34 BOLI ORDERS

Table of Contents

In the Matter of

KARA JOHNSON dba Duck Stop Market

Case No. 30-14
Final Order of Commissioner Brad Avakian
Issued November 6, 2014

SYNOPSIS

Complainant, an individual with multiple disabilities who has been prescribed a service dog and uses service dogs to mitigate her disabilities, was not allowed to shop in Respondent's convenience store in April 2013 while accompanied by her service dogs. Respondent violated ORS 659A.142(4). The forum awarded Complainant $60,000 in damages for physical, emotional, and mental suffering.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 22-25, 2014, at the office of the Workers Compensation Board, Delta Triad Building, 1140 Willagillespie Road, Suite 38, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Cristin Casey, an employee of the Agency. Michel A. Hilt-Hayden ("Complainant") and Kara Johnson ("Respondent") were present throughout the hearing. Also present throughout the hearing were Mark Jordan, Complainant's attorney, and Meng Ouyang and Jill Featherstonhaugh, Respondent's attorneys.

The Agency called the following witnesses: Complainant; Moayyad Khoshnaw, senior Civil Rights Division investigator; Heather Murlin, president, Sunstone Service Dogs; Elizabeth Fuell, Complainant's daughter; and Kevin Lugene-Hayden, Complainant's husband.

Respondent called the following witnesses: Respondent; Charlotte Gordon, Respondent's employee; Patricia Wiest; Gordon Gill; Moayyad Khoshnaw; Heather Murlin; Complainant; and Joy St. Peter and Bill Spiry (expert witnesses).

The forum received into evidence:

a) Administrative exhibits X1 through X29;
b) Agency exhibits A1 through A30;

c) Respondents' exhibits R1 through R19 and R22.[1]

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 10, 2013, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") in which she alleged that Respondent unlawfully discriminated against her because of her disability by not allowing Complainant to enter Duck Stop Market with her service dogs in April 2013. (Testimony of Complainant; Ex. A1)

2) On October 7, 2013, after investigation, the CRD issued a Notice of Substantial Evidence Determination in which it found substantial evidence of unlawful discrimination in public accommodation against Respondent based on Complainant's disability. The CRD issued an amended Notice of Substantial Evidence Determination on March 5, 2014. (Testimony of Khoshnaw; Exs. A16, A17)

3) On March 14, 2014, the Agency issued Formal Charges and served them on Respondent, accompanied by a Notice of Hearing setting a hearing date of June 10, 2014. The Charges alleged that Respondent had unlawfully discriminated against Complainant in a place of public accommodation, based on her disability, by denying her entry with her service dogs in April 2013. The Charges requested that Complainant be awarded "at least $30,000" in damages for physical, mental and emotional distress. (Ex. X2)

4) On April 2, 2014, Respondent filed an answer to the Formal Charges in which Respondent denied that she had unlawfully discriminated against Complainant. (Ex. X8)

5) On May 8, 2014, Respondent filed a motion for summary judgment in which Respondent argued that Complainant's dogs were not "assistance animals" as defined by Oregon law and that, as a matter of law, Respondent was not required to accommodate Complainant by allowing her to bring her dogs into Duck Stop Market. On May 15, 2014, the Agency filed a response to Respondent's motion for summary judgment. (Exs. X10 through X12)

[1] Exhibit R21, a video purporting to show Complainant, unaccompanied by a dog, pushing a stroller near a Dari-Mart store, was shown to Complainant, but not authenticated or offered into evidence.

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

6) On May 12, 2014, Respondent filed an unopposed motion to postpone the hearing. On May 15, 2014, the ALJ rescheduled the hearing to begin on July 22, 2014. (Exs. X13, X15b)

7) On May 16, 2014, the Agency filed a motion for a protective order regarding certain of Complainant's medical records. On May 20, 2014, the ALJ issued a protective order regarding those records. (Exs. X15, X16)

8) On May 21, 2014, the ALJ issued an interim order denying Respondent's motion for summary judgment. That order is reprinted below:

"**INTRODUCTION**

"On May 8, 2014, Respondent filed a motion for summary judgment, accompanied by a Memorandum of Law, in which Respondent contended there are no material issues of fact in this case and that, based on the undisputed facts, Respondent should prevail as a matter of law. The Agency timely filed written objections to Respondent's motion.

"**SUMMARY JUDGMENT STANDARD**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B).* The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> ' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

The 'record' considered by the forum consists of: (1) the Formal Charges and Respondent's answer; (2) Respondent's motion, with attached exhibits; and (3) the Agency's response to Respondent's motion, with attached exhibits.

"**THE AGENCY'S CHARGES AND RESPONDENT'S ANSWER**

"**<u>The Agency's Formal Charges.</u>**

"Summarized, the Agency's Formal Charges allege the following:

- 'Complainant has visual impairment and a mental disability that substantially limit one or more major life activities and benefits from the use of a service animal to assist her mobility.
- 'In April 2013, Complainant had two service animals -- a 12-year-old dog (Panda) that was in the process of retiring as a service animal and an 18-month-old dog Contessa) that was enrolled in service dog training. Both dogs are trained to assist with psychological and visual impairment and have service identification cards.
- 'On April 17, 2013, Complainant and her husband, accompanied by Panda and Contessa, visited Respondent's store to purchase milk. When Respondent saw them entering the store, she asked them to leave. Complainant told Respondent that Panda and Contessa were service dogs. Respondent asked to see their service identification cards, then asked Complainant again to leave the store.
- 'On April 18, 2013, Complainant returned to Respondent's store in the company of her daughter and one of her service dogs.[3] Before Complainant entered Respondent's store, one of Respondent's employees stopped her and told her they were not allowed to enter the store because of the events of the previous day.
- 'On April 19, 2013, Complainant again visited Respondent's store, this time accompanied by Heather Murlin, President and Director of Training at Sunstone Service Dogs, and Contessa, who was enrolled in training at Sunstone. Respondent again did not allow Complainant into the store.
- 'Respondent's actions on April 17, 18 and 19, 2013, violated ORS 659A.142(4) and OAR 839-006-0300(2) by imposing a distinction, discrimination or restriction on Complainant because of her disabilities.

"**Respondent's Answer.**

"Summarized, Respondent alleges the following in her answer:

- 'Due to lack of knowledge and information, neither admits nor denies that Complainant had a disability.
- 'Denies that Panda and Contessa were service animals.
- 'Denies that Respondent told Complainant that service animals were not allowed in Respondent's store.
- 'Admits that Complainant told Respondent on April 17, 2013, that her dogs were "service dogs" and that Respondent asked to see their identification cards. Denies that Respondent asked Complainant and her husband to leave Respondent's store.
- 'Admits the actions alleged to have taken place on April 18, 2013.
- 'Admits that Complainant, Murlin, and one dog came to Respondent's store on April 19, 2013, but denies that the dog was a service animal or that Complainant and Murlin were denied access to Respondent's store.

[3] The Formal Charges do not specify which dog accompanied Complainant.

"DISCUSSION

"Respondent, in her answer, does not specifically admit that Complainant, Panda and Contessa were denied access to Respondent's store on April 17, 2013. However, Respondent's Memorandum of Law, at page 4, lines 17-18, states '[i]t is undisputed that Respondent denied Panda and Contessa access to [Respondent's] store on April 17, 2013.' Earlier in the same Memorandum at page 2, lines 3-5, Respondent's counsel states that, on April 17, 2013, 'Respondent approached Complainant and her husband as they were entering the store and stated to Complainant: 'Ma'am, I'm sorry but you need to take the dogs out.'

"For the purpose of evaluating Respondent's motion, and based on the allegations in the Formal Charges, Respondent's answer, and the above quoted statements, the forum finds that the following facts are undisputed: (1) At times material herein, Respondent was a 'place of public accommodation' within the meaning of ORS 659A.142(4); (2) Panda was a retired or retiring service dog; (3) Contessa was a service dog in training; (4) Complainant's dogs were denied access to Respondent's store on April 17, 2014; and (5) Complainant, accompanied by her daughter and either Panda or Contessa, was denied access to Respondent's store on April 18, 2014.

"Respondent argues that she is entitled to summary judgment as a matter of law, reasoning as follows:

> '[B]ecause Panda was retired and Contessa was in training, the two dogs were in fact not assistance animals as defined by Oregon law. Consequently, by denying the dogs' access to the store, Respondent did not deny Complainant access to her store on April 17, 2013, nor did Respondent discriminate [against] Complainant because of her alleged disabilities.'

In support of this argument, Respondent relies on OAR 839-006-0345(1), which provides that '"[a]ssistance animal"' means a dog or other animal designated by administrative rule that has been individually **trained** to do work or perform tasks for the benefit of an individual.' (Emphasis added) Respondent contends that the inclusion of the word 'trained' in the definition of 'assistance animal' in OAR 839-006-0345(1) implicitly excludes any dog that is retired or has not been fully trained.

"Respondent's argument fails because OAR 839-006-0345(1) is not applicable to this proceeding and because the applicable relevant definition of 'assistance animal'[4] does not exclude retired or retiring assistance dogs or assistance dogs in training.

[4] The Formal Charges use the term "service animals," the term used in the ADA in reference to dogs trained to assist persons with disabilities. Respondent's motion uses the term "assistance animals," the term used in ORS 659A.143 and OAR 839-006-0345 in reference to dogs trained to assist persons with disabilities.

"**Inapplicability of OAR 839-006-0345(1)**

"Neither OAR 839-006-0345 nor ORS 659A.143, the statute it interprets, existed at the time of the alleged discrimination. The Oregon Legislature enacted SB 610 in its 2013 regular session. SB 610 went into effect on June 26, 2013, and was renumbered as ORS 659A.143. Among its provisions, ORS 659A.143 defines 'assistance animal' in the context of 'place of public accommodation,' regulates inquiries that can be made about assistance animals, and gives a person with a disability the right to be accompanied by an assistance animal. In response, BOLI promulgated OAR 839-006-0345(1)-(12), which is virtually identical to ORS 659A.143 in its language, differing only in paragraph numbering. OAR 839-006-0345 went into effect until December 30, 2013. There is no language in either the statute or rule to show that they were intended to be applied retroactively. Based on the above, the forum concludes that they do not apply to this proceeding.

"**Panda and Contessa were both 'service animals.'**

"The Formal Charges allege that Respondent violated ORS 659.142(4) and OAR 839-006-0300(2) through her alleged actions. Both ORS 659.142(4) and OAR 839-006-0300(2) were in effect in April 2013. ORS 659.142(4) provides that '[i]t is an unlawful practice for any place of public accommodation, resort or amusement as defined in ORS 659A.400, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is an individual with a disability.' OAR 839-006-0300(2) provides, in pertinent part, that 'Discrimination on the basis of disability by places of public accommodation is an unlawful practice and the Civil Rights Division of the Bureau of Labor and Industries has the authority to protect the rights of individuals with disabilities through the enforcement of ORS 659A.142(4).' Neither the statute nor the rule contains any reference to service or assistance animals. Accordingly, the forum turns elsewhere for guidance.

"ORS 659A.139 provides that 'ORS 659A.103 to 659A.144 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended.' In April 2013, Title III of the ADA, at 28 C.F.R. §36.104, contained the following definition of 'service animal:'

> '*Service animal* means any dog that is individually **trained** to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition. The work or tasks performed by a service animal must be directly related to the individual´s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks,

> alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. The crime deterrent effects of an animal´s presence and the provision of emotional support, well-being, comfort, or companionship do not constitute work or tasks for the purposes of this definition.' (Emphasis added)

"The ADA contains no accompanying definition of 'trained' to guide the forum in determining whether 'trained' should be given the limited definition sought by Respondent, i.e. a dog that has completed training and is not retired, or whether the term should be interpreted more expansively to include dogs with the 'training' status of Panda and Contessa in April 2013. Since the word 'trained' is a word of common usage, the forum gives it the plain, natural and ordinary meaning contained in *Webster's Third New Int'l Dictionary* (unabridged edition 2002), reprinted below:

> '**1 :** having undergone a course of training <we employ *trained* personnel> <a government-*trained* physician> **2 :** formed, shaped, or disciplined by training **:** qualified or conditioned by training <a trained mind> <a *trained* nose> <readers *trained* to be critical>' *Webster's,* at 2424.

"In the context of this case, although the first definition implies that training must be complete for a dog to be 'trained,' the second definition is not so limiting. The legislative policy expressed in ORS 659A.103(1), printed in pertinent part below, assists the forum in choosing the correct definition:

> 'It is declared to be the public policy of Oregon to guarantee individuals the fullest possible participation in the social and economic life of the state * * * to use and enjoy places of public accommodation * * * without discrimination on the basis of disability.'

"Based on this policy statement and the ADA's failure to exclude dogs that (a) have been trained but are retired or retiring or (b) dogs that are undergoing training but are not yet fully trained from its detailed definition of 'service animal,' the forum adopts *Webster's* second definition. Both Panda and Contessa fit within that definition in April 2013. The forum also notes that Panda, as a fully trained 'service animal,' also fits within *Webster's* first definition.

"**Conclusion**

"Respondent's motion for summary judgment is denied in its entirety."

The ALJ's ruling on Respondent's motion for summary judgment is SUSTAINED. (Ex. X17)

9) On May 21, 2014, after the ALJ issued his interim order denying Respondent's motion for summary judgment, Respondent e-mailed a courtesy copy of a reply to the Agency's response to Respondent's motion for summary judgment to the ALJ, indicating that a hard copy of the reply would be mailed the next day. On May 22, 2014, the ALJ issued an interim order stating that the forum declined to consider Respondent's reply. On June 2, 2014, Respondent filed another motion asking the forum to reconsider Respondent's motion for summary judgment, which the ALJ declined to consider. (Exs. X18, X19, X20)

10) On June 19, 2014, Respondent requested another postponement based Respondent's June 10 receipt of a summons for jury duty in Lane County Circuit Court on July 18, 2014. On June 23, 2014, Agency filed objections to Respondent's motion. On June 24, 2014, the ALJ issued an interim order that concluded:

> "Before the forum will consider granting Respondent's motion to postpone the hearing, Respondent must provide documentary evidence that (1) she has asked to have her jury service either deferred or excused and (2) that deferral or excuse has been denied. Until then, the hearing remains set to begin at 9:00 a.m. on July 22, 2014."

