172, 184 (2005).

Had Complainant not been suspended and discharged, he would have presumably returned to his job as medical appointments coordinator at $12 per hour[10] and worked another 15 days in total until Blue Gryphon closed its doors on April 22, 2013, 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.

B. Emotional and Mental Suffering 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 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 Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 170 (2012).

[10] The Agency argued that Complainant would have continued to earn $15 per hour after Turnbull's and Culver's return from vacation, but there is no evidence in the record to support that conclusion.

Between March 31 and April 4, Complainant was "really upset" and felt "really bad" about his suspension, particularly because he reasonably believed Turnbull suspended him because he had authorized the food purchases. Complainant also had a reasonable contemporaneous belief that he was fired because he complained to Lane County Protective Services about an inadequate food supply for Blue Gryphon's residents. 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.[11] He had formed close, long-term relationships with Blue Gryphon's residents 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. During the subsequent year that he was out of work, he experienced financial difficulties while he lived on unemployment benefits that were "substantially less" than his pay at Blue Gryphon.[12] At the time of the hearing, he was still upset over his termination.

In a recent whistleblower case, the forum awarded the complainant $10,000 for emotional and mental suffering. *In the Matter of Hey Beautiful Enterprises, Ltd.,* 34 BOLI 80, 101 (2015). In that case, complainant worked three weeks for respondent before she was suspended, then discharged for complaining about not being paid her wages. She testified that she loved working for respondent, whom she regarded as a mentor, that she felt angry and emotionally distraught when she was suspended, and

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[11] OAR 400-050-0665(1)(a) requires "all facility employees" at Oregon adult foster care homes "to immediately report abuse and suspected abuse to the investigative authority." Per OAR 411-050-0602(2), the pertinent definition of "abuse" is found in OAR 411-020-0002. OAR 411-020-0002(1) provides, in pertinent part, that "(1) "Abuse" means any of the following: * * * (b) NEGLECT. Neglect including: (A) Failure to provide the basic care, or services necessary to maintain the health and safety of an adult[.]"

[12] Complainant testified that his car was repossessed and he was behind on his rent for a while as a result of his discharge. However, there is insufficient evidence in the record to determine the actual impact of Complainant's discharge on these events, primarily because of the forum's conclusion that Complainant only lost 15 days' pay, in contrast to the $42,000 in lost wages sought in the Charges.

depressed because she was never called back to work. She suffered stress from her subsequent unemployment, but there was no evidence that she attempted to mitigate her damages. Complainant's longevity of employment and his significant attachment to Blue Gryphon's residents distinguish this case from *Hey Beautiful*, and the forum concludes that $20,000 is an award commensurate with the mental and emotional distress Complainant experienced as a result of his suspension and discharge from Blue Gryphon.

Mandatory Training on the Correct Interpretation and Application of Oregon Laws Pertaining to Whistleblowers

In its Formal Charges, the Agency asked that Respondent Turnbull be trained, at her expense, "on the correct interpretation and application of the Oregon laws pertaining to whistleblowing, by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency."

BOLI's Commissioner is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring a respondent to:

> "(a) Perform an act or series of acts designated in the order that are reasonably calculated to:
>
> "(A) Carry out the purposes of this chapter;
>
> "(B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief; and
>
> "(C) Protect the rights of the complainant and other persons similarly situated[.]"

This statute gives the Commissioner the authority to require Respondent Turnbull to undergo training of the type sought in the Formal Charges. The forum finds that this requirement is appropriate in this case.

Respondents' Exceptions

Respondents raise six exceptions.

1. *There is no evidence that Respondent Turnbull was aware that Complainant had made a food shortage report before she "suspended"[13] Complainant. Instead, Turnbull suspended Complainant "because he failed to report to her the lack of food, before it ran out, and for his anger and loud outbursts."*

Respondents' exception relies on Turnbull's version of the facts that the ALJ found to be not credible. The ALJ's credibility findings are supported by a preponderance of the evidence in the record. Respondents' exception is overruled.

2. *OAR 839-010-0100(1) is invalid insofar as it prohibits retaliation by employers against employees who make a report to the employer only.*

Respondents argue that BOLI exceeded its authority in drafting OAR 839-010-0100(1) to protect whistleblowers who make "internal complaints" only and that Respondents cannot be held liable for taking an adverse action against Complainant based on his report to Turnbull of insufficient food at Blue Gryphon. Respondents raise two points in support of their argument.

