

**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**

In the Matter of:

Case Nos. **26-18**

**EDGEWOOD CONSTRUCTION LLC;**  
**ROBERTO GARCIA, Individually;**  
**TOMAS JUAREZ FLORES,**  
**Individually and**  
**MIGUEL DOE, Individually,**  
Respondents.

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

**SYNOPSIS**

The forum concluded that Respondent Edgewood Construction, LLC discriminated against and unlawfully terminated Complainant due to his invocation or use of Workers' Compensation benefits, in violation of ORS 659A.040(1) and OAR 839-006-0117(1)(a). The forum did not find Respondent Edgewood Construction LLC liable for violation of ORS 659A.043 and OAR 839-006-0130(1)(a)-(d). Respondent Roberto Garcia, Respondent Tomas Juarez-Flores and Respondent Miguel Doe were not held jointly and severally liable as aiders and abettors, due to lack of service. The forum awarded Complainant \$21,560.00 in economic damages and \$50,000.00 in emotional and mental suffering damages.

The above-entitled case was assigned for hearing to Jennifer Gaddis, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Respondents did not file an Answer to the Agency's Formal Charges, nor did they appear for the contested case hearing. The contested case hearing was held on September 11, 2018 at BOLI's Portland office, located at 800

1 NE Oregon Street, Suite 1045, in Portland, Oregon. Complainant Rafael Saldana was  
2 present throughout the hearing.

3 The Agency called BOLI Complainant Rafael Saldana and BOLI Civil Rights  
4 Investigator Tiffany Ray as witnesses.

5 The forum received into evidence Administrative exhibits X1 through X17. The  
6 forum also received into evidence Agency exhibits A1 through A8, and A10.

7 Having fully considered the entire record in this matter, I, Brad Avakian,  
8 Commissioner of the Bureau of Labor and Industries, hereby make the following  
9 Findings of Fact (Procedural, On the Merits, and Ultimate<sup>1</sup>), Conclusions of Law,  
10 Opinion, and Order.

#### 11 **FINDINGS OF FACT – PROCEDURAL**

12  
13 1) On January 25, 2018, the Agency made a request for hearing in this  
14 matter. (Exs. X1, X3)

15 2) On January 30, 2018, the forum issued a Notice of Hearing to  
16 Respondents and the Agency, which stated the time and place of the hearing as June 5,  
17 2018, beginning at 10:00 a.m., at BOLI's Portland office, located at 800 NE Oregon  
18 Street, Suite 1045, Portland, Oregon. With the Notice of Hearing, the forum also sent a  
19 copy of the Agency's Formal Charges,<sup>2</sup> a document entitled "Summary of Contested  
20 Case Rights and Procedures" containing the information required by ORS 183.413, a  
21 copy of the "Responsive Pleadings Rule," a document entitled "Servicemembers Civil  
22

23 <sup>1</sup> The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the  
Findings of Fact – The Merits.

24 <sup>2</sup> The Agency's Formal Charges were undated. On February 9, 2018, the forum issued an Amended  
25 Notice of Hearing, which included the Agency's dated Amended Formal Charges and the  
accompanying documentation previously sent to Respondents on January 30, 2018. (Exs. X4, X4a-  
X4h)

1 Relief Act (SCRA) Notification,” a multi-language notice explaining the significance of  
2 the Notice of Hearing, and a copy of the forum’s contested case hearings rules, OAR  
3 839-050-000 to 839-050-0445. (Exs. X2, X2a-2h)

4 3) On March 26, 2018, the Oregon Secretary of State’s office confirmed  
5 receipt of the Amended NOH and Formal Charges, on behalf of Respondent Edgewood  
6 Construction, LLC. (Ex. X5)

7 4) On April 19, 2018, the Agency filed its first Motion for Default against  
8 Respondent Edgewood Construction, LLC. (Ex. X6)

9 5) On April 30, 2018, the forum issued its Interim Order Directing Agency to  
10 Supplement its Motion for Default of Respondent Edgewood Construction, LLC. The  
11 order stated:

12  
13 “On April 19, 2018, the Agency filed a motion for default against  
14 Respondent Edgewood Construction, LLC, in this matter, pursuant to OAR 839-  
15 050-150 and OAR 839-050-0330. Respondent’s filing was due April 26, 2018;  
Respondent Edgewood Construction, LLC (‘Respondent’) filed no response to  
the Agency’s motion.