(Exs. X23, X24, X25)

11) On July 9, 2014, the ALJ issued an interim order changing the hearing location from BOLI's Eugene office to the Eugene offices of the Workers Compensation Board. (Ex. X28)

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

13) At 8:30 a.m. on July 24, 2014, the ALJ made an onsite visit to Duck Stop Market. Also present were: Respondent, Complainant, Elizabeth Fuell, Cristin Casey, Jill Fetherstonhaugh, Meng Ouyang, Mark Jordan, and BOLI ALJ Kari Furnanz. The ALJ observed Duck Stop Market's premises and the surrounding environment, measured the distance from Eugene Mobile Village RV to Duck Stop Market, and took photographs to document the visit. The ALJ also noted that there was a white Lexus SUV with Oregon license plate "911FXN" parked outside Duck Stop Market during the visit. Those photographs have been included in the record as Exhibit ALJ1, together with a description of their contents. When the hearing reconvened, the ALJ summarized the observations he made during the onsite visit on the record and gave the participants an opportunity to comment on the accuracy of his observations. (Statement of ALJ; Exhibit ALJ1)

15) After the onsite visit and during a break in the hearing that same day, the ALJ took a walk around the building in which the hearing was held. During the walk, the ALJ observed Respondent getting out of a white Lexus SUV with Oregon license plate "911FXN" that was parked adjacent to the hearing location. (Observation of ALJ)

16) During the hearing, Respondent called Bill Spiry as an expert witness. The Agency objected to Spiry's testifying as an expert witness after Spiry stated his qualifications to testify as an expert witness, contending that Spiry was not qualified as an expert witness. The forum granted the Agency's objection and Spiry was not allowed to testify. Respondent's counsel was given an opportunity to make an oral offer of proof concerning what Spiry's testimony would be if he had been allowed to testify. (Statements of ALJ, Casey, Fetherstonhaugh)

17) During the hearing, different persons were designated as Complainant's "caregiver," including Heather Murlin, Andrew Murlin, Elizabeth Fuell, and Mark Jordan. (Entire Record)

18) Panda accompanied Lugene-Hayden to the hearing and sat at his feet while he testified. Under cross examination, Lugene-Hayden testified that Panda was not his service animal and that he brought Panda because he "was told to." (Testimony of Lugene-Hayden; Observation of ALJ)

19) At the close of the Agency's case-in-chief, Respondent moved for a directed verdict and requested the opportunity to make an oral or written argument in support of the motion. The ALJ regarded Respondent's motion as a motion to dismiss. Respondent's counsel was given several minutes to argue her motion, and the Agency was given equal time to argue against the motion. After hearing the arguments, the ALJ denied Respondent's motion. (Statements of ALJ, Casey, Fetherstonhaugh)

20) On October 9, 2014, 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. Respondent and the Agency both filed exceptions on October 20, 2014. The exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Duck Stop Market ("DSM"), a convenience store located at 4791 Franklin Blvd., Eugene, Oregon, was an assumed business name owned and operated by Respondent as a sole proprietorship. (Testimony of Johnson; Ex. A7)

2) Respondent has an OLCC license for DSM and a license from the Oregon Department of Agriculture ("ODA") to prepare and serve food at DSM. DSM is classified as a "food establishment" by administrative rules promulgated by the Oregon Health Authority.[5] DSM could be fined and/or shut down by the ODA if Respondent allowed a

[5] *See* Oregon Health Authority administrative rules, Chapter 150, subpart 1-201.10.

dog on the premises that is not a service dog and Respondent had been told this by the local health inspector prior to April 17, 2013. (Testimony of Johnson; Observation of ALJ; Ex. ALJ1)

3) Complainant is visually impaired and can only see for 6-10 feet.[6] She recognizes people by their "blobs" and "shapes." She wears dark glasses because her eyes are light sensitive and light causes her headaches to escalate. Her Oregon driver's license was revoked in March 2005 because she could not pass DMV's eye exam and she has not driven since then. Because she has no depth perception, she is easily frightened while riding in the front seat of a vehicle and screams a lot due to her visual misperceptions. At hearing, she was able to read exhibits with the aid of magnifiers, although she was apparently able to read the printing on several exhibits by holding them a few inches away from her face. She carries a collapsible white and red "assistance stick" that she sometimes uses to assist her when walking. She is also hard of hearing and wears one hearing aid. At age 17, Complainant was diagnosed as mentally ill and has since been diagnosed as having PTSD, agoraphobia,[7] and schizophrenia. At the time of hearing, she was taking 23 separate daily medications for these three conditions and had to take medications every two hours. Throughout the hearing, Complainant had her assistance stick, wore dark sunglasses, and had Contessa with her, in addition to one or more caregivers.[8] (Testimony of Complainant, Fuell; Observation of ALJ)

4) Schizophrenia causes Complainant to see and hear things that aren't really there. Agoraphobia makes it difficult for Complainant to leave her house[9] and she is "heavily sedated" when she leaves her house. PTSD and agoraphobia make it unpleasant for her to look at people, meet new people, or talk to people in public. In particular, PTSD gives her "trouble in public." Because of her mental conditions, she has panic attacks while awake and while sleeping. She usually keeps her shades drawn at home. However, she is able to leave her home and take the bus several times a week with Contessa, her service dog, to attend appointments. On days when Complainant has to leave home and take the bus, it takes her about six hours of extensive preparation to prepare herself to go out because of her mental conditions. (Testimony of Complainant)

5) In 2007, a Psychiatric Mental Health Nurse Practitioner ("PMHND") prescribed "one service dog" for Complainant for "medical and mental impairments." At

[6] As a more concrete example of the extent of her visual impairment, Complainant testified that she has to get her face within three inches of her toilet to see if it is clean. At hearing, when asked to read Ex. A24, Complainant testified she was only able to read it by using one of the magnifiers she brought to the hearing.

[7] Complainant testified she was diagnosed with agoraphobia in 2010.

[8] *See* Finding of Fact #18 – The Merits.

[9] Complainant testified that at one point in 2010-2011 she was tying furniture to her door handles so that she could not go out and no one could come into her house. She also testified that she began getting treatment for this condition in 2011.

that time, Complainant owned Panda, a dog who was born in her household. At her home, Complainant trained Panda to perform several mitigation tasks to assist her with her disabilities. Prior to April 2013, those tasks included: (a) "covering" and chest compression when Complainant had a PTSD attack; (b) waking Complainant at night when she has nightmares and calming her down; (c) dropping on Complainant's chest and getting her to breathe again when Complainant stops breathing at night; and (d) keeping Complainant from running into street curbs and objects in her house. Since 2007, Complainant's disabilities have worsened so that Complainant now needs a more highly trained and sophisticated dog than Panda. Panda, who was 13 years old at the time of hearing, can no longer perform her mitigation tasks on a fulltime basis because of her age. In addition, Panda began having seizures two years ago.[10] (Testimony of Complainant; Ex. A24)

6) On December 8, 2011, Marilyn Krueger, PMHND, wrote a prescription for Complainant that read: "Ms. Hilt-Hayden, due to mental disorders and visual impairment, must be allowed to have her service dog with her at all times." On January 5, 2012, Krueger wrote and signed another letter that read as follows:

> "To whom it may concern,
> "My client Michel A. Hilt-Hayden being determined to have an irreversible disability as defined under the guidelines of the DSMVIIII. Michel's care team and I have determined that the only suitable option to mitigate her disability/s is through an appropriate paring (sic) with a service dog. There is no other equipment or combination of equipment that has the ability to assist my client to the fullness of her disability.
>
> "We have located a service dog program in Oregon that meets her needs. Oregon Assistance Dogs; who are a non-profit service dog training organization. Service dogs as well as all related supplies, training, and travel are to be billed as durable medical equipment to the client's insurance.
>
> "Oregon Assistance dogs fees total 2,130 which includes the dog, training, shots, vests, spay/neuter, and all other costs for a dog previous to being placed with a disabled client."

(Testimony of Complainant; Ex. A24)

7) In 2012, Heather Murlin worked for Oregon Assistance Dogs ("OAD") as an apprentice trainer under the supervision of OAD's director. At that time, she had eight years of experience working with service dogs. She met Complainant through the Willamette Valley Assistance Dog Club. After OAD's director was fired in early 2012, Murlin became OAD's interim director. In early 2012, Complainant applied to OAD for a service dog and met Contessa, a collie dog born in September 2011 who was owned

[10] Complainant credibly testified that she stopped feeding Panda commercial dog food after he began having seizures, with the result that Panda's health has improved "dramatically."

and being trained by OAD. Contessa immediately bonded with Complainant and was "matched" with her. About the same time, Murlin started Sunstone Service Dogs ("SSD"), a non-profit corporation that trains service dogs, providing training specific to each client's disabilities, and SSD took over all of OAD's assets and liabilities. Murlin has been SSD's director of training since SSD's inception. In exchange for agreeing to serve as treasurer on SSD's Board of Directors and as SSD's Finance Director/bookkeeper, Murlin agreed that Complainant did not have to pay for Contessa. Since then, Complainant and Murlin have been the primary operators of SSD and have become good friends. Murlin operates SSD from her home in St. Helens and spends a considerable amount of time talking on "Skype" with Complainant. (Testimony of Murlin, Complainant)

8) SSD maintains ownership of its dogs until they are three years old. At the time of hearing, Complainant did not yet own Contessa. (Testimony of Murlin, Complainant)

9) In Oregon, there are no legal standards that specify the training a dog must undergo to become a "trained" service dog. Nationally, an organization called Assistance Dogs International ("ADI") sets the industry standards and membership in ADI is considered a desirable goal for service dog trainers. SSD has applied for and is actively seeking ADI membership, and Murlin has attempted to adhere to ADI industry standards since SSD started. (Testimony of Murlin, St. Peter)

10) Dogs in SSD's service dog training program train for 24 months before they "graduate." SSD's standard program involves the following training:

- Basic potty, crate, and manners training, along with an evaluation of the puppy's temperament for suitability as a service dog.
- At eight weeks of age, a puppy begins a six week course called "Puppy Star" training.
- After "Puppy Star" training, more detailed training is conducted, including skills that will help the dogs when they are out in public. At the conclusion of that training, each dog is required to pass the "CGC" test (Canine Good Citizen), a test designed by the American Kennel Club that has 10 different subtests. Among other things, this training prepares dogs for public circumstances that may scare them, e.g. people with skateboards, bicycles, hats, or umbrellas, or children pulling their ears. This training involves three classes a month and is attended by people with disabilities who are training their own dogs ("tandem training"), and puppy raisers who are training dogs for SSD's clients who unable to participate in the training at that point. The CGC test is usually taken when a dog is about eight months of age.
- "Operant" conditioning.
- Training for and taking two Public Access Tests ("PAT") that are designed by ADI.
- Training for and passing the Community Canine test.

In all, SSD's 24 month training program includes 72 classes that last two to three hours each, held three times a month, in classroom settings and on field trips. (Testimony of Murlin)

11) Contessa is a 50 pound collie dog who was born in September 2011. OAD acquired Contessa on December 21, 2011. Per OAD's usual procedures, Murlin temperament tested Contessa and quarantined her in Murlin's house for two weeks. Contessa lived with Murlin for several months, during which Contessa learned crate training, underwent "socialization training" with six other dogs living at Murlin's house, learned to eat around other dogs without being defensive about her food, learned to go to the bathroom when cued, and learned how to walk on a "loose leash." (Testimony of Murlin)

12) When Contessa left Murlin's house, she lived with volunteers associated with SSD for several months while she was simultaneously being gradually acclimatized to Complainant's environment. The volunteers taught Contessa how to "walk nicely beside a wheelchair," how to open cupboards, started to teach her how to turn on lights, and taught her not to bark,[11] how to "target" items she was asked to "target," and how to respond to verbal directions. (Testimony of Murlin)

13) Complainant began tandem training with Contessa in preparation for the CGC test when Contessa was first matched with her in early 2012. In May 2012, Contessa was transitioned into Complainant's home and has lived with Complainant ever since. From May 2012 until Contessa's "graduation" on June 25, 2014, Complainant and Contessa continued SSD's regular course of training, which included attending two three-hour class sessions a month and going on field trips with SSD trainers and other SSD teams in training. (Testimony of Complainant, Murlin)

14) After failing the CGC test the first time she took it because she "shied," Contessa passed the CGC test in December 2012 and Public Access Tests ("PAT") in September 2013 and June 2014. She had the skills to pass the first PAT test before September 2013. (Testimony of Complainant, Murlin)

15) Panda has continued to live with Complainant since Contessa moved into Complainant's house. Contessa has learned skills from Panda by imitating Panda whenever Panda has performed work that mitigates Complainant's disabilities. At the time of hearing, Complainant needed both of her dogs present at night and in a hospital situation, as when she had all her teeth extracted.[12] At the time of hearing, Contessa was Complainant's "day dog" whom Complainant uses "out and about" during the day and Panda was her "night dog," which gives Contessa "a rest" and keeps Panda "feeling special." (Testimony of Complainant)

[11] Murlin testified that collies tend to bark when they are upset.

[12] Complainant gave this answer in response to a question on direct examination regarding whether there were situations in which she needs both Contessa and Panda present.