First, Respondents rely on *Lamson v. Crater Lake Motors, Inc.*, 346 Or 628 (2009), stating that *Lamson* held that "a wrongful discharge claim based on retaliation for 'whistleblowing' under ORS 659A.230 requires that the complaint be made to a recognized outside authority legally vested with the power to take action on such complaints, and that internal complaints, without more, are normally insufficient." Respondents' reliance is misplaced. The only issue in *Lamson* was whether the plaintiff had been wrongfully discharged, a common law tort decided based on case law that is not controlling in this case.

[13] As discussed earlier in the Opinion, Respondents contend that Complainant was never discharged.

Second, Respondents argue that "there is no suggestion in the statutes that an entirely internal complaint suffices" and that the broad language in OAR 839-010-0100(1) that gives a cause of action to a person who reports information "to anyone" is *ultra vires*. Stated again, ORS 659A.199(1) provides:

> "It is an unlawful employment practice for an employer to discharge, demote, suspend * * * an employee * * * for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."

OAR 839-010-0100(1) provides:

> "ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging, demoting, suspending* * * an employee * * * for the reason that the employee has in good faith reported information to anyone that the employee believes is evidence of a violation of any state or federal law, rule or regulation."

An agency's powers are limited to those delegated to it by statute. *Ettinger v. Denny Chancler Equip. Co.*, 139 Or. App. 103, 108, 910 P.2d 420, 423 (1996), citing *U. of O. Co–Oper. v. Dept. of Rev.*, 273 Or. 539, 550, 542 P.2d 900 (1975). "An act of a * * * governmental entity is *ultra vires* when that act falls outside the entity's corporate powers." *W. Linn Corp. Park, L.L.C. v. City of W. Linn*, 349 Or. 58, 96, 240 P.3d 29, 50 (2010), citing *Keeney v. City of Salem,* 150 Or. 667, 669–71, 47 P.2d 852 (1935).

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." OAR 839-010-0100(1), which interprets ORS 659A.199, a statute BOLI's commissioner is authorized to enforce, is such a rule. ORS 659A.800. 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.[14] 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 finds 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*. Respondent's exception is overruled.

3. *There was no evidence as to an insufficient supply of food at Blue Gryphon during Turnbull's vacation.*

Findings of Fact ##14 and 19 – The Merits, support this conclusion. Respondents' exception lacks evidentiary support and is overruled.

4. *There was insufficient evidence of economic damages.*

The ALJ's computation of Complainant's lost wages was based on Complainant's credible, undisputed testimony about his work schedule and wage prior to his temporary promotion to the position of interim manager during Turnbull's absence. The forum has historically computed back pay awards to discharged complainants based on the number of hours they worked and wage they earned prior to their discharge.[15] The ALJ's computation follows the forum's precedent. Respondents' exception is overruled.

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[14] For example, ORS 659A.203 protects whistleblowing public employees who discuss activities of the state or any agency or political subdivision "with any member of the Legislative Assembly, legislative committee staff acting under the direction of a member of the Legislative Assembly, any member of the elected governing body of a political subdivision in the state or any elected auditor of a city, county or metropolitan service district."

[15] *See, e.g., In the Matter of Spud Cellar Deli, Inc.*, 31 BOLI 106, 139 (2010); *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 290 (2009); *In the Matter of Robb Wochnick*, 25 BOLI 265, 288 (2004); *In the Matter of Southern Oregon Subway, Inc.*, 25 BOLI 218, 242 (2004).

5. Complainant failed to mitigate his damages.

Respondents' argument rests on the undisputed fact that Complainant declined an offer of a similar job shortly after his discharge in which he would have been scheduled to work night shift. Even assuming that Complainant had occasionally worked a night shift in the past, his regular shift throughout his employment with Blue Gryphon was 8 a.m. to 5 p.m. Complainant also credibly testified that, at the time of his discharge, he was not able 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. Respondents' exception is overruled.