16 “The Agency moved the forum to find Respondent in default, based on its  
17 failure to file an Answer to the Formal Charges. After unsuccessfully attempting  
18 to serve Respondent at its last known address, the Agency then served the  
19 Formal Charges and Notice of Hearing on the Secretary of State’s office, on  
20 March 7, 2018. Pursuant to ORS 63.121(3)(b)(A)(B), the Agency then needed to  
21 serve Respondent or its registered agent a copy of the ‘process, notice or  
22 demand and accompanying papers [sent to the Secretary of State’s Office]...by  
23 certified or registered mail \* \* \*’ The Agency then needed to provide the forum  
24 with (1) the return receipts of said mailing and (2) an affidavit, by the individual  
25 doing the mailing, that this step was complied with. ORS 63.121(3)(c).  
Unfortunately, this information was not included in the Agency’s motion. The  
Agency is hereby directed to supplement its motion with (1) a copy of the return  
receipts of the mailing to Respondent, notifying it that the required documents  
have been sent to the Secretary of State’s Office, and (2) an affidavit, by the  
individual doing the mailing, that this step was carried out, pursuant to ORS  
63.121(3)(b) and (c).

“IT IS SO ORDERED.”

1 (Ex. X7)

2 6) On May 8, 2018, the Agency filed a Motion for Postponement of the  
3 contested case hearing. On May 10, 2018, the forum issued its Interim Order re:  
4 Agency's Motion for Postponement and Setting Deadline for Agency to Supplement its  
5 Motion for Default. The forum's order stated:

6 "On May 8, 2018, the Agency filed a Motion for Postponement of the  
7 contested case hearing, currently set for June 5, 2018. The Agency cited a  
8 conflict with another hearing set during that week, which has previously had two  
9 set-overs and cannot be postponed again. This being the first request for  
10 postponement in this matter, and the prosecutor being unavailable to participate  
11 in this case due to being in a hearing on another matter, the Agency's Motion for  
12 Postponement is **GRANTED**.

13 "The new hearing information for this matter is as follows:

14 "DATE: TUESDAY, June 26th, 2018, and successive days thereafter  
15 until concluded.

16 "TIME: 10:00 A.M.

17 "PLACE: OFFICES OF THE BUREAU OF LABOR & INDUSTRIES,  
18 W.W. GREGG HEARINGS ROOM (10<sup>TH</sup> FLOOR), 1045 STATE  
19 OFFICE BUILDING, 800 NE OREGON STREET, PORTLAND,  
20 OREGON 97232

21 "The Case Summary deadline is now: June 12, 2018.

22 "Upon review of the Agency's Motion for Postponement, I noted that the  
23 Agency failed to mail a copy of its motion to Respondent's last known address,  
24 as required by OAR 839-050-0030(2) and (3). Since there is a pending Motion  
25 for Default in this matter, I am aware that at least one respondent's mail has  
been returned as undeliverable to the Agency.<sup>3</sup> Since none of the Respondents  
have been found in default, however, the Agency must comply with the filing  
requirements in the contested case rules. The Agency is directed to  
supplement its Motion for Postponement with a Certificate of Service,  
indicating it provided a copy of its motion to all named Respondents no  
later than May 25, 2018.

"Further, upon review of the Agency's Motion for Default, I noted that the  
Certificate of Service on that motion also failed to comply with OAR 839-050-

<sup>3</sup> I also note that Respondents share the address of 12216 NE Barnes Rd. #131, Portland, OR 97229.

1 0030(2) and (3). Although the Agency sent a copy of the Motion for Default to  
2 Respondent Edgewood Construction, LLC, at its last known address, the Agency  
3 failed to send a copy of its motion to any of the other Respondents named in the  
4 Agency's Formal Charges. Until the contested case against a particular  
5 respondent is resolved, the Agency must serve a copy of any filing on the  
6 respondent. Also, in my interim order, issued April 30, 2018, I directed the  
7 Agency to supplement its Motion for Default with proof of service on Respondent  
8 Edgewood Construction, LLC of its transmittal of the relevant documents to the  
9 Oregon Secretary of State's office, however, I failed to set a deadline by which to  
10 do so. The Agency is directed to supplement its Motion for Default Against  
Respondent Edgewood Construction, LLC with (1) a copy of the return  
receipts of the mailing to Respondent, notifying it that the required  
documents have been sent to the Secretary of State's Office, (2) an  
affidavit, by the individual doing the mailing, that this step was carried out,  
pursuant to ORS 63.121(3)(b) and (c), and (3) a Certificate of Service,  
indicating it provided a copy of its Motion for Default Against Respondent  
Edgewood Construction, LLC to all named Respondents no later than May  
25, 2018.

11 "IT IS SO ORDERED."