16) Complainant, her husband, Kevin Lugene-Hayden, and her son Brad Hilt, moved to Eugene Mobile Village RV Park ("EMV") on April 17, 2013, where they lived in their 34' Mallard recreational vehicle ("Mallard"). The Mallard has a small refrigerator that will only hold a three day stock of perishable food. At that time, Complainant, Lugene-Hayden, and Hilt drank about a gallon of milk per day. They lived at EMV for eight weeks before moving to another location. (Testimony of Complainant, Lugene-Hayden, Fuell; Ex. A29)

17) Lugene-Hayden, Complainant's husband, has PTSD and problems walking because one of his legs is longer than the other. He had PTSD in April 2013. (Testimony of Complainant, Lugene-Hayden)

18) In April 2013, and continuing to the present day, Brad Hilt, Complainant's son, has been Complainant's and Lugene-Hayden's daily "brains and brawn" caregiver. Elizabeth Fuell, Complainant's daughter, has been their "administrative" caregiver. (Testimony of Complainant; E. Fuell)

19) Although Contessa was still "in training" in SSD's program in April 2013, she was trained at that time to perform specific tasks to mitigate Complainant's impairments that are described in Findings of Fact ##3 & 4 – The Merits. Those tasks included the following: (1) "covering" and chest compression when Complainant had a PTSD attack; (2) assisting Complainant to walk through crosswalks, including pushing the "walk" button; (3) leading Complainant to a vehicle that she was to ride in; (4) locating bus stops; (5) alerting Complainant to traffic; (6) alerting Complainant to take her medication every two hours; (7) helping Complainant breathe properly when Complainant suffers panic attacks in her sleep; (8) opening and closing doors; (9) providing "tactile" stimulation; and (10) helping Complainant avoid objects while walking. At that time and since then, when Complainant has ridden a public bus, Contessa has been the only dog accompanying her. (Testimony of Complainant, Murlin)

20) EMV is located on the west side of Franklin Boulevard, with its driveway connected directly to Franklin. At that location, Franklin is a two-way, two-lane street that is approximately 40 feet across, including a ten foot wide paved shoulder on both sides of Franklin. At EMV's driveway exit onto Franklin, the posted speed limit is 40 miles per hour. DSM is on the east side of Franklin, across the street from EMV, and approximately 80 feet north of EMV's driveway entrance. There is a sign posted immediately south of DSM that changes Franklin's speed limit to 30 miles per hour for vehicles driving north. The front door of DSM is approximately 100 feet from the driveway entrance to Eugene Mobile. (Observation of ALJ; Ex. ALJ1)

21) On April 17, 2013, Complainant, accompanied by Contessa, met Lugene-Hayden, who was accompanied by Panda, as she was returning on foot from a doctor's appointment. Both dogs were on leash. Contessa was wearing a blue SSD service dog

in training vest,[13] as well as a training harness called a "pre-harness" and a "haltie," a type of soft muzzle.[14] Complainant told Lugene-Hayden they needed milk and Lugene-Hayden told her that there was a grocery store right across the street from their new home. Together, they crossed Franklin to buy milk at DSM, accompanied by Contessa and Panda. (Testimony of Complainant, Lugene-Hayden; Ex. ALJ1)

22) Lugene-Hayden had previously been in DSM by himself to purchase MD 20-20, a type of fortified wine. Lugene-Hayden uses Panda to assist him with his PTSD, but there is no evidence in the record that he has been prescribed a service dog or that he was accompanied by Panda on his previous visits to DSM. (Testimony of Complainant, Respondent; Ex. A8; Entire record)

23) On April 17, 2013, Complainant and Lugene-Hayden entered DSM's front door with Contessa and Panda, with the intent of buying milk, and began to walk down the aisle to the right of the door. Panda remained under Lugene-Hayden's control during Complainant's and Lugene-Hayden's visit to DSM. Charlotte Gordon was working as a store clerk at DSM that day. Respondent, who had been working at her work station located in the back of DSM, saw Complainant and Lugene-Hayden on her security monitor, came into the front of DSM and told Complainant that she could not bring her dogs into the store. Complainant responded "I'm sorry; they're service dogs – why can't they come in? They're allowed in by law." Respondent replied "no dogs are allowed in this facility" and told Complainant that she and Lugene-Hayden needed "to leave." When Complainant asked again why her service dogs weren't allowed in, Respondent told her there was a sign outside that said "no service dogs – go read it." Complainant read the sign, then went back in the store and told the lady to read the sign, as it read "service animals welcome." Respondent told Complainant "I can't let them in" and told Complainant that there was a drive-in window Complainant could use. Respondent also told Complainant that she and Gordon could hold the dogs outside while Complainant shopped. At some time during the conversation, Complainant told Johnson that Contessa and Panda were service dogs and that Panda was "retired" and Contessa was "in training." At the conclusion of this conversation, Complainant stayed outside with Contessa and Panda while Lugene-Hayden went into DSM. Lugene-Hayden did not buy milk while in DSM.[15] (Testimony of Complainant, Respondent)

24) Except for Complainant's dogs, Respondent has never had a dog in her store during the entire 12 years she has owned DSM. (Testimony of Respondent)

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[13] Exhibit ALJ1 contains several pictures of Contessa's "service dog in training" vest. The words "Sunstone Service Dogs" and "Service Dog in Training" are conspicuously printed in gold letters on the vest.

[14] Exhibit ALJ1 has two pictures of Contessa wearing the same "haltie" she wore on April 17, 2013.

[15] On cross examination, Complainant testified as follows:

Q: "So your husband was able to make his purchases that day, correct?"

A: "He did not get the milk."

25) At all times material, a sign was conspicuously posted in a front window of DSM that read:

"**PETS ARE NOT ALLOWED IN FOOD ESTABLISHMENTS**

Oregon law prohibits all animals, in grocery stores, restaurants, and other food establishments. Service animals are trained working animals, NOT pets. The Americans with Disabilities Act (ADA) authorizes the use of service animals in a food establishment ONLY for the benefit of individuals with disabilities.

SERVICE ANIMALS WELCOME

People with disabilities may bring service animals into all areas where customers are normally allowed to go. A service animal is a dog that is individually trained to do work or perform tasks for people with disabilities. Dogs whose function is to provide comfort or emotional support DO NOT qualify as service animals according to the ADA."

(Testimony of Complainant, Respondent; Observation of ALJ; Ex. ALJ1)

26) This was the first time Complainant had ever been "disallowed" entry with her service dogs in a place of public accommodation. She felt angry and insulted, and became really upset and "was maxing out" from her PTSD. She left DSM to control her anger. (Testimony of Complainant)

27) Respondent maintains a log book at DSM in which Respondent and her employees make handwritten notes about significant events. Respondent wrote the following in DSM's log book on April 17, 2013: "New people across street – one I ordered MD 20 20 for. Came in with wife & 2 service dogs. Told them no dogs in store, wife not happy – Too BAD!" (Testimony of Respondent, Khoshnaw; Ex. A8)

28) The next closest grocery store to DSM is a "Dari-Mart" located .5 miles north of DSM. Dari-Mart is on the same side of the street as EMV. There is a bus stop for north-proceeding passengers located immediately north of DSM on the east side of Franklin Blvd. The closest crosswalk to EMV that crosses Franklin Blvd. is .4 miles north. (Testimony of Complainant; Observation of ALJ; Ex. ALJ1)

29) After the incident with Complainant on April 17, Respondent told her employees about the incident and told them that she did not want Complainant's dogs in DSM. (Testimony of Respondent)

30) On the evening of April 17, 2013, Complainant completed an online BOLI "Civil Rights Division Public Accommodation Discrimination Questionnaire" describing her experience that day at DSM. (Testimony of Complainant; Ex. A4)

31) On the evening of April 17, Complainant asked Fuell to come over and help her organize some paperwork about service dogs to take to DSM and to accompany her to DSM the next day as an observer. (Testimony of Complainant)

32) At all times material, DSM's front door opened inward, with the door hinged on the right side. The door opens to a maximum angle of about 110 degrees. There is a tall, moveable candy rack located several feet behind the door. (Observation of ALJ; Ex. ALJ1)

33) On April 18, Complainant and Fuell visited DSM, accompanied by Contessa, who wore her SSD service dog in training vest. Complainant asked Fuell to bring her cell phone so she could make a video recording, if necessary, to help Complainant recall what happened. Complainant also intended to buy milk during the visit. Respondent was not at DSM that day and Cathy Bailey[16] was the store clerk on duty. Fuell entered DSM first to hold the door open for Complainant and Contessa,[17] then stood behind the door with DSM's candy rack at her back. As Complainant entered DSM with Contessa, Bailey approached Complainant, put her hand on the door, and stood in a position that prevented Fuell from moving out from behind the door. In a loud voice, Bailey told Complainant "You're not welcome here; your dog needs to leave." At that point, Complainant's PTSD "kicked in." Complainant told Bailey that Contessa was a service dog and Fuell said she was recording the conversation.[18] Bailey stated that she didn't care, that they needed to leave, and threatened to call the police if Complainant and Fuell did not go outside. In response, Complainant and Fuell said they would call the "cops." Fuell then called the sheriff's department, and Complainant and Fuell waited inside Fuell's car that was parked on the south side of DSM's parking lot. While they waited, someone came out from DSM and told them "No matter what happens, you are 86'd off the property," which Complainant understood to mean that she was not allowed to come into DSM under any circumstance. Three hours later, two deputies showed up. In the interim, Respondent and Complainant had separate phone conversations with Gordon Gill, the sergeant supervising the patrol shift, concerning the ongoing incident. Complainant told Gill she wanted access into DSM and Gill explained to Complainant that Respondent did not want Complainant on the property. When the deputies arrived, Complainant and Fuell told the deputies that they had gone into DSM to buy milk and had been told to leave and that they were not welcome. The deputies took Complainant's handouts and gave them to Bailey, then asked Complainant and Fuell to leave, asking Complainant if she could come back the next day and meet with Respondent and see if they could work out "an amicable solution." The deputies also asked Complainant not to return before she met with Respondent the next day. In all, Complainant spent about four hours at Duck Stop Market on April 18 and "still didn't get" her milk. (Testimony of Complainant, Fuell)

[16] Respondent did not call Bailey as a witness and offered no explanation for not calling her.

[17] Fuell testified that when she accompanies Complainant to stores, she usually enters the store first because of Complainant's visual impairment, then tells her when it is alright to enter.

[18] The Agency did not offer the recording into evidence and offered no explanation for not offering it.

34 BOLI ORDERS

34) The following handwritten entry appears in Respondent's store log for April 18, 2013: "Next drama! DOG & BLIND LADY & daughter come in refuse to leave – call cops on me! 2 hours later – sherriff (sic) (2 of them show up.) HOLLY SHIT!!" (Testimony of Khoshnaw; Ex. A8)

35) The April 18 incident at DSM upset Complainant. In her words, "I was starting to get perturbed" and she began to wonder "how many others are being treated this way?" Complainant decided the solution was to come back the next day with Murlin in an attempt to "educate" Respondent about service dogs. That evening at home, she completed a second online BOLI "Civil Rights Division Public Accommodation Discrimination Questionnaire" describing her experience on April 18 at DSM. (Testimony of Complainant, Fuell; Ex. A4)

36) On April 19, 2013, Complainant and Murlin visited Cesar Chavez Elementary School with Contessa and Liberty, another SSD dog, conducting dog safety classes for students from 9 a.m. to 3 p.m. At Complainant's request, Murlin agreed to go with her to DSM after their Chavez visit to educate Respondent about service dogs. Complainant and Murlin went to Complainant's house and called DSM. They were told that Respondent had just left, but would be back soon. After waiting a few minutes, they left Liberty in the Mallard and walked to DSM with Contessa, who wore her SSD "service dog in training" vest and a green and black body harness. Respondent and Cathy Bailey met Complainant and Murlin outside and stood in front of DSM on the paved walkway on the south side of DSM's front door, with their arms crossed. Complainant and Murlin stood a few feet south of Respondent and Bailey on the same paved walkway. Complainant felt that Respondent and Bailey were blocking the doorway and felt "unwelcome." During the subsequent conversation, Complainant told Respondent she was there to try and work on an amicable solution and had brought some ADA materials about service dogs for Respondent to read. Respondent agreed to read the materials and get back to Complainant within a week. During the meeting, Murlin also explained to Respondent that Contessa was a service animal. In all, the meeting lasted about 20 minutes. During the meeting, Complainant did not ask or attempt to enter DSM[19] and Respondent did not invite Complainant and Murlin into the store because of Respondent's desire to keep the meeting private, away from customers who were in the store. Respondent told Complainant and Murlin that dogs were not allowed in DSM and that Complainant was not allowed back on the property until Respondent determined what to do with Complainant's service dogs. (Testimony of Complainant, Murlin; Exhibit ALJ1; Stipulation of Respondent, Complainant)

37) On April 22, 2013, Respondent called Complainant and said that she had read the paperwork Complainant had given to her. Respondent asked Complainant "what service is your dog trained to provide for you?" Complainant said "for mental disorder and visual impairment." Respondent told Complainant that she had to let Complainant into DSM, and that she would let Complainant shop at DSM so long as

[19] Complainant did not testify that she visited DSM on April 19 for any other purpose than meeting with Respondent and giving Respondent the ADA materials. Neither Complainant nor Murlin testified that they attempted to enter DSM on April 19.

Complainant was only accompanied by one dog.[20] When Complainant went home, she told her family that they could shop at DSM and told Lugene-Hayden that he was "more than welcome to go across and do our shopping." (Testimony of Complainant, Respondent, Khoshnaw; Exs. A8, A12)

38) Prior to April 22, 2013, Complainant would have shopped at DSM daily, had she been allowed to do so. (Testimony of Complainant)

39) Complainant did not return to DSM after April 22 because she believed Respondent was unlawfully restricting her access by limiting her to only one dog.[21] However, the rest of her family elected to shop at DSM.[22] (Testimony of Complainant)

40) Complainant experienced "trauma" from not being able to take Contessa or Panda into DSM and subsequently "went through a stage where the world hated her and she couldn't do nothing." Complainant became even more reticent about leaving her home, only leaving when she had to, and it took "weeks to get [Complainant] back to what we called normal at the time." (Testimony of Complainant, Fuell)

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[20] Respondent testified that she was "satisfied" with this answer, although she still did not believe that Complainant's dogs were "service animals."