6. The proposed award of $20,000 for emotional distress is "unreasonable and out of proportion."

Respondents argue that the forum erred by including emotional distress "that undoubtedly resulted from the closing of the business" and that $20,000 is "dramatically out of line with what citizens in Lane County generally award in employment discrimination/retaliation cases." The forum's award is consistent with its own precedent and is less than the amount sought by the Agency in its Formal Charges. Respondents' exception is overruled.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent **Blue Gryphon, LLC's** violations of ORS 659A.199 and OAR 839-010-0100 and Respondent **Flora Turnbull's** violation of ORS 659A.030(1)(g), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Blue Gryphon LLC** and **Flora Turnbull** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street,

Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant **Lewis Garchow** in the amount of:

1) ONE THOUSAND SIX HUNDRED AND TWENTY DOLLARS ($1,620), less lawful deductions, representing wages lost by Lewis Garchow between April 1 and April 22, 2013, as a result of Respondents' unlawful employment practice found herein; plus,

2) TWENTY THOUSAND DOLLARS ($20,000), representing compensatory damages for emotional and mental suffering experienced by Lewis Garchow as a result of Respondents' unlawful employment practice found herein; plus,

3) Interest at the legal rate on the sum of TWENTY-ONE THOUSAND SIX HUNDRED AND TWENTY DOLLARS ($21,620) until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Flora Turnbull**, within 12 months after the Final Order is issued, to participate in training, at her expense, on the correct interpretation and application of the Oregon laws pertaining to whistleblowers by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Blue Gryphon LLC** and **Flora Turnbull** 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.

Brad Avakian, Commissioner
Bureau of Labor and Industries

Issued ON: 11/24/15

JUDICIAL REVIEW NOTICE

Pursuant to ORS 183.482, you are entitled to judicial review of this Final Order. To obtain judicial review, you must file a Petition for Judicial Review with the Court of Appeals in Salem, Oregon, within sixty (60) days of the service of this Order.

If you file a Petition for Judicial Review, *YOU MUST ALSO SERVE A COPY OF THE PETITION ON the* **BUREAU OF LABOR AND INDUSTRIES** *and* ***THE DEPARTMENT OF JUSTICE - APPELLATE DIVISION***

AT THE FOLLOWING ADDRESSES:

BUREAU OF LABOR AND INDUSTRIES
CONTESTED CASE COORDINATOR
1045 STATE OFFICE BUILDING
800 NE OREGON STREET
PORTLAND, OREGON 97232-2180

DEPARTMENT OF JUSTICE
APPELLATE DIVISION
1162 COURT STREET NE
SALEM, OREGON 97301-4096

If you file a Petition for Judicial Review and if you wish to stay the enforcement of this final order pending judicial review, **you must file a request with the Bureau of Labor and Industries**, at the address above. Your request must contain the information described in ORS 183.482(3) and OAR 137-003-0090 to OAR 137-003-0092.

CERTIFIED TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL AND OF A WHOLE THEREOF.

Diane M. Quicker

FO-CRD/*Blue Gryphon, #20-15.doc*

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I SERVED A COPY OF THE ATTACHED

FINAL ORDER

In the Matter of:

BLUE GRYPHON, LLC and FLORA TURNBULL, individually as aider and abettor under ORS 659A.030(1)(g), Case #20-15

BY HAND DELIVERING OR PLACING IT IN INTERNAL STATE MAIL SERVICES TO EACH PERSON AT THE ADDRESS LISTED BELOW:

Cristin Casey Administrative Prosecutor Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232	Jennifer Gaddis Chief Prosecutor Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232	Gerhard Taeubel, Administrator Wage and Hour Division Bureau of Labor and Industries 1045 State Office Building 800 NE Oregon Street Portland, OR 97232

AND BY PREPARING AND PLACING IT IN THE OUTGOING BUREAU OF LABOR AND INDUSTRIES MAIL TO EACH PERSON OR ENTITY AT THE ADDRESSES LISTED BELOW:

Marianne Dugan, Attorney at Law 259 E. 5th Ave. Suite 200-D Eugene, Oregon 97401 via Regular & Certified Mail Certified Mail # 7015 1660 0000 2223 9253	Flora Turnbull 345 E. Rosewood Avenue Eugene, OR 97404 via Regular & Certified Mail Certified Mail # 7015 1660 0000 2223 9260

On Tuesday, November 24, 2015

Diane M. Anicker

Diane M. Anicker, Contested Case Coordinator, Bureau of Labor and Industries, 971-673-0865