12 (Exs. X8-X9)

13 7) On June 4, 2018, the forum issued its Interim Order re: Agency's Motion  
14 for Default on Respondent Edgewood Construction, LLC and Redirecting Agency to  
15 Supplement the Record with Valid Certificates of Service. The order stated:

16 "On April 30, 2018, the forum directed the Agency to supplement its  
17 Motion for Default of Respondent Edgewood Construction, LLC with (1) a copy of  
18 the return receipts of the mailing to Respondent, notifying it that the required  
19 documents have been sent to the Secretary of State's Office, and (2) an affidavit,  
20 by the individual doing the mailing, that this step was carried out, pursuant to  
21 ORS 63.121(3)(b) and (c). On May 8, 2018, the Agency moved to postpone the  
22 contested case hearing, based on its conflict with another hearing set on the  
23 same date. The Agency's motion was granted, via interim order, on May 10,  
24 2018. At the time of the issuance of the May 10, 2018, interim order, the forum  
25 had received neither a supplemental filing to the Agency's Motion for Default nor  
any information related to when a supplement might be filed. Within its interim  
order on the postponement, the forum set a deadline by which the Agency was  
directed to supplement its Motion for Default with the information originally  
requested on April 30, 2018. The deadline for the Agency to supplement its  
motion was May 25, 2018. Since the Agency has not supplemented its motion  
as directed, the Agency's Motion for Default against Respondent Edgewood  
Construction, LLC is **DENIED**. Should the Agency wish to refile a Motion for

1 Default, with the information requested, the forum would consider that motion in  
2 due course.

3 "Upon review of the Agency's Motion for Postponement, the forum also  
4 noted that the Agency failed to mail a copy of its motion to any of the named  
5 Respondents, as required by OAR 839-050-0030(2) and (3). Since there was a  
6 pending Motion for Default, it was apparent that at least one respondent's mail  
7 was returned as undeliverable to the Agency.<sup>4</sup> However, since this matter  
8 remains pending against all Respondents, the Agency must comply with the filing  
9 requirements in the contested case rules. The Agency was directed on May 10,  
10 2018, to supplement the record with a complete Certificate of Service on its  
11 Motion for Postponement, indicating it provided a copy of its motion to all named  
12 Respondents no later than May 25, 2018. The Agency did not supplement the  
13 record as directed. **The Agency is now redirected to supplement the record  
14 with a complete Certificate of Service on its Motion for Postponement,  
15 indicating it provided a copy of its motion to all named Respondents no  
16 later than June 18, 2018.**

17 "Upon review of the Agency's Motion for Default, I noted that the  
18 Certificate of Service on that motion also failed to comply with OAR 839-050-  
19 0030(2) and (3). Although the Agency sent a copy of the Motion for Default to  
20 Respondent Edgewood Construction, LLC, at its last known address, the Agency  
21 failed to send a copy of its motion to any of the other Respondents named in the  
22 Agency's Formal Charges. The Agency was directed on May 10, 2018 to  
23 supplement the record with a complete Certificate of Service on its Motion for  
24 Default, indicating it provided a copy of its motion to all named Respondents no  
25 later than May 25, 2018. The Agency did not supplement the record as directed.  
**The Agency is now redirected to supplement the record with a complete  
Certificate of Service on its Motion for Default, indicating it provided a copy  
of its motion to all named Respondents no later than June 18, 2018.**

"IT IS SO ORDERED."

(Ex. X10)

8) On June 7, 2018, the Agency filed its Second Motion for Postponement of  
the contested case hearing. On June 11, 2018, the forum issued its Interim Order re:  
Agency's Second Motion for Postponement. The order stated:

"On June 7, 2018, the Agency filed a Second Motion for Postponement of  
the contested case hearing, currently set for June 26, 2018. The Agency

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<sup>4</sup> It was noted in the May 10, 2018 interim order that Respondents share the address of 12216 NE Barnes Rd. #131, Portland, OR 97229.

1 indicated it would be in hearing the next two weeks and had inadequate time to  
2 prepare. Pursuant to OAR 839-050-0150, Respondents' responsive filing(s)  
3 would be due June 14, 2018. Since none of Respondents have filed an Answer  
in this matter and case summaries for the June 26<sup>th</sup> hearing are due tomorrow,  
the Agency's Second Motion for Postponement is **GRANTED**.

4 "The new hearing information for this matter is as follows:

5 "DATE: TUESDAY, September 11, 2018, and successive days  
6 thereafter until concluded.

7 "TIME: 10:00 A.M.

8 "PLACE: OFFICES OF THE BUREAU OF LABOR & INDUSTRIES,  
9 W.W. GREGG HEARINGS ROOM (10<sup>TH</sup> FLOOR), 1045  
10 STATE OFFICE BUILDING, 800 NE OREGON STREET,  
11 PORTLAND, OREGON 97232

12 "The Case Summary deadline is now: August 28, 2018.

13 "IT IS SO ORDERED."