[21] Complainant's testimony on this issue was as follows:

Q: "Ms. Johnson called you on the 22nd and told you that you could bring one dog into the store?"

A: "Yes."

Q: "And so why didn't you just start bringing one dog into the store?"

A: "She made it conditional, and that's not appropriate."

Q: "What do you mean, it's not appropriate?"

A: "There is no restrictions on how many service dogs I can have."

Q: "So it's your testimony that you could bring in – you could train one animal to do one task and have 10 tasks you need and bring in 10 service animals to a store; is that your testimony?"

A: "That's correct. If that's the way I trained the service dogs, yes. There are no restrictions on how many service dogs a person can use. She limited, again, my access."

[22] Complainant testified as follows on cross examination:

Q: "After April 22, even though you were invited back to the store, you elected not to shop there again. Is that your testimony?"

A: "I elected not to; the rest of the family did."

Q: "You didn't elect not to?"

A: "I elected not to; the rest of the family chose to....my husband, my son, my daughter, whoever."

"* * * * *

"Just to minimize it, I'm going to stay away because I'm really hot-headed about this and I'm having problems about this whole scenario. It still doesn't set right with me. They've agreed but there are conditions. That's not right by law. I was reading up on ADA and reading more thoroughly and the whole thing was sitting wrong with me."

41) Shortly after Complainant filed her complaint with BOLI, Respondent called Lugene-Hayden when he was shopping in DSM and told him that she would be "more comfortable" if he didn't shop in DSM until the complaint was resolved. (Testimony of Respondent)

42) Lugene-Hayden then began walking to Glenwood to buy milk and butter. There is no evidence that Contessa or Panda accompanied him on those trips. This was physically difficult for him. There were times when he fell when walking home and had to be assisted by the police; on some of these occasions the problem was caused because of his consumption of alcohol. (Testimony of Complainant)

43) Complainant and Lugene-Hayden moved out of EMV on June 11, 2013. (Testimony of Complainant; Ex. A29)

44) In October 2013, Complainant moved to the apartment complex where she continued to live at the time of the hearing. (Testimony of Complainant)

45) On December 2, 2013, Respondent mailed the following letter to "Sunstone Service Dogs," attention "Heather Murlin:"

"Dear Heather,

"I am the owner of [Duck Stop Market].

"I found your organization on line and read through it. Some of the information conflicts with the information on the ADA website. I noticed Michel is the treasurer of the organization.

"I have purposely sought out people in stores who have service dogs and had shared by incident with Michel. Their reactions have been stunned. All of these dogs were wearing vests and one woman told me this was a requirement which I cannot find in any of the literature. They have offered to speak on my behalf.

"As you know, Michele is asking for compensation from me. Most recently she is asking for $5,000.00. I told Eric Yates she could sue me, I offered her $300.00.

"There have been two articles in the register guard[23] in the past two months regarding the ambiguous laws on service dogs.

"I plan to go public with this and will mention your organization and its affiliation with Michel. The register guard is awaiting my story. I have also had conversations with my other business associates about this and informed them where to get information to prevent this ordeal in their stores. I phoned Michel on

[23] The forum takes judicial notice that "The Register-Guard" is the name of Eugene's daily local newspaper.

> April 22nd and told her she could enter my store with one dog. She filed a complaint with Civil Rights on May 10. I was mortified to think I was being accused to (sic) discrimination.
>
> "This entire situation needs to be dropped. Michel has a very large attorney bill and there is no guarantee how that bill might be paid. Rather than her wanting compensation she should be advocating to inform people of the rights of the service dog issue.
>
> "Sincerely
> Kara Johnson"

(Testimony of Murlin, Complainant; Ex. A28)

46) Complainant opened Johnson's letter when it arrived in SSD's Post Office Box. It concerned her because SSD had nothing to do with her complaint except for SSD's ownership of Contessa. She felt the letter was "very much of a threat" to SSD, felt personally threatened, and was upset and experienced stress because SSD still owned Contessa and owns dogs used by other disabled persons. Murlin and Complainant discussed the contents of the letter while having a lengthy conversation using "Skype." During the conversation, Murlin observed Complainant scratching and "rocking," two activities Complainant does when she is under stress. (Testimony of Complainant, Murlin)

47) Complainant and Murlin turned the letter over to Mark Jordan, Complainant's attorney. (Testimony of Complainant)

48) On April 15, 2014, Respondent's employee Charlotte Gordon saw Complainant at a bus stop at 5th Avenue and B Street[24] in Springfield, Oregon. At the time, Respondent was in Gordon's car and told Gordon to follow the bus to see where Complainant went. Gordon followed the bus for about 20 minutes, then drove Respondent back to DSM after Complainant got off the bus on Olympic Street in front of a Winco store. On April 21, 2014, Gordon signed an affidavit, printed on the letterhead of Respondent's attorneys that included the following statement:

> "On the afternoon of April 15, 2014, I was driving the car and observed Michel with a leashed dog lying at her feet and a child in a stroller waiting at the bus stop at the 5th Avenue and B Street in Springfield, Oregon. The dog lying at Michel's feet was a dog looked like 'Lassie dog' and was not either 'Panda' or 'Contessa.' I follow the bus that Michel boarded to see where Michel was going. Approximately 20 minutes later I observed Michel get off the bus on Olympic street in front of WinCo, pushing the child in a stroller with both hands on the stroller and also holding a white cane with red on it like holding an umbrella. I

[24] The forum takes judicial notice that 5th Avenue and B Street in Springfield is approximately 1.2 miles away from DSM.

> also observed the 'Lassie dog' walking behind her and definitely not guiding Michel. There was no one else walking with Michel."

(Testimony of Gordon; Ex. A26)

49) Complainant has been co-parenting Callie, her 21-month-old granddaughter, since Callie was very young. Each week, Callie arrives on Friday or Saturday and leaves on Sunday, Monday, or Tuesday. In or around May 2014, Complainant and Callie were walking on a Springfield sidewalk, accompanied by Contessa. At the time, Complainant was not using Callie's stroller because Callie wanted to walk. As Complainant bent down to pick up Callie, "a lady" driving a white SUV-type vehicle stopped in front of her, took pictures, and asked if "the baby" was okay. At that time, Complainant did not recognize the car or the lady taking pictures. Further along in their walk, the lady took pictures of them again, standing next to the white SUV Complainant had seen earlier. Complainant asked the lady who she was and asked her to stop taking pictures. The lady told Complainant that she was from Portland. Complainant got close enough to the lady's vehicle to read its license plate and wrote down the number on a scrap of paper she had with her that had "prayer chain" notes on it. The number she wrote down was "911FXN."[25] This incident was very upsetting to Complainant, as she sensed she was being followed. During this encounter, Contessa kept looking behind her and showing signs of stress and Complainant feared that Contessa's training would suffer. (Testimony of Complainant, Murlin)

50) At some point prior to the hearing, Complainant received an eviction notice from her landlord at her current apartment because of complaints that someone associated with her was taking pictures at Complainant's apartment. By this time, Mark Jordan, Complainant's attorney had received the affidavit signed on April 21, 2014, by Charlotte Gordon, as well as a second affidavit signed the same day by Patricia Wiest, another of Respondent's employees, also printed on the letterhead of Respondent's attorneys. Attached to Wiest's affidavit were two photos of Complainant's apartment and Complainant's neighbor's car, which was parked in front of Complainant's apartment. In the affidavit, Wiest swore that the car in the photos was "just like the one" that Wiest saw Complainant driving on April 29, 2013. One of the photos was taken from inside the cab of a vehicle that had a white mirror. Jordan showed these affidavits to Complainant. After Complainant explained to her landlord that "she was being stalked" by Respondent and showed the landlord the photos attached to Wiest's affidavit, the landlord rescinded the eviction and told her that they would do their best to keep trespassers off the property. The affidavits confirmed Complainant's feeling that she had been followed, which in turn exacerbated her PTSD. She had felt like a "target" before when she perceived she was being followed and the two affidavits confirmed that she had been followed. This made her feel that she was being stalked and "couldn't

[25] At hearing, to refresh her recollection, Complainant produced the contemporaneous note on which this license plate number was handwritten in blue ink. The note was written on a piece of paper that also had "prayer chain" notes on it. The ALJ, the participants, and their representatives were all given an opportunity to examine the paper. It was not offered into evidence.

feel safe anywhere." It made her feel "very, very angry" to know that she had been followed, and she felt "frustrated and violated." She felt that her "private life was being invaded upon" and feels less safe in her home now. When she first moved to her new apartment, she opened the blinds to her kitchen but has now shut them again. (Testimony of Complainant, Murlin, Wiest; Exs. A27, R7)

51) Complainant's new apartment is "five to seven miles" away from DSM, located at the back of a large apartment complex. To take the photos attached to Wiest's affidavits, the photographer needed to navigate a series of parking lots to get to Complainant's apartment.[26] (Testimony of Complainant)

CREDIBILITY FINDINGS

52) Charlotte Gordon is a current employee of Respondent who was working at DSM on April 17, 2013. Her bias in this matter was demonstrated by Gordon's willingness to chauffeur Respondent in Gordon's car, at Respondent's request, to follow Complainant's bus for 20 minutes "to see where Michel was going," see where Complainant got off the bus, then drive Respondent back to DSM, with no evidence presented that this occurred during her work time. In her affidavit she stated that the dog with Complainant that day was not Contessa or Panda. In contrast, at hearing, she testified that the dog with Complainant that day was Contessa. Besides her testimony, she also signed an affidavit, apparently prepared by Respondent's attorneys,[27] stating that on two occasions she saw Complainant walking on Franklin Blvd. in "April or May, 2013," pushing a baby stroller while unaccompanied by a dog. Although Complainant did not testify that she is "legally blind," her level of visual impairment is such that the forum finds this testimony simply unbelievable. Given the character of the other entries made in Respondent's store log book[28] contained in Exhibit A8 that were submitted by Respondent during the Agency's investigation, the forum would have expected the Gordon's two "viewings" of Complainant to be noted in that log book, but no such entries were offered into evidence. The forum has only credited Gordon's testimony when it was corroborated by other credible evidence. (Testimony of Gordon)

53) Patricia Wiest, who still works for Respondent, was not a credible witness. Although she had never seen Complainant in DSM, she testified that an unnamed co-worker had pointed Complainant out to her and, on two occasions, while at her clerk's station in DSM, she saw Complainant walking in public. Like Gordon, she signed an

[26] With reference to the photos attached to Exhibit A27, Complainant testified as follows:

Q: "Is this the apartment you currently live in?"

A: "Yes, it is, and they have to go all the way past private property, no solicitation, no trespassing signs, go past a parking lot on this side, a parking lot on this side, turn down a parking lot and go all the way to the end to get to this car and take a picture."

[27] The affidavit is prepared on the letterhead of Respondent's counsel.

[28] Some of the entries are quoted in Findings of Fact ##32 & 34 – The Merits.

affidavit in which she declared that she saw Complainant walking on Franklin Blvd. "[a]round the end of April 2013 and the beginning of May 2013," pushing a baby stroller and without a dog. In the same affidavit, she stated that, on April 29, 2013, she saw Complainant driving a tan car into EMV that "look[ed] like" the "exact" car in the photo attached to her affidavit.[29] Under cross examination, she testified that she saw Complainant driving "this car," referring to the car photographed in Exhibits A27 and R7, adding that it "looks like the exact same car I saw." Given the lack of evidence that Complainant owned a car in 2013, the undisputed fact that she has not had a driver's license since 2005 because of her severe visual impairment, and Complainant's credible testimony that the car in the photographs belongs to her neighbor at the apartment complex where Complainant presently lives, located some "five to seven miles" from DSM, the forum finds this testimony to be preposterous. In addition, Respondents offered no contemporaneous entries from Respondent's store log book to corroborate Wiest's two "viewings" of Complainant. The forum has discounted Wiest's testimony in its entirety except for her testimony that Complainant has never come into DSM when Wiest was there and that she is an employee of DSM. (Testimony of Wiest)

54) Kevin Lugene-Hayden had a natural bias because Complainant is his wife and he presumably stands to gain financially if Complainant prevails. He testified that he has short-term memory problems as a result of his PTSD, but that his long-term memory is not impaired and that he clearly recalled the events of April 2013. However, his testimony demonstrated otherwise. First, contrary to every other witness, he testified that he talked to DSM's clerk and showed Panda's service dog ID to the clerk working at DSM on April 17, 2013. Second, he testified that he had never gone into DSM before April 17, 2013, whereas Respondent credibly testified he had come in several days earlier and attempted to order MD 20-20, a cheap type of fortified wine, and that Respondent had placed a special order for him. Third, Lugene-Hayden and Complainant spent most of their time together in the Mallard. Complainant testified in considerable detail about her emotional distress. In contrast, when Lugene-Hayden was asked how Respondent's actions affected Complainant, the only thing that he could recall, despite being given ample time to answer the question, was that "she was fidgety" and "she said she didn't like going outside and wouldn't go outside." The forum has only credited his testimony when it was either undisputed or corroborated by other credible evidence. (Testimony of Lugene-Hayden)

55) Elizabeth Fuell had a natural bias as Complainant's daughter and "administrative caregiver." Although she had a clear recollection of the events on April 18, 2013, that was consistent with Complainant's testimony, her recollection was not perfect. As to her April 18, 2013, visit to DSM with Complainant, she initially testified: "It was May; it had to have been between the 15th and 21st last year." When prompted, she allowed that it could "possibly have" been in April 2013. Although Fuell's recollection of dates was not perfect, her testimony as to her observations was credible and the forum has credited her testimony of those observations in its entirety. (Testimony of Fuell)

[29] Her affidavit is attached to Exhibit A27.