14 (Exs. X11-X12)

15 9) On August 20, 2018, the Agency filed its second Motion for Default on  
16 Respondent Edgewood Construction, LLC. On August 24, 2018, the forum issued its  
17 Interim Order Directing Agency to Supplement its Second Motion for Default of  
Respondent Edgewood Construction, LLC. The order stated:

18 "On August 21, 2018, the Agency filed a second Motion for Default against  
19 Respondent Edgewood Construction, LLC, pursuant to OAR 839-050-150 and  
20 OAR 839-050-0330. **Any responsive filings by Respondents are due August**  
**28, 2018.**

21 "After service on the Secretary of State, ORS 63.121(3)(c) requires that  
22 the Agency file, 'as part of the return of service, *the return receipt of mailing* and  
23 an affidavit of the person initiating the proceedings stating that this section has  
24 been complied with.' (emphasis added) Although the Agency provided a printout  
of the USPS Tracking Results (Agency's motion, Ex. H), the statute specifically  
requires the return receipt of mailing<sup>5</sup> to Respondent Edgewood Construction

25 <sup>5</sup> A 'return receipt' is a green postcard labeled 'PS Form 3811.' *In the Matter of Soapy's, Inc.*, 14 BOLI 86,  
87-88 (1995) (referencing a certified mail return receipt labeled as 'PS Form 3811'). See also *Ayres v.*

1 LLC, notifying it that the Agency has served the Secretary of State's Office.  
2 Before the forum can consider the Agency's second Motion for Default and any  
3 responsive filings by Respondents, the Agency will need to supplement its  
4 motion with the return receipt of mailing to Respondent Edgewood Construction  
5 LLC, notifying it that the Agency had served the appropriate documents on the  
6 Secretary of State's Office.

7 "IT IS SO ORDERED."

8 (Exs. X13-X14)

9 10) On August 28, 2018, the Agency timely filed its Case Summary. None of  
10 the named Respondents filed Case Summaries. (Ex. X15)

11 11) On September 6, 2018, the Agency filed its Supplement to Agency's  
12 Second Motion for Default of Respondent Edgewood Construction, LLC, which included  
13 the returned certified mailing referenced in the forum's Interim Order Directing Agency  
14 to Supplement its Second Motion for Default of Respondent Edgewood Construction,  
15 LLC.<sup>6</sup> (Exs. X16-X17)

16 12) The hearing began on September 11, 2018. None of the Respondents  
17 attended the hearing. Based on their failure to appear, Respondents were found in  
18 default, pursuant to OAR 839-050-0330(1)(d).<sup>7</sup> The Agency was still required to present  
19 a prima facie case of the allegations alleged in its charging document. (Hearing  
20 Record)

21 13) At the start of hearing, the ALJ orally informed the Agency and

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22 *Bd. of Parole & Post Prison Supervision, 194 Or App 429, 438, 97 P3d 1, 7 (2004) (taking judicial notice  
23 of US Postal Service procedures).*

24 <sup>6</sup> Pursuant to OAR 839-050-0150, Respondent Edgewood Construction LLC then had seven days by  
25 which to respond. Since the hearing was set to begin prior to the expiration of the seven-day response  
period, the Forum did not rule on the Agency's August 20, 2018 Motion for Default. Had the Agency  
received the requested supplemental information and been able to file it with the Contested Case  
Coordinator sooner, the Agency's Motion for Default would have been granted.

<sup>7</sup> Based on subsequent review of the record, however, Respondents Garcia, Juarez Flores and "Doe"  
were not properly served with the Agency's Formal Charges. Thus, they cannot be found in default.

1 Complainant Saldana of the issues to be addressed, the matters to be proven, and the  
2 procedures governing the conduct of the hearing. (Hearing Record)

3 14) The hearing concluded and the record closed on September 11, 2018.

4 15) On October 24, 2018, the ALJ issued a proposed order that notified the  
5 Agency that it was entitled to file exceptions to the proposed order within ten days of the  
6 order's issuance. (Ex. X18)

7 16) The Agency did not file exceptions.

### 8 FINDINGS OF FACT – THE MERITS

9 1) At all times material herein, Respondent Edgewood Construction LLC was  
10 an active domestic limited liability corporation doing business in the State of Oregon.  
11 (Ex. A3)

12 2) Respondent Edgewood Construction LLC employed Complainant from  
13 sometime in September of 2015 until his termination, on December 26, 2015.  
14 (Testimony of Complainant; Ex. A4)

15 3) At times material, Complainant worked as part of a six-person crew, he  
16 was paid at a rate of \$10.00 per hour and worked 46 to 48 hours per week. (Testimony  
17 of Complainant)

18 4) At times material, Respondent Tomas Juarez-Flores and Respondent  
19 Miguel "Doe"<sup>8</sup> were co-owners of Edgewood Construction LLC. Respondent Juarez-  
20 Flores was also the registered agent for Respondent Edgewood Construction LLC.  
21 (Testimony of Complainant; Exs. A3, A10)

22  
23  
24  
25 <sup>8</sup> At hearing, the Agency stated that it didn't have any information regarding Respondent "Doe"'s legal last name.

1           5) Complainant was hired by Respondent Roberto Garcia, who was also  
2 Complainant's direct supervisor. (Testimony of Complainant)

3           6) On or about December 15, 2015, Complainant suffered an on-the-job injury  
4 while working for Respondents. Respondent Garcia witnessed the incident. (Testimony  
5 of Complainant; Exs. A1, A4, A6)

6           7) On or about December 15, 2015, during Complainant's lunch break and  
7 after he had suffered the injury, Respondent Garcia asked Complainant to work the rest  
8 of the day. Complainant complied. (Testimony of Complainant)

9           8) At the conclusion of his work day on December 15, 2015, Complainant told  
10 Respondent Garcia that he was going to have to see a doctor. Respondent Garcia  
11 asked him to wait. Respondent Garcia told Complainant he would get him Respondent  
12 Edgewood Construction LLC's Workers' Compensation Insurance number. (Testimony  
13 of Complainant; Ex. A4)

14           9) Complainant called Respondent Garcia for at least a week, after suffering  
15 the injury, trying to get the Workers' Compensation information. Respondent Garcia  
16 ultimately told Complainant to "do whatever" and "figure it out." (Testimony of  
17 Complainant)

18           10) On December 22, 2015, Complainant went to a healthcare facility to seek  
19 medical attention for the injury. The healthcare provider was able to determine that he  
20 had suffered a work-related injury and that he should not return to work until December  
21 29, 2015. (Testimony of Complainant; Exs. A4, A6)

22  
23           ////

24           ////  
25

1 11) Complainant's healthcare provider was able to assist him in retrieving  
2 Respondent Edgewood Construction LLC's Workers' Compensation information.  
3 (Testimony Complainant; Ex. A7)

4 12) On or about December 23, 2015, Complainant called Respondent Garcia  
5 and told him that he had sought medical attention. This made Respondent Garcia very  
6 angry. (Testimony of Complainant)

7 13) On or about December 23, 2015, Respondent Garcia obtained a copy of  
8 the medical note, from Complainant, stating that Complainant should not return to work  
9 until December 29, 2015. (Testimony of Complainant; Ex. A4)

10 14) On or about the weekend of December 26, 2015, Respondent Garcia  
11 called Complainant and told him that he needed to come to work on Monday, December  
12 28, 2015. He told Complainant that if he didn't show up, he would be fired. (Testimony  
13 of Complainant; Ex. A4)

14 15) On or about December 28, 2015, Complainant received a text message  
15 from Respondent Garcia, informing him of his termination. Complainant texted him  
16 back and asked him why he was being fired when he couldn't work due to a work-  
17 related injury. Respondent Garcia did not respond. (Testimony of Complainant; Ex. A4)

18 16) On January 29, 2016, Complainant's Workers' Compensation claim was  
19 received by the Department of Consumer and Business Services. On February 11,  
20 2016, Travelers insurance accepted Complainant's claim. (Testimony Complainant;  
21 Exs. A6, A7)

22  
23 //

24 //

1 17) Shortly thereafter, Respondent Garcia discovered that Complainant had  
2 obtained Workers' Compensation for his injury and, again, was angry with Complainant.

3 (Testimony of Complainant)

4 18) On or about June 20, 2016, Complainant was declared medically stationary  
5 and able to return to work. (Testimony of Complainant; Ex. A8)

6 19) On or about June 20, 2016, Complainant called Respondent "Doe" and told  
7 Respondent "Doe" that he was able to return to work. Respondent "Doe" did not want  
8 to talk to Complainant and told him that he would not give Complainant any work  
9 because Complainant had received Workers' Compensation for his work-related injury.

10 (Testimony of Complainant)

11 20) After Complainant's termination, he struggled to pay rent and he and his  
12 family ultimately had to move out of their apartment. Complainant and his family rented  
13 a single room to live in, during this period. (Testimony of Complainant)

14 21) Complainant experienced extreme stress during this time. Complainant  
15 knew that his daughter was old enough to understand that they didn't have a place to  
16 sleep, which caused him distress. He couldn't eat well, suffered from sleeplessness  
17 and described the time period as "very bad." (Testimony of Complainant)

18 22) Despite his best efforts to find employment, Complainant could not find  
19 work again until November of 2016. (Testimony of Complainant)

20  
21 **CONCLUSIONS OF LAW**

22 1) At all times material herein, Respondents were employers, as defined in  
23 ORS 656.005(13)(a).