56) Gordon Gill is a sergeant with the Lane County Sheriff's Department who has visited DSM numerous times in past few years. He testified as to his recollection of events on April 18, 2013, in extensive detail without reviewing any notes, and testified that neither he nor his deputies visited DSM that day. In contrast, Complainant and Fuell credibly testified that two deputies showed up. DSM's store log book also contains a contemporaneous note that two deputies appeared, and Respondent stated in her May 28, 2013 response to the complaint that a deputy came to DSM. Because Gill's recollection is suspect, the forum has given his testimony no weight except when it was undisputed or corroborated by other credible evidence. (Testimony of Gill)

57) Moayyad Khoshnaw is the Agency's senior investigator who investigated Complainant's complaint. In that process, he interviewed witnesses, and typed notes of his interviews, and wrote the substantial evidence determination and amended substantial evidence determination in the record as Exhibits A16 and A17. With one exception, the forum has credited this testimony in its entirety. That exception is a sentence in his interview notes from his August 12, 2013, interview with Murlin that reads: "[t]he small dog is still in training she is more than 18 months old and she **needs** the ADA definition of trained animal to mitigate the need for Michel's disability we just do not graduate them until they are two years old." (Bolded emphasis added) Khoshnaw testified that his notes reflect what he was told. Based on Murlin's credible testimony that she told Khoshnaw "meets" instead of "needs," and the fact that the word "needs" in the above sentence makes little sense, whereas "meets" is logical and gives the sentence meaning, the forum concludes that Murlin spoke the word "meets" instead of "needs." (Testimony of Khoshnaw)

58) Joy St. Peter was called as an expert witness by Respondent. She is the founder, owner, and executive director of The Joys of Living Assistance Dogs ("JLAD"), a 501(c)(3) company "dedicated to the breeding, raising, training and placement of assistance dogs with people living with disabilities." Her testimony established that she is clearly an expert regarding service dogs and their training. She testified as to the training she requires her JLAD dogs to undergo and training she requires her trainers to undergo, the industry standards set by ADI, her knowledge of the ADA, and expressed her opinion about how ADI standards apply to Contessa and Panda. The forum has credited her testimony in its entirety. (Testimony of St. Peter)

59) Heather Murlin had a potential bias because of SSD's training and ownership of Contessa, her business relationship and friendship with Complainant, and Respondent's threat against her company, as expressed in Respondent's December 2, 2013, letter.[30] She testified at length, from personal observation and without exaggeration, as to Complainant's mental and physical impairments, Contessa's training, and the tasks Contessa was trained to perform as of April 17, 2013, that mitigated Complainant's disabilities. She had a clear recollection of the events on April 19, 2013, Complainant's reaction to receiving Respondent's December 2, 2013, letter, and Complainant's statements to her regarding her observations that she was being

[30] *See* Finding of Fact #45 – The Merits.

"stalked" by Respondent. She was not impeached with regard to any of this testimony. Murlin and St. Peter are both experienced service dog trainers and both testified about the significance of Contessa's "training" with relationship to the ADA. However, the forum has given Murlin's testimony about Contessa's training more weight because Murlin was directly involved in Contessa's training and observed Contessa with Complainant on numerous occasions, whereas St. Peter never observed Contessa and only testified in reference to the "training standards" that her company follows and industry standards in general. (Testimony of Murlin)

60) Respondent was an articulate witness who responded directly to questions asked of her during direct and cross examination. The forum finds that her testimony was not credible on four key points for the reasons described below.

First, she testified that on April 17, 2013, she did not believe that Complainant's dogs were "service dogs" because they had no identification and thought Complainant was "lying." Specifically, on direct examination by Respondent's counsel, she testified as follows:

> Q: "Did you think they were service animals when [Complainant] told you [that one dog was retired and the other was in training]?"
> A: "No."
> Q: "Why not?"
> A: "One's retired and one's in training and I honestly thought at that time that service dogs had to have identification, either, you know, a vest, and when she wouldn't provide me with when I asked her for identification, she wouldn't provide it to me, so I thought she was lying."
> Q: "So did you demand ID?"
> A: "No."
> Q: "Did you request she give you ID?
> A: "I asked for it, politely."

In Respondent's May 28, 2013, written response to the complaint, Respondent also claimed that neither Contessa nor Panda "was wearing service dog identification." In contrast, Complainant credibly testified that Contessa was wearing her SSD "service dog in training" vest on April 17, 2013. Significantly, Respondent wrote the following in DSM's store log book on April 17, 2013:

> "New people across street – one I ordered MD 20 20 for. Came in with wife & 2 service dogs. Told them no dogs in store, wife not happy – Too BAD!"

Respondent's entry is notable for two reasons. First, it establishes that in 2013 Respondent contemporaneously recorded events she perceived as significant to DSM. Second, it refers to Complainant's dogs as the "2 service dogs." Based on Respondent's testimony, if she sincerely believed at the time at the time she wrote the note that Complainant was lying, the forum finds it probable that she would not have identified Contessa and Panda as "service dogs" but would have qualified that phrase by noting that Complainant claimed they were service dogs. Finally, Respondent said

nothing in her initial position statement about not allowing Contessa or Panda to enter DSM with Complainant because one was "retired" and the other was "in training."

Second, Respondent testified that Complainant "yelled" at her during their April 17, 2013, encounter, a point also emphasized by Gordon in her testimony, and both Respondent and Gordon demonstrated the yelling by raising their voices. However, in Respondent's three prior statements – the log book entry, her May 28 written response to the complaint, and her interview with Khoshnaw -- she said nothing about any yelling.

Third, Respondent testified that she decided to let Complainant come into DSM with one dog, even though she believed that neither Contessa nor Panda were service dogs, because "I didn't want to fight with her" and "wanted to be a good neighbor." She testified that she "was running a huge risk" in conceding that Complainant could come into DSM with one dog, but "tried to give [Complainant] the benefit of the doubt." Given Respondent's acute awareness that the Health Department could fine or shut down DSM if she allowed a non-service dog in the store, it is simply not credible that Respondent would let Complainant come into the store with a dog Respondent genuinely believed was not a service dog.

Fourth, Respondent wrote the following in her May 28, 2013, response to the complaint:

> "On April 17th [Lugene-Hayden] came in with his wife with 2 large dogs, one appeared to be an old black dog, the younger dog had a noose around it's (sic) nose. The dog with the noose alarmed me as it was my experience dogs with a noose might be harmful."

At hearing, Respondent acknowledged that Contessa and Panda were on leashes and testified that Contessa was wearing a "muzzle" that was unlike any muzzle Respondent had seen before. However, Respondent did not testify as to any prior experiences with dogs wearing nooses that would have caused her to think Contessa "might be harmful" or to any aggressive behavior by Contessa. Charlotte Gordon, Respondent's employee who also witnessed the events on April 17, 2013, did not testify that Contessa appeared threatening. Further, although Respondent testified at some length about her familiarity with Oregon Health Authority administrative rules and her related concern that Contessa and Panda might be a "direct threat" under those rules, there was no evidence presented to show that Contessa and Panda were "out of control" or were not "housebroken."[31]

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[31] Effective September 4, 2012, Oregon Health Authority administrative rules, Chapter 150, subpart 6-501.115 ("Prohibiting Animals") have provided as follows:

"(B) A food establishment shall permit the use of a service animal by an individual with a disability on its premises unless the service animal poses a direct threat to the health and safety of others.

"(1) For purposes of section 6-501.115 the term 'direct threat' means a significant risk that to the health or safety of others that cannot be eliminated by modification of policies, practices, or procedures or by provision of auxiliary aids or services.

In conclusion, the forum has only credited Respondent's testimony when it was undisputed or supported by other credible evidence. (Testimony of Respondent)

61) Complainant was an emotional witness. At all times during her testimony, Contessa was lying down at or on her feet. Complainant also held a small "worry stone" that she continually rubbed back and forth in her hands and testified that it helps her to focus. She also "rocked" in her chair frequently and her caregiver had to intercede at least twice to stop her from scratching her neck and hurting herself. With the following two exceptions, the forum found Complainant's testimony to be credible. First, her identification of Respondent was inconsistent. At hearing, she testified on July 24th that the lady she talked with at DSM on April 17, 2013, had not been present during the entire hearing and unequivocally testified that "we did not meet Ms. Johnson on the 17th." She further testified it was a "blonde-haired lady" she spoke with on the 17th. In contrast, in the intake questionnaire she filled out on the night of April 17th, she wrote "[t]he owner confronted us." On July 23, 2013, she told Khoshnaw that she spoke with "a dark hair (sic) lady in the store. I have to wear dark glasses, and all I remember [is] dark hair and [a] white face." That is an accurate description of Respondent. Second, she exaggerated her family's inability to obtain milk, butter, and half and half as a result of Respondent's actions and the resulting inconvenience to her family. Lugene-Hayden, who did not need a service dog to shop, was able to buy these products at DSM up to the time Complainant filed her complaint. In addition, Complainant's son, who lived with Complainant and Lugene-Hayden, could have bought these products at any time at DSM. (Testimony of Complainant; Observation of ALJ)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Kara Johnson was an individual "person" as defined in ORS 659A.001(9)(a) and a sole proprietor who owned and operated DSM, a place of "public accommodation" as defined in ORS 659A.400(1).

2) At all times material herein, Complainant was an individual with a disability under ORS 659A.104.

3) On April 17 and 18, 2013, Respondent refused to let Complainant enter DSM to purchase groceries while accompanied by her service animal, thereby making a

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"(2) In determining whether a service animal poses a direct threat to the health or safety of others, a food establishment must make an individualized assessment, based on reasonable judgment that relies on the best available objective evidence, to ascertain: The nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications in policies, practices, or procedures will mitigate the risk.

"(3) A food establishment may ask an individual with a disability to remove the service animal from the premises if:

(a) the animal was out of control and the animals handwork does not take effective action to control it; or

(b) The animal is not housebroken."

distinction, discrimination or restriction against Complainant because of her disability in violation of ORS 659A.142(4).

4) On April 19, 2013, Respondent told Complainant that her dogs were not allowed in DSM and that Complainant was not allowed on DSM's property until Respondent determined what to do with Complainant's service dogs, thereby making a distinction, discrimination or restriction against Complainant because of her disability in violation of ORS 659A.142(4).

5) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.

6) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue a cease and desist order, including an award of compensatory damages to Complainant, based on Respondent's unlawful practices. The sum of money awarded and other actions Respondent is required to take in the Order below are an appropriate exercise of that authority.

OPINION

Introduction

The Agency alleges that Respondent unlawfully discriminated against Complainant in April 2013, in violation of ORS 659A.142(4) and OAR 839-006-0300(2), by denying her access to DSM when Complainant was accompanied by her service dogs. This is the first case brought before the forum involving service animals and places of public accommodation.

To prevail in this matter, the Agency must prove the following by a preponderance of the evidence: (1) Respondent is a place of public accommodation as defined in ORS 659A.400; (2) Complainant is an individual with a disability; (3) Respondent made a distinction, discrimination or restriction against Complainant because she is an individual with a disability; and (4) Complainant was harmed by Respondent's conduct. *In the Matter of C. C. Slaughters, Ltd.,* 26 BOLI 186, 193 (2005).

1. Duck Stop Market Is a "Place of Public Accommodation"

ORS 659A.142(4) provides that "It is an unlawful practice for any place of public accommodation, resort or amusement as defined in ORS 659A.400, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is an individual with a disability."

ORS 659A.400(1)(a) defines "place of public accommodation" as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges

whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." DSM, a retail convenience store, fits within this definition, which Respondent admitted in her Answer to the Formal Charges.

2. Complainant Is An Individual With Multiple Disabilities

ORS 659A.104 provides, in pertinent part:

"(1) An individual has a disability for the purposes of ORS 659A.103 to 659A.145 if the individual meets any one of the following criteria:

"(a) The individual has a physical or mental impairment that substantially limits one or more major life activities of the individual.

"* * * * *

"(2) Activities and functions that are considered major life activities for the purpose of determining if an individual has a disability include but are not limited to:

(a) Caring for oneself;

* * * * *

(b) Seeing;

* * * * *

(f) Sleeping;

* * * * *

(s) Socializing;

* * * * *

(v) Interacting with others;

* * * * *

"(3) An individual is substantially limited in a major life activity if the individual has an impairment * * * that restricts one or more major life activities of the individual as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. An impairment that substantially limits one major life activity of the individual need not limit other major life activities of the individual. * * *

"(4) When determining whether an impairment substantially limits a major life activity of an individual, the determination shall be made without regard to the ameliorative effects of mitigating measures, including:

(a) Medication;

* * * * *

(c) Low vision devices or other devices that magnify, enhance or otherwise augment a visual image, except that ordinary eyeglasses or contact lenses or other similar lenses that are intended to fully correct visual acuity or eliminate refractive error may be considered when determining whether an impairment substantially limits a major life activity of an individual;

* * * * *

(i) Reasonable accommodations or auxiliary aids or services[.]"

OAR 839-006-0205 contains language similar to the above.

Complainant's credible testimony, corroborated by the testimony of Murlin and Fuell and the medical records in Exhibit A24, established that she has multiple physical and mental impairments, including visual, hearing, PTSD, agoraphobia, and schizophrenia. Complainant also credibly testified that these impairments affect her major life activities of seeing, caring for herself, sleeping, socializing, and thinking clearly. Although she testified that she is hard of hearing, she did not testify how this restricted any major life activity, other than her statement that she wears one hearing aid. The extent of the effect that her impairments have on her major life activities are described in detail in Findings of Fact ##3 & 4 – The Merits. The forum has no difficulty in concluding that each of her impairments, except for her hearing, restricts one or more Complainant's major life activities as compared to most people in the general population.

Based on the above, the forum concludes that the Agency has met its burden of showing that Complainant is an individual with a disability under ORS 659A.104.

With Certain Exceptions, Service Animals Must Be Allowed to Accompany Individuals with Disabilities in Places of Public Accommodation

Respondent moved for summary judgment on the grounds that Respondent was not required to allow Complainant to be accompanied by Contessa or Panda in DSM because neither dog was a "service animal." The forum denied Respondent's motion, concluding that Contessa and Panda were both "service animals" in April 2013 under Oregon law and the ADA. In light of the evidence presented at hearing, the forum revisits and expands on that ruling.

In April 2013, neither ORS chapter 659A nor the Agency's administrative rules contained any reference to "service animals" in the context of public accommodation. ORS 659A.139(1) provides that "ORS 659A.103 to 659A.144 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended." Accordingly, the forum turns for guidance to

34 BOLI ORDERS

Title III of the ADA and 28 C.F.R. §36.302(c), the interpretive regulations promulgated by Department of Justice in the Code of Federal Regulations. Those regulations provide:

> "(c) *Service animals*—(1) *General.* Generally, a public accommodation shall modify policies, practices, or procedures to permit the use of a service animal by an individual with a disability.
>
> "(2) *Exceptions.* A public accommodation may ask an individual with a disability to remove a service animal from the premises if:
>
> "(i) The animal is out of control and the animal's handler does not take effective action to control it; or
>
> "(ii) The animal is not housebroken.
>
> "(3) *If an animal is properly excluded.* If a public accommodation properly excludes a service animal under §36.302(c)(2), it shall give the individual with a disability the opportunity to obtain goods, services, and accommodations without having the service animal on the premises.
>
> "(4) *Animal under handler's control.* A service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (*e.g.,* voice control, signals, or other effective means).
>
> "(5) *Care or supervision.* A public accommodation is not responsible for the care or supervision of a service animal.
>
> "(6) *Inquiries.* A public accommodation shall not ask about the nature or extent of a person's disability, but may make two inquiries to determine whether an animal qualifies as a service animal. A public accommodation may ask if the animal is required because of a disability and what work or task the animal has been trained to perform. A public accommodation shall not require documentation, such as proof that the animal has been certified, trained, or licensed as a service animal. Generally, a public accommodation may not make these inquiries about a service animal when it is readily apparent that an animal is trained to do work or perform tasks for an individual with a disability (*e.g.,* the dog is observed guiding an individual who is blind or has low vision, pulling a person's wheelchair, or providing assistance with stability or balance to an individual with an observable mobility disability).

> "(7) *Access to areas of a public accommodation.* Individuals with disabilities shall be permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go."

Based on these rules, the forum concludes that Oregon law in April 2013 required places of public accommodation to allow individuals with disabilities to be accompanied by their service animal: (a) unless the animal is out of control and the animal's handler does not take effective action to control it or (b) the animal is not housebroken. There is no evidence in this case that either of these exceptions applied to Contessa or Panda in April 2013. Consequently, Respondent was required to allow Complainant to access DSM with her service animal ***unless*** the forum concludes that neither Contessa nor Panda was a "service animal."

Contessa and Panda Were Both Service Animals in April 2013

> In April 2013, the ADA defined "service animal" as follows:
>
> '*Service animal* means any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. * * * The work or tasks performed by a service animal must be directly related to the individual´s disability. Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, * * * alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, * * * and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors. * * *"

28 C.F.R. §36.104. Pursuant to ORS 659A.139(1)'s deference to the ADA, the forum relies on this definition of "service animal" in this case. In Respondent's motion for summary judgment, Respondent argued that, regardless of any tasks they were trained to perform, Contessa was not a "service animal" because she was not "trained," in that she had not completed her training, and that Panda was not a "service animal" because he was "retired or retiring." The forum rejected Respondent's argument based on the policy statement contained in ORS 659A.103(1) and the ADA's failure to exclude dogs that (a) have been trained but are retired or retiring or (b) dogs that are undergoing training but are not yet fully trained from its detailed definition of "service animal."[32]

At hearing, Complainant and Murlin credibly testified as to numerous tasks that Contessa and Panda were trained to perform, as of April 2013, which mitigate Complainant's multiple disabilities. Tasks Contessa was trained to perform included: (1) "covering"; (2) assisting Complainant to walk through crosswalks, including pushing the

[32] *See* Finding of Fact #8 – Procedural.

"walk" button; (3) leading Complainant to a vehicle that she was to ride in; (4) locate bus stops; (5) alerting Complainant to traffic; (6) alerting Complainant to take her medication every two hours; (7) helping Complainant breathe properly when Complainant suffers panic attacks in her sleep; (8) opening and closing doors; (9) providing "tactile" stimulation; and (10) helping Complainant avoid objects while walking. Tasks Panda was trained to perform included: (a) "covering" and chest compression when Complainant had a PTSD attack; (b) waking Complainant at night when she has nightmares and calming her down; (c) dropping on Complainant's chest and getting her to breathe again when Complainant stops breathing at night; and (d) keeping Complainant from running into street curbs and things in her house. Based on this evidence, the forum concludes that Contessa and Panda were both "individually trained to do work or perform tasks for the benefit of an individual (Complainant) with a disability as of April 2013 and were "service animals" under Oregon law.

3. Respondent Made a Distinction, Discrimination or Restriction against Complainant Because She is an Individual with a Disability in Violation of ORS 659A.142(4).

In its Formal Charges, the Agency alleges that Respondent violated ORS 659A.142(4) by refusing to allow Complainant to enter DSM with her service dogs on multiple occasions, as discussed below.

April 17, 2013

On April 17, Complainant and Lugene-Hayden entered DSM for the purpose of buying milk, respectively accompanied by Contessa and Panda, who were both leashed. Contessa wore her service dog in training vest ("vest"), a training harness, and a "haltie," a type of soft muzzle. Almost immediately, they were accosted by Respondent, who told them they could not bring dogs into DSM and that they needed to leave. Complainant responded by telling Respondent that Contessa and Panda were service dogs and pointed out the poster in DSM's front window that said service dogs were allowed. Respondent again told Complainant she could not let the dogs come into DSM, but she could use DSM's drive-up window or Respondent and DSM's clerk would hold the dogs outside while Complainant shopped. At no time did Respondent ask Complainant either of the questions permitted by the ADA -- if Contessa and Panda were required because of a disability and what work or task they had been trained to perform. Finally, there is no evidence that either Contessa or Panda was out of control or not housebroken, the two exceptions that would have justified Respondent's refusal to allow Complainant entry with her dogs. 28 C.F.R. §36.302(c)(2). In conclusion, Respondent violated ORS 659A.142(4) by not allowing Complainant to shop in DSM while accompanied by her service animals.

April 18, 2013

On April 18, Complainant and Fuell visited DSM together with Contessa, who wore her vest.[33] Complainant again intended to buy milk. Respondent was not at DSM that day, but on the previous day had told her employees about the incident with Complainant and her dogs and told them she did not want Complainant's dogs in DSM. Fuell entered DSM first to hold the door open for Complainant and Contessa. As Complainant entered with Contessa, Bailey -- Respondent's store clerk on duty at that time -- approached Complainant, put her hand on the door, stood in a position that prevented Fuell from moving out from behind the door, and loudly told Complainant "You're not welcome here; your dog needs to leave." As on the previous day, Complainant stated that her dog was a service dog. Bailey responded that she didn't care, that they needed to leave, and that she would call the police if Complainant, Fuell, and Contessa did not go outside. Complainant, Fuell, and Contessa went outside and the events transpired involving the sheriff's department, Complainant, and Respondent, described in detail in Finding of Fact #33 – The Merits. Sergeant Gill, who spoke with both Respondent and Complainant that day, also told Complainant that Respondent did not want her on the property.

Again, there is no evidence that Contessa was out of control or was not housebroken, the two exceptions that would have justified Respondent's refusal to allow Complainant to shop in DSM with Contessa. In conclusion, Respondent violated ORS 659A.142(4) by not allowing Complainant to shop in DSM while accompanied by Contessa, her service animal.

April 19, 2013

On April 19, Complainant and Murlin visited DSM with Contessa, who wore her vest and training harness.[34] The primary reason for their visit was to educate Respondent about service dogs. Respondent and one of her store clerks met them outside DSM with crossed arms, standing between the door and Complainant, Murlin, and Contessa. This made Complainant feel that she was being blocked from DSM's doorway. In a meeting that lasted about 20 minutes, Complainant told Respondent she was there to try and work on an amicable solution and had some ADA materials about service dogs for Respondent to read. Respondent agreed to read the materials and get back to Complainant within a week. During the meeting, Murlin also explained to Respondent that Contessa was a service animal. During the meeting, Complainant did not ask or attempt to enter DSM. Respondent did not invite Complainant into the store. Respondent also told Complainant that dogs were not allowed in DSM and that Complainant was not allowed on the property until Respondent determined what to do with Complainant's service dogs, thereby violating ORS 659A.142(4).

[33] There was no testimony as to whether Contessa was on a leash and Respondent did not contend that she was not leashed.

[34] *Id.*

Post-April 19, 2013

On April 22, 2013, Respondent called Complainant, told her she had read the paperwork Complainant had given to her, and asked "what service is your dog trained to provide for you?" Complainant responded "for mental disorder and visual impairment." Respondent told Complainant that she had to let her into DSM, and that Complainant could shop at DSM so long as she was accompanied by only one dog. When Complainant went home, she told her family that they could shop at DSM, and they subsequently did so. Complainant herself chose not to shop at DSM because she believed Respondent was unlawfully restricting her access by limiting her to only one dog. Later, shortly after Complainant filed her complaint with BOLI, Respondent asked Lugene-Hayden not to shop at DSM until Complainant's complaint was resolved, and there is no evidence that he attempted to shop at DSM again.

4. Complainant was Harmed by Respondent's Refusal to Allow Her to Shop at DSM with Panda or Contessa.

Respondent's refusal to allow Complainant to enter DSM with Contessa or Panda from April 17 until April 22, 2013, effectively prevented her from shopping at DSM based on her multiple disabilities and harmed Complainant. The fact that Lugene-Hayden and the rest of her family was allowed to shop at DSM on those days does not alter that fact.

DAMAGES

The Formal Charges seek damages for "physical, mental and emotional distress in an amount estimated to be at least $30,000.00, to be proven at hearing."

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 Dr. Andrew Engel, DMD, PC,* 32 BOLI 100, 152 (2012). Additionally, this forum has long held that Respondents must take Complainants "as they find them."[35]

Through the credible testimony of Complainant, Murlin, and Fuell, the Agency established that Complainant experienced the physical, mental and emotional distress as a result of Respondent's unlawful discrimination described below.

In April 2013, Complainant had been using a service dog for six years. Because of her background, she was very aware of the law regarding places of public

[35] *See, e.g., In the Matter of Charles Edward Minor,* 31 BOLI 88, 104 (2010) (with regard to the particular sensitivity of a complainant who was sexually harassed by respondent).

accommodations and service dogs. The April 17, 2013, incident described in Finding of Fact #23 – The Merits, was the first time Complainant had ever been "disallowed" entry with her service dogs in a place of public accommodation. She had entered DSM with the intent of purchasing milk and was told she could not bring either dog into DSM while she shopped, even after she told Respondent that Contessa and Panda were "service dogs." Alternatively, Respondent offered to let Complainant shop while Respondent and Bailey held the dogs or let Complainant use DMS's drive-in window. Not surprisingly, Complainant felt angry and insulted, became really upset, and "was maxing out" from her PTSD to the extent that she left DSM to control her anger. At the hearing, Complainant testified with considerable emotion -- "All I wanted was a quart of milk so I could drink. There was no sign of respect for a disabled person or her husband who is disabled. All we wanted was milk."

On April 18, 2013, Complainant returned to DSM to buy milk, accompanied by Fuell and Contessa. The events described in Finding of Fact #33 – The Merits, then transpired. During this incident, Complainant's PTSD "kicked in," she endured a long wait for the sheriff, and she was again frustrated by her inability to purchase milk. The incident further upset Complainant. In her words, "I was starting to get perturbed" and she began to wonder "how many others are being treated this way?"

On April 19, 2013, Complainant returned to DSM with Contessa, Murlin, and some ADA educational literature for the primary purpose of educating Respondent about the Oregon law, the ADA, and its requirements as to service dogs. During her meeting with Respondent and Gordon, Complainant perceived that they were blocking DSM's doorway and felt "unwelcome" as a result.

Complainant experienced "trauma" from not being able to take Contessa and Panda into DSM and, according to Fuell, subsequently "went through a stage where the world hated her and she couldn't do nothing" and became even more reticent about leaving her home, only leaving when she had no choice. Again based on Fuell's credible testimony, it took "weeks to get [Complainant] back to what we called normal at the time."

At this point, it is relevant to quote ORS 659A.103, the Oregon Legislature's statement of policy with regard to individuals with a disability and access to places of public accommodation. In pertinent part, that statute provides:

> "(1) It is declared to be the public policy of Oregon to guarantee individuals the fullest possible participation in the social and economic life of the state, * * * to use and enjoy places of public accommodation * * * without discrimination on the basis of disability.
>
> "(2) The guarantees expressed in subsection (1) of this section are hereby declared to be the policy of the State of Oregon to protect, and ORS 659A.103 to 659A.145 shall be construed to effectuate such policy."

This policy statement clearly establishes that the State of Oregon considers access by individuals with a disability to places of public accommodation to be a fundamental human right. Correspondingly, the forum concludes that denial of that right is an affront to a disabled individual's fundamental human dignity, an affront that Complainant experienced as a result of Respondent's refusal to allow her to shop at DSM while accompanied by Contessa or Panda from April 17 to 22, 2013, and Respondent's subsequent conditional permission for her to enter with one service dog.[36]

As a result of Respondent's post-April 22, 2013 activities described in Findings of Fact ##45, 46, and 48-51, Complainant's emotional and mental suffering and distress continued long after Complainant moved to a different neighborhood located a considerable distance from DSM. Based on Respondent's threats against SSD, she felt personally threatened, was upset, and experienced considerable stress. She feared that Contessa's training would suffer when Respondent, or someone driving Respondent's vehicle, followed her and her granddaughter as described in Finding of Fact #49 – The Merits. Finally, she received an eviction notice from her current residence because Respondent, or someone working in conjunction with Respondent, drove to her apartment complex and took photographs of her neighbor's car and Complainant's apartment. After receiving affidavits from Respondent's attorneys that included photographs of her current apartment, she had a reasonable belief that she was being "stalked," which exacerbated her PTSD and she no longer felt "safe anywhere." It made her feel "very, very angry" to know that she had been followed, and she felt "frustrated and violated." She felt that her "private life was being invaded upon" and feels less safe in her home now. When she first moved to her new apartment, she opened the blinds to her kitchen but has now shut them again. Complainant is entitled to damages for physical, emotional, and mental suffering for all of the suffering described in this section.[37]

Tellingly, Respondent offered no rebuttal testimony or explanation regarding the "stalking" activity and did not cross examine Complainant about her physical, mental, or emotional distress.