24 *////*



OPINION

**RESPONDENTS' LIABILITY UNDER ORS 659A.040(1) AND OAR 839-006-0117(1)(a)**

*Respondent Edgewood Construction LLC*

Pursuant to ORS 659A.040(1):

"It is an unlawful employment practice for an employer to discriminate against a worker with respect to hire or tenure or any term or condition of employment because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656[, regarding Workers' Compensation,] or has given testimony under the provisions of those laws."

In a case alleging a violation of ORS 659A.040(1), the agency's prima facie case must prove: (1) Respondent was 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 his termination. *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 74 (2015).

Complainant worked for Respondent Edgewood Construction LLC from September of 2015 until he was terminated on December 26, 2015. (Proposed Findings of Fact – The Merits #2) He worked as part of a six-person crew, making \$10.00 per hour and worked 46 to 48 hours per week. (Proposed Findings of Fact – The Merits #3) At all times material herein, Respondent Edgewood Construction LLC

1 was an active domestic limited liability corporation doing business in the State of  
2 Oregon. (Proposed Findings of Fact – The Merits #1) On or about December 15, 2015,  
3 Complainant suffered an on-the-job injury while working for Respondent. His direct  
4 supervisor, Respondent Garcia, witnessed the incident. (Proposed Findings of Fact –  
5 The Merits #5, #6) Despite knowing Complainant was injured, Respondent Garcia  
6 requested that Complainant work the remainder of the day; Complainant complied with  
7 Respondent Garcia's request. (Proposed Findings of Fact – The Merits #7) At the end  
8 of the day, Complainant told Respondent Garcia that he was going to have to seek  
9 medical attention. Respondent Garcia asked Complainant to wait and told Complainant  
10 that he would give Complainant Respondent's Workers' Compensation insurance  
11 number. (Proposed Findings of Fact – The Merits #8) Respondent Garcia never gave  
12 Complainant the information, despite Complainant's repeated attempts to obtain it from  
13 him. Respondent Garcia told Complainant to just "figure it out." (Proposed Findings of  
14 Fact – The Merits #9)

15  
16 On December 22, 2015, seven days after his injury, Complainant finally sought  
17 medical attention. Complainant's healthcare provider determined that, based on his  
18 injury, Complainant could not return to work until December 29, 2015. (Proposed  
19 Findings of Fact – The Merits #10) The healthcare provider was also able to help  
20 Complainant retrieve Respondents' Workers' Compensation insurance information.  
21 (Proposed Findings of Fact – The Merits #11) On or about December 23, 2015,  
22 Complainant informed Respondent Garcia that he had sought medical attention and  
23 gave him a copy of the healthcare provider's letter, stating that Complainant could not  
24 return to work until December 29, 2015. Respondent Garcia was very angry that  
25

1 Complainant sought medical attention. (Proposed Findings of Fact – The Merits #12,  
2 #13) Respondent Garcia called Complainant a few days later and told Complainant he  
3 needed to report to work on December 28, 2015 or he would be terminated. (Proposed  
4 Findings of Fact – The Merits #14) When Complainant failed to show up for work on  
5 December 28, 2015, Respondent Garcia terminated him via text message. (Proposed  
6 Findings of Fact – The Merits #15)

7 On or about June 20, 2016, Complainant was finally declared medically  
8 stationary and could return to work. (Proposed Findings of Fact – The Merits #18)  
9 Complainant immediately called Respondent “Doe,” an owner of Respondent  
10 Edgewood Construction LLC, and asked him for work. Respondent “Doe” told  
11 Complainant he would not give Complainant any work because Complainant had  
12 received Workers’ Compensation for his injury. (Proposed Findings of Fact – The  
13 Merits #19) The facts of this case present clear evidence of the causal connection  
14 between Respondent Edgewood Construction LLC’s discrimination against Complainant  
15 due to Complainant’s invocation or use of Workers’ Compensation benefits.  
16 Respondent Edgewood Construction LLC is liable for violation of ORS 659A.040(1) and  
17 OAR 839-006-0117(1)(A).  
18

19 *Aiders and Abettors*

20 Upon review of the record, there is insufficient evidence of service of the  
21 Agency’s Formal Charges on Respondent Roberto Garcia, Respondent Tomas Juarez  
22 Flores and Respondent Miguel “Doe.” Therefore, they cannot be held liable as aiders  
23 and abettors.  
24