The forum has only issued one final order in a case involving disability and a place of public accommodation. *In the Matter of C. C. Slaughter's, Ltd.,* 26 BOLI 186, 196-97 (2005). In *Slaughter's*, a complainant who had Parkinson's disease was accused of being drunk because of the way he walked and was told to leave the respondent's club on two occasions. He was embarrassed, shaken, and upset by

[36] The forum notes that there is no evidence in the record that Respondent was aware, from April 17 until June 11, 2013, when Complainant moved away from EMV, that Complainant did not require the presence of both Contessa and Panda in order to shop by herself.

[37] This forum has previously held that the stress inherent in litigation does not form a basis for an award of mental distress damages. *See, e.g.*, *In the Matter of Katari, Inc.*, 16 BOLI 149, 160 (1997), *aff'd without opinion, Katari, Inc. v. Bureau of Labor and Industries*, 154 Or App 192, 957 P2d 1231, *rev den*, 327 Or 583 (1998). In the forum's view, the stress experienced by Complainant described in this paragraph does not follow that category, but is part of a continuum of stress at Complainant experienced as a result of Respondent's violations of ORS 659A.142(4).

respondent's refusal to let him stay in respondent's club, felt like the incident had created a scene and that he had been on public display in front of 30 patrons, and thought other patrons might think he was a drunk. After he went home, he thought a lot that night about the way he was treated and had trouble sleeping that night and the next couple of nights. It upset him enough that he talked to a number of people about the incident. He felt even worse after the second time he was asked to leave because it was the second time he had been told to leave and respondent's manager refused to look at the medical documentation he had told complainant to obtain to prove that he had Parkinson's. Again, he was upset and stressed and felt that he had been on public display again, this time in front of 60 patrons. He had trouble sleeping, began to think more about how Parkinson's had negatively impacted his social life, and felt even more self-conscious about his appearance. The respondent's refusal to let complainant remain in its club made complainant very apprehensive about shopping in new places, and particularly about visiting new bars, in that he was afraid he would be stopped again and accused of being drunk because of his Parkinson's. The commissioner awarded the complainant $25,000 in damages for emotional distress. Complainant's emotional and mental distress in this case is greater because of the events that occurred after Respondent's discriminatory actions that aggravated Complainant's emotional and mental distress. The forum concludes that $60,000 is an appropriate award to compensate Complainant for her physical, emotional, and mental suffering.

AGENCY EXCEPTIONS

The Agency filed three exceptions. The first two sought to have language added to the Opinion to make "it clear that the events occurring on [April 18 and April 19] were a violation of ORS 659A.142(4). The forum GRANTS these exceptions and has added the requested clarifying language.

The Agency's third exception requests an additional Conclusion of Law and that appropriate language be added to the Opinion to "make it clear that it was a violation of ORS 659A.142(2) [sic] for Respondent to 'allow' Complainant to shop at DSM 'so long as she was accompanied by only one dog.'" The Agency's third exception is OVERRULED. Having concluded that Respondent engaged in an unlawful practice on April 17, April 18, and April 19, 2013, by refusing to allow Complainant to enter DSM with any service dog, the forum finds it unnecessary to determine whether Respondent's April 22 refusal to allow Complainant to enter DSM with multiple service dogs is a violation of ORS 659A.142(4) and declines to consider that issue.

RESPONDENT'S EXCEPTIONS

Respondent filed voluminous exceptions to the Proposed Order, most of them aimed at the ALJ's failure to rely on ORS chapter 346 in interpreting and applying the law. The forum first addresses Respondent's exceptions to the Proposed Findings of Fact.

A. Exceptions to Proposed Findings of Fact

Respondent argues that the Findings of Fact should be amended to "correct and include" ten specific "facts," numbered "a" through "j." The forum finds that "a," "c," "d," "e," "f," "h," and "j" are either irrelevant, inaccurate, or contradicted by more credible evidence in the record. Finding of Fact #23 has been revised in response to "b." Finding of Fact #49 has been revised in response to "i." Exception "g" is already implicitly incorporated in Findings of Fact ##33 and 36.

Respondent also objects to the ALJ's findings that Joy St. Peter was Respondent's only credible witness. The forum finds that the ALJ's credibility findings are supported by substantial evidence in the record and declines to revise them.

B. Exceptions to Proposed Conclusions of Law

Respondent excepts to the forum's conclusions of law that that Respondent violated ORS 659A.142(4) on April 17, 18, and 19, 2013. Respondent's exceptions are based on the argument that the ALJ should have applied ORS 346.680 and 346.685 instead of the ADA to determine whether Contessa and Panda were service animals and whether Complainant was entitled to have them accompany her in DSM. Respondent argues that, had the ALJ applied those laws, as a matter of law the ALJ could not have concluded that violated ORS 659A.142(4). These exceptions are OVERRULED for reasons stated in the forum's following analysis of Respondent's exceptions to the Proposed Opinion.

C. Exceptions to the Proposed Opinion

Respondent's exceptions to the Proposed Opinion fall in three categories: (1) The ALJ's reasoning that Contessa and Panda were "service animals" and that Complainant was entitled to have one or both accompany her in DSM is flawed because it relies on the ADA, not ORS 346.680 and 346.685; (2) Respondent "acted in strict compliance with the law and did not harm Complainant"; and (3) Complainant is not entitled to any damages. Exception (2) is OVERRULED and requires no further discussion because Respondent's arguments are not supported by the law or the facts for reasons already set out in this Final Order. Exception (3) is OVERRULED because the Agency proved, by a preponderance of the evidence, that Complainant is entitled to the damages awarded in the Proposed Order.[38] Exception (1) requires the additional discussion and is OVERRULED for the reasons stated below.

[38] Respondent argues vigorously that the forum's conclusions about the extent of Complainant's emotional and mental distress are overblown and inaccurate and that there is no credible evidence to support Complainant's testimony that Respondent engaged in "stalking" activity. The forum notes once more that Respondent's counsel had ample opportunity to elicit rebuttal testimony responding to both issues, but elected to offer no rebuttal testimony or explanation regarding the "stalking" activity and did not cross examine Complainant about her physical, mental, or emotional distress.

In its motion for summary judgment, Respondent argued that ORS 659A.143 and OAR 839-006-0345(1), not the ADA, were applicable to this case. The ALJ denied Respondent's motion, concluding that ORS 659A.143 and OAR 839-006-0345(1) were inapplicable because they had not been enacted at the time of the alleged discrimination and there is no language in either the statute or rule to show that they were intended to be applied retroactively.[39] In her exception, Respondent now argues that the forum should rely on the provisions of *former* ORS 346.680 and 346.685 containing specific definitions of "assistance animal" and "assistance animal trainee," not the ADA, to determine whether Complainant was entitled by law to be accompanied by Contessa and Panda in DSM. Respondent contends that *former* ORS 346.680 and 346.685, if applied to this case, would require reversal of the Proposed Order. For the following reasons, the forum rejects Respondent's argument that *former* ORS 346.680 and 346.685 should be applied in this case.

First, *former* ORS 346.680 and 346.685 are part of a different statutory scheme enacted in 1989 that established the right of "a person with a physical impairment to have an assistance animal with the person * * * in any place of public accommodation" but did not give such person any legal recourse. Both were repealed when ORS 659A.143 went into effect on June 26, 2013,

Second, ORS 659A.139 was amended in 2009 to require deference to the ADA in disability discrimination cases involving public accommodation (ORS 659A.142) and real property (ORS 659A.144 and ORS 659A.144).[40] Prior to 2009, ORS 659A.139 only required deference to "similar provisions" of the ADA ("ADA deference") in employment disability discrimination cases, but not in public accommodation cases. At the time of the amendment, *former* ORS 346.680 and 346.685 had been in existence for 20 years, with the pertinent definitions in ORS 346.680 and rights and restrictions in ORS 346.685(1) being substantively unchanged since at least 1999.[41] The legislature is presumed to be aware of existing law, yet in amending ORS 659A.139 it chose to specifically defer to the ADA in future constructions of ORS 659A.142(4) instead of *then-existing* ORS 346.680 and 346.685. This deliberate legislative choice is reflected

[39] *See* Finding of Fact #8 – Procedural.

[40] The amended language is printed below as it appears in Oregon Laws 2009, c. 508 §13:

> "659A.139. **(1)** [ORS 659A.112 to 659A.139] **ORS 659A.103 to 659A.145** shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended **by the federal ADA Amendments Act of 2008 and as otherwise amended**.
>
> "**(2) The determination of whether an individual has a disability as provided in section 2 (1) of this 2009 Act shall be construed in favor of broad coverage of individuals under ORS 659A.100 to 659A.145, to the maximum extent permitted by the terms of ORS 659A.100 to 659A.145."**

[41] The forum did not research versions of these laws in existence prior to 1999. In 2007, both statutes were amended to change "physically impaired person" to "person with a physical impairment."

in the forum's decision to rely on the ADA definition of "service animal" and the ADA's requirements in 28 C.F.R. §36.302(c).

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of violations of ORS 659A.142(4) by **Respondent Kara Johnson** and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Kara Johnson** 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 **Michel Hilt-Hayden** in the amount of:

1) SIXTY THOUSAND DOLLARS ($60,000), representing compensatory damages for emotional, mental, and physical suffering experienced by Michel Hilt-Hayden as a result of Respondent's unlawful practices found herein,

plus,

2) Interest at the legal rate on the sum of $60,000 from the date of issuance of the Final Order until Respondent complies with the requirements of the Order herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of violations of ORS 659A.142(4) by **Respondent Kara Johnson**, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Kara Johnson** to:

1) At Respondent's expense, undergo training, along with her employees, on the correct interpretation and application of Oregon laws pertaining to disability and service animals in places of public accommodation, with the training to be conducted by the Technical Assistance Unit of the Bureau of Labor and Industries or another trainer agreeable to the Agency.

2) To create and implement a public accommodation policy that accurately reflects Oregon law, to be approved by the Bureau of Labor and Industries, Civil Rights Division.

3) Cease and desist from violating laws pertaining to unlawful discrimination against persons with disabilities in the scope of the operation of Duck Stop Market.

In the Matter of

AUTOTEAM LLC, GLOBAL AUTO MOTORS, LLC, and DRIVE CREDIT, LLC

Case No. 01-15
Final Order of Commissioner Brad Avakian
Issued March 31, 2015

SYNOPSIS

Although credible evidence established that Respondent Autoteam employed Claimant, the evidence was not sufficiently reliable to support the number of work hours claimed or whether the Claimant was paid for all hours worked. Based on the lack of evidence establishing that Respondents failed to pay Claimant for all wages owed, the Amended Order of Determination alleging unpaid wages, penalty wages and civil penalties was dismissed. ORS 652.140; ORS 652.150; ORS 653.055; ORS 652.025.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 13, 2015, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Suite 1045, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Wage claimant James Cleary ("Claimant") did not appear to testify and the Agency offered no explanation for his absence. Autoteam LLC, Global Auto Motors, LLC, and Drive Credit LLC ("Respondents"), were represented by their attorney, Richard Franklin. Chris Turner, identified as the "principal" for Autoteam LLC was also present.

The Agency called BOLI Wage and Hour Compliance Specialist Bernadette Yap-Sam as a witness (by telephone). Respondents called Autoteam owner Chris Turner as a witness (in person).

The forum received into evidence:

a) Administrative exhibits X-1 through X-9;
b) Agency exhibits A-1 through A-22, A-24 through A-31, and A-34; and
c) Respondents' exhibit R-2.

34 BOLI ORDERS

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, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 4, 2014, Claimant filed a wage claim and assignment of wages with the Agency. (Testimony of Yap-Sam, Ex. A-1)

2) On June 13, 2014, the Agency issued Order of Determination ("OOD") No. 14-0972 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the OOD alleged that:

- Claimant was employed by and performed work for "Autoteam LLC and Global Auto Motors LLC and Drive Credit LLC *** ('Employers')" from March 14, 2014, through March 22, 2014, at the rate of not less than $9.10 per hour.

- Claimant earned a total of $728.00 and was paid $200.00 for his work and is owed $528.00 in unpaid, due and owing wages.

- Employers willfully failed to pay these wages and owe Claimant $2,184.00 in penalty wages under ORS 652.140 and ORS 652.150.

- Employers paid Claimant less than the wages to which he was entitled and are therefore also liable to Claimant for civil penalties in the amount of $2,184.00 pursuant to ORS 653.055(1)(b).

(Ex. X-1a)

3) On June 19, 2014, Respondents' attorney filed an answer and request for hearing on behalf of all Respondents. Respondents admitted that Claimant was employed by Autoteam, but asserted that Claimant "was paid in full in cash," and, therefore, was not entitled to unpaid wages, penalty wages, or civil penalties. Respondents denied that Claimant was employed by Global Auto Motors and Drive Credit. (Ex. X-1b)

4) On September 25, 2014, BOLI's Contested Case Coordinator issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on January 13, 2015, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a multi-language warning notice, 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," and a copy of the forum's

contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X-2, X-2a – X-2e)

5) On October 6, 2014, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by December 30, 3014, and notified them of the possible sanctions for failure to comply with the case summary order. (Ex. X-3)

6) Respondents filed a case summary on December 17, 2014. The Agency filed a case summary on December 30, 2014. (Exs. X-5, X-6)

7) On January 5, 2014, the ALJ issued an Interim Order that stated:

> "On December 31, 2015, BOLI's Contested Case Coordinator notified me and the Agency's administrative prosecutor by email that she had received a copy of a return receipt postcard from the USPS with reference to a new charging document -- specifically, an amended Order of Determination that was apparently issued in this case. A copy of an amended Order of Determination was not provided to me, nor is it contained in the Contested Case Coordinator's file.
>
> "Given the rapidly approaching hearing date of January 13, 2015, the Agency is hereby ordered to immediately provide a copy of any amended Order of Determination to the Contested Case Coordinator and to me, with a copy to Respondent's counsel."