25 **RESPONDENT EDGEWOOD CONSTRUCTION LLC’S LIABILITY UNDER ORS  
659A.043 and OAR 839-006-0130(1)(a)-(d)**

1 Pursuant to ORS 659A.043(1), "[a] worker who has sustained a compensable  
2 injury shall be reinstated by the worker's employer to the worker's former position of  
3 employment upon demand for such reinstatement, if the position exists and is available  
4 and the worker is not disabled from performing the duties of such position." This right to  
5 reinstatement, however, does not apply to:

- 6 (A) A worker hired on a temporary basis as a replacement for an injured  
7 worker.
- 8 (B) A seasonal worker employed to perform less than six months' work in a  
9 calendar year.
- 10 (C) A worker whose employment at the time of injury resulted from referral  
11 from a hiring hall operating pursuant to a collective bargaining agreement.
- 12 (D) *A worker whose employer employs 20 or fewer workers at the time of the  
13 worker's injury and at the time of the worker's demand for reinstatement.*

14 (emphasis added) ORS 659A.043(3)(b).

15 It is unclear from the record how many employees worked for Respondent  
16 Edgewood Construction LLC. At hearing, Complainant testified that he worked on a  
17 crew of six people. (Proposed Findings of Fact – The Merits #3) However, he had no  
18 knowledge of how many other crews there were. In a contested case hearing, "[t]he  
19 agency has the burden to establish, by a preponderance of the evidence, that  
20 respondent violated the statutes in the manner alleged." *In the Matter of Mohammad  
21 Khan*, 15 BOLI 191, 207-11 (1996). Since the employer must employ 21 or more  
22 workers in order for the right of reinstatement to apply, it is an element that must be  
23 proven by the Agency; it is not something that Respondents needed to raise as an  
24 affirmative defense. Since there was insufficient evidence, at hearing, that Respondent  
25 Edgewood Construction LLC employed 21 or more workers, Respondent is not liable for  
the failure to reinstate Complainant, under ORS 659A.043 and OAR 839-006-  
0130(1)(a)-(d).

1 **DAMAGES**

2 Pursuant to ORS 659A.850(4)(a)(B), the Commissioner of the Bureau of Labor  
3 and Industries may issue an order requiring Respondent to perform an act or series of  
4 acts reasonably calculated to “[e]liminate the effects of the unlawful practice that the  
5 respondent is found to have engaged in, including but not limited to paying an award of  
6 actual damages suffered by the complainant and complying with injunctive or other  
7 equitable relief.” Such damages may include economic damages and emotional  
8 distress damages. In its Amended Formal Charges, issued on February 9, 2018, the  
9 Agency sought economic damages of at least \$16,000.00, out of pocket expenses of at  
10 least \$200.00 and damages for emotional, mental, and physical suffering of at least  
11 \$30,000.00. At hearing, the Agency withdrew its request for an award of \$200.00 in out-  
12 of-pocket expenses.  
13

14 *Economic Damages – Lost Wages*

15 The purpose of a lost wages or “back pay” award in employment discrimination  
16 cases is to compensate a complainant for the loss of wages and benefits the  
17 complainant would have received but for the respondent’s unlawful employment  
18 practices. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238  
19 (2015). Back pay awards are calculated to make a complainant whole for injuries  
20 suffered as a result of the discrimination. *Id.* The forum must have a basis for  
21 calculating back pay before it can make an award; the forum cannot award back pay  
22 when there is a lack of evidence from which to calculate such an award. *In the Matter*  
23 *of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett*, 33 BOLI  
24 121, 158 (2014).  
25

1 The evidence at hearing was that Respondents terminated Complainant on  
2 December 26, 2015. (Proposed Findings of Fact – The Merits #2) Complainant worked  
3 46 to 48 hours per week, at \$10.00 per hour. (Proposed Findings of Fact – The Merits  
4 #3) Complainant was not able to start looking for work until he was medically stationary  
5 in June of 2016. (Proposed Findings of Fact – The Merits #18) Despite his best efforts  
6 to find employment, Complainant was not able to find new employment until November  
7 of 2016. (Proposed Findings of Fact – The Merits #22) Under Oregon law, employees  
8 who work over 40 hours per week are entitled to time and a half, for those hours over  
9 the 40 hour limit. ORS 653.261(1)(a). Even assuming Complainant worked only 46  
10 hours per week, which was the low estimate of the hours he worked each week,  
11 Complainant earned at least \$490.00 per week ((40 hours x \$10.00 = \$400.00) + (6  
12 hours x \$15.00 = \$90.00). There were 44 work weeks between Complainant's  
13 termination, on December 26, 2015, and the date he was able to obtain new  
14 employment, on or about November 1, 2016.<sup>9</sup> Based on Respondents' unlawful and  
15 discriminatory conduct, Respondent is liable for \$21,560.00 in gross lost wages, to  
16 Complainant (44 weeks x \$490.00).<sup>10</sup>

18 *Emotional Distress Damages*

19 "In determining an award for emotional and mental suffering, the forum considers  
20 the type of discriminatory conduct, and the duration, frequency, and severity of  
21 the conduct. It also considers the type and duration of the mental distress and  
22 the vulnerability of the aggrieved persons. The actual amount depends on the  
23 facts presented by each aggrieved person. An aggrieved person's testimony, if  
24 believed, is sufficient to support a claim for mental suffering damages."

25 <sup>9</sup> November 1, 2016 is an approximate date. There was no evidence, at hearing, of an exact date.

<sup>10</sup> "The Oregon Court of Appeals has previously acknowledged that the *at least* language in the pleadings provides a respondent with notice that the Agency may seek a higher amount of damages at hearing." *In the Matter of Lioness Holdings, LLC, dba Tan Republic and Peter Lamka*, 36 BOLI 227, 255 (2018) citing *Klein v. Oregon Bureau of Labor and Industries*, 289 Or App 507, 561-562 (2017).

1 *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 129  
2 (2015), 289 Or. App. 507 (2017). Complainant suffered an injury at work, an experience  
3 that is not uncommon in the construction field. Despite needing medical attention, he  
4 worked through the rest of the day, at his employer's request. Despite needing medical  
5 attention, he delayed seeking medical attention, at his employer's request. He was  
6 subsequently fired anyway. This caused Complainant significant harm.

7 The time period following Complainant's termination was extremely stressful for  
8 Complainant and he described it as "very bad." Complainant struggled to pay rent on  
9 his residence and he ultimately had to move himself and his family out of their  
10 apartment and into a single room. Complainant knew that his daughter was old enough  
11 to understand that they didn't have a place to sleep. This weighed heavily on him as a  
12 parent. Complainant experienced problems eating and couldn't sleep. (Proposed  
13 Findings of Fact – The Merits #20, #21) Complainant experienced this uncertainty and  
14 stress for almost a year. His inability to provide for his spouse and daughter was a  
15 prolonged source of stress and anxiety. Further, he was forced to uproot his family,  
16 during this stressful time, in order to keep a roof over their heads. Based on the  
17 circumstances of this case, the forum finds that \$50,000.00 is an appropriate award of  
18 emotional distress damages.  
19

## 20 ORDER

21 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
22 659A.850(4), and to eliminate the effects of **Respondent's** violations of ORS  
23 659A.040(1) an OAR 839-006-0117(1)(A), and as payment of the damages awarded,  
24 the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent**  
25

1 **Edgewood Construction LLC** to deliver to the Administrative Prosecution Unit of the  
2 Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street,  
3 Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and  
4 Industries in trust for Complainant **Rafael Saldana** in the amount of:

5  
6 1) TWENTY-ONE THOUSAND FIVE HUNDRED AND SIXTY  
7 DOLLARS and ZERO CENTS (\$21,560.00) representing economic damages  
8 Rafael Saldana incurred as a result of Respondents' unlawful employment  
9 practices;

10 2) Interest at the legal rate on the sum of TWENTY-ONE THOUSAND  
11 FIVE HUNDRED AND SIXTY DOLLARS and ZERO CENTS (\$21,560.00) from  
12 the date the Final Order is issued until paid;

13 3) FIFTY THOUSAND DOLLARS (\$50,000.00), representing  
14 damages for emotional and mental suffering Rafael Saldana experienced as a  
15 result of Respondents' unlawful employment practices; plus,

16 4) Interest at the legal rate on the sum of FIFTY THOUSAND  
17 DOLLARS (\$50,000.00) from the date the Final Order is issued until paid.

18 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
19 659A.850(4), the Commissioner of the Bureau of Labor and Industries hereby orders  
20 **Respondent Edgewood Construction LLC** to cease and desist from discriminating or  
21 retaliating against any employee based upon the employee's application for benefits or  
22 invocation or use of the procedures provided for in ORS chapter 656[, regarding  
23 Workers' Compensation,] or the giving of testimony under the provisions of those laws.

24 C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
25 659A.850(4), and to eliminate the effects of Respondent's unlawful employment practice  
found herein, the Commissioner of the Bureau of Labor and Industries hereby orders  
**Respondent Edgewood Construction LLC** to train its management personnel on the  
correct interpretation and application of the Oregon Workers' Compensation laws, either

1 through a training offered by the Bureau of Labor and Industries Technical Assistance  
2 for Employers Unit or another trainer agreeable to the Agency.

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5 \_\_\_\_\_  
6 Brad Avakian, Commissioner  
7 Bureau of Labor and Industries

8 ISSUED ON: November 16, 2018  
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