(Ex. X-7)

8) On January 6, 2015, the Agency filed an Amended OOD that was signed on December 19, 2014, amending its original OOD as follows:

- Global Auto Motors and Drive Credit are each a successor employer.

- The general business operations of Global Auto Motors are so similar to Autoteam that they indicate a common identity. Both are in the business of selling used motor vehicles, have the same address as their principal place of business, and there was no lapse in time between Autoteam's cessation of operations and Global Auto Motors initiation of operations. Both had the same individual employed as manager and responsible for hiring and firing employees. Global Auto Motors offers the same services offered by Autoteam: the sale of used motor vehicles.

- The general business operations of Drive Credit are so similar to Autoteam that they indicate a common identity. Both are in the business of selling used motor vehicles. Both conduct business on contiguous parcels of land and share an entrance to the properties. The period of time between Autoteam's cessation of operations (March 22, 2014) and Drive Credit's initiation of operations (April 2014) was brief. Both had the same individual employed as manager and responsible for hiring and firing employees. Drive Credit offers the same services offered by Autoteam: the sale of used motor vehicles.

- Autoteam and the successor employers are jointly and severally liable for the full amount of alleged unpaid wages and interest.

The Amended OOD stated that the Respondents must either pay the full amount of the wage claim, penalty wages and civil penalties, or present a written request for a contested case hearing within 20 days of receipt of the OOD. (Ex. X-8)

9) The Agency submitted an amended case summary on January 9, 2015, which added an additional exhibit – A-35, comprised of a copy of the Amended OOD and a copy of a return mail receipt directed to "Rick Franklin, P.O. Box 2187, Gresham, OR 97030." The return mail receipt bears an unreadable signature on the back of the receipt in the Box B "Received by" section, and in the "Date of Delivery" section there is a handwritten notation of "12/27/14." The front of the receipt bears a copy of a mailing label addressed to BOLI's Contested Case Coordinator, and also contains the following handwritten notation "#01-15, AO, Amended OOD." Additionally, the front of the return mail receipt bears a stamp indicating it was postmarked December 27, 2014, in Portland, Oregon. (Agency Amended Case Summary; Ex. A-35)

10) At the commencement of the hearing, the ALJ asked Respondents' attorney, Richard Franklin, if he had received the amended case summary with attached Exhibit A-35 (the Amended OOD). Mr. Franklin indicated he had received the Amended OOD and that his signature was in the Box B "Received by" section of the return mail receipt. He could not recall the date when he had received the document, as he had not been to the post office to pick up mail for a period of time during the Christmas holidays. He stated that he needed additional time on behalf of his clients to respond to the revised allegations in the Amended OOD and to arrange for additional witnesses and exhibits to address the successor liability allegations, and requested a postponement of the hearing. Ms. Ortega objected to the request to postpone the hearing, but agreed that Respondents were entitled to additional time to respond to the Amended OOD. The ALJ ruled that Respondents could have an extension until January 20, 2015, to respond to the Amended OOD. The ALJ denied, in part, Respondents' request to postpone the hearing, and ruled that the hearing would proceed as scheduled as to the liability of Respondent Autoteam. However, the hearing would be postponed as to the successor liability allegations against the other two Respondents and would be reconvened at a later date to address those issues. (Hearing Record)

11) Claimant James Cleary was not at the hearing. No explanation as to the reason for his absence was provided. (Hearing Record)

12) The Agency and Respondents stipulated to the follow facts:

- Claimant was employed by Autoteam as a used car salesman.
- Claimant was to be paid the greater of commission or minimum wage.
- Claimant was employed for "at least the period March 14, 2014 to March 21, 2014."

(Stipulation of Participants).

13) Both sides were given the opportunity to present witness testimony and evidence on the issue of liability for unpaid wages, penalty wages and civil penalties and the record on those issues was closed. (Entire Record)

14) At the conclusion of the hearing, Mr. Franklin requested that the ALJ first issue a ruling on liability as to unpaid wages and then re-convene the hearing, if necessary, to rule on the successor employer allegations, thereby avoiding a potential second hearing. Ms. Ortega agreed that Mr. Franklin's proposal "makes sense" and she had no objections to the proposal. (Entire Record)

15) Following the hearing, the ALJ issued an Interim Order on January 14, 2015, that stated:

> "During the hearing for this matter held on January 14, 2015, Respondents' counsel requested additional time to file a response to address the allegations raised in the Amended Order of Determination ("AOOD"). Administrative Prosecutor Adriana Ortega indicated that she did not object to Respondents' request to address the revisions to the Agency's allegations. Therefore, Respondents may have until January 20, 2015, to file a response to address the amended allegations raised in the AOOD."

Footnote 1 in the Interim Order further stated:

> "In the event the hearing is reconvened to address the successor in interest allegations raised in the AOOD and an answer to the AOOD has not been filed by the above deadline, then Respondents' answer to the original Order of Determination will be deemed its answer to the AOOD. 839-050-0140(2)(b)."

(Ex. X-10)

16) On January 19, 2015, Respondents filed an amended case summary listing additional witnesses. The amended case summary also included a "Legal Memo" arguing that, "[t]he agency's failure to produce [Claimant] Mr. Cleary to testify and be cross-examined under oath or affirmation, should be absolutely fatal to its case against the employer." (Ex. X-11)

17) The Agency filed a Motion to Disregard Respondent's amended case summary on January 29, 2015, stating that it was untimely because the Interim Order of October 6, 2014, required case summaries to be filed no later than December 30, 2014. Respondents did not file a response to the Agency's motion. (Ex. X-12)

18) The ALJ issued an Interim Order on February 23, 2015, granting the Agency's motion with respect to the "Legal Memo" liability argument, and denying the motion to the extent the amended case summary listed new witnesses to discuss the successor in interest theory raised in the AOOD. (Ex. X-13)

19) The ALJ issued a proposed order on March 2, 2015, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondents filed any exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Autoteam was an Oregon corporation that conducted a used car sales business with its principal place of business on 6850 SE 82nd Ave. in Portland, Oregon. Chris Turner managed the business. (Ex. A-31, Testimony of Turner)

2) Claimant was employed by Autoteam as a used car salesman. (Ex. X-1b, p. 2; Testimony of Turner)

3) Claimant was to be paid the greater of commission or minimum wage. (Stipulation of Participants)

4) Claimant was hired on March 14, 2014, by Chris Turner and Eddie Estoy. Typically, when a person is hired, they begin work the next day. He worked at least until March 21, 2014. (Agency Case Summary, ¶ 8; Entire Record; Testimony of Turner)

5) Autoteam issued a Monday – Friday work schedule listing Claimant as "Jay." He was scheduled to be "off" Monday, March 17, 2014,[1] and Tuesday, March 18, 2014, and was scheduled to work the following hours:

[1] The forum takes judicial notice of the fact that March 17, 2014, was the first Monday after Claimant's hire date of March 14, 2014.

Date	Scheduled Hours
Wednesday, March 19, 2014	"9-8pm"
Thursday, March 20, 2014	"11-8pm"
Friday, March 21, 2014	"11am-8pm"
Saturday, March 22, 2014	"Bell"[2] (10-8pm)
Sunday, March 23, 2014	"10-7pm"

(Testimony of Turner; Ex. A-1, p. 6)

6) Claimant was frequently "missing" or away from the worksite during his scheduled shifts. Respondent did not keep a record of the hours actually worked by Claimant. (Testimony of Turner)

7) Claimant worked an undetermined number of hours between March 14 and March 21 or 22, 2014.[3]

8) Claimant was paid $200 with a handwritten check signed by Eddie Estoy issued from the "Autoteam LLC Expenses Account" on March 20, 2014, and $400 in cash from Chris Turner on his last day of work after Claimant complained that he was not sufficiently paid. Turner considered the $400 cash payment to be an overpayment. (Ex. A-31; Testimony of Turner)

9) Claimant was terminated from his position on March 21 or 22, 2014. (Ex. A-1, p. 1; Agency Case Summary, ¶ 8; Testimony of Turner)

10) On April 4, 2014, Claimant filed a Wage Claim Form stating that he earned $773.50 in wages and was paid only $200, leaving a balance owing of $573.50. With his wage claim form, Claimant submitted two documents regarding the number of hours he worked: (1) BOLI's WH-127 form with his handwritten notations as to his hours worked; and (2) a copy of a work schedule for one week with assigned shifts. (Testimony of Yap-Sam; Ex. A-1, pp. 1-4, 6)

11) The BOLI WH-127 calendar form submitted by Claimant had handwritten entries with the following work hours:

Friday	3-14-14	9-8
Saturday	3-15-14	9-8
Sunday	3-16-14	10-7
Monday	3-17-14	10-2/4-8
Tuesday	3-18-14	11-7

[2] Chris Turner credibly testified that "Bell" meant that a salesperson was scheduled to work from "open to close" and that the hours of the business on Saturday were 10 am to 8 pm.

[3] The forum's reasons for concluding that "Claimant worked an undetermined number of hours" are set forth in detail in the Opinion.

Wednesday	3-19-14	9-6
Thursday	3-20-14	11-8
Friday	3-21-14	11-8
Saturday	3-22-14	9-3

(Ex. A-1, p. 4)

12) Compliance Specialist Bernadette Yap-Sam was assigned to investigate Claimant's claim. (Testimony of Yap-Sam; Ex. A-15, p. 1)

13) On May 1, 2014, in a response to an email from Ms. Yap-Sam requesting legible copies of any records regarding Claimant's employment, Claimant sent an email to Ms. Yap-Sam with an attachment containing a handwritten list of the hours he claimed he worked. The hours listed were the same as those written on his BOLI WH-127 form, except were written in a list format on a blank piece of paper. (Ex. A-5, p. 2)

14) Respondent's attorney, Richard Franklin, informed Ms. Yap-Sam by email correspondence on May 28, 2014, that Claimant "has been paid in full," and that he "was a very short term employee of Autoteam and paid in cash." On October 14, 2014, Mr. Franklin clarified by email that a check was tendered to Claimant, and that he was also "tendered *** $400 cash at the time he was terminated." (Ex. A-28, p. 1)

15) Ms. Yap-Sam was a credible witness in describing the Agency's investigation, and the documents and information she received from the Claimant and Respondents. However, she did not have firsthand knowledge of the hours worked by Claimant and relied entirely on the information he submitted. (Testimony of Yap-Sam)

16) Mr. Turner was a credible witness, with one exception. Mr. Turner had an inherent bias as the owner of Respondent Autoteam and his admission that he was not always present at the worksite when Claimant was scheduled to work suggested that he exaggerated the amount of time Claimant was away from the worksite. Specifically, I find his testimony that Claimant did not show up "three-fourths" of the time and worked a maximum of 24-25 hours to be essentially a guess based on Mr. Turner's lack of ability to consistently observe the work site. Accordingly, I have credited Mr. Turner's testimony that Claimant was often away from the worksite at times he was scheduled to work, but decline to adopt Mr. Turner's recitation as to the *amount* of time Claimant worked. (Testimony of Turner; Observation of ALJ)

17) The Agency also initially intended to call Janet Frye to testify as a witness. Respondents objected on the grounds that Janet Frye was not identified as a witness on the Agency's case summary. The Agency stated the witness was not listed due to an oversight, and that the witness would discuss the contents of Exhibit A-34. After Exhibit A-34 was admitted into evidence, the Agency withdrew the request to offer testimony from Janet Frye. (Entire Record)

18) Additionally, the Agency indicated it intended to call Ashley and Ryan Osban as witnesses. After further discussion on the record, the Agency indicated that these witnesses would be discussing the successor in interest theory and requested that their testimony be reserved in the event the hearing was later re-convened to address the successor in interest allegations. (Entire Record)

ULTIMATE FINDINGS OF FACT

1) At all material times, Respondent Autoteam employed one or more persons to perform work in Oregon.

2) There is insufficient evidence to determine whether Respondents Global or Direct employed Claimant.

3) In 2014, the state minimum wage was $9.10.

4) Respondent Autoteam paid Claimant a total of $600.

5) There is insufficient reliable evidence to determine the number of hours Claimant worked for Autoteam or whether he was paid for all hours worked.

6) There is insufficient evidence to conclude that Respondents are liable for unpaid wages to Claimant.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Autoteam was an Oregon employer that employed Claimant and was subject to the provisions of ORS 652.110 to 652.332.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.405.

3) Respondents are not liable for unpaid wages to Claimant.

4) Respondents are not liable for penalty wages under ORS 652.150 for willful failure to pay wages or compensation to Claimant as provided in ORS 652.140.

5) Respondents are not liable for civil penalties under ORS 653.055 for the alleged failure to pay Claimant all the wages due at the end of his employment. ORS 653.055.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to dismiss the wage claim filed by Claimant. ORS 652.332.

OPINION

INTRODUCTION

In a wage claim case, the Agency must first establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011). In this case, the elements of the Agency's prima facie case are: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondents; and 4) Claimant performed work for which he was not properly compensated. *See, e.g., In the Matter of Dan Thomas Construction, Inc.,* 32 BOLI 174, 180 (2013).

CLAIMANT WAS EMPLOYED BY RESPONDENT AUTOTEAM

The parties stipulated that Claimant was employed by Respondent Autoteam. This element of the prima facie case is satisfied as to Autoteam.

The original OOD asserted that Claimant was also employed by Respondents Global and Drive. Although the Agency amended the OOD to assert that Global and Drive were successor employers,[4] at hearing the Agency asked that it be permitted to introduce evidence regarding Global and Drive, and their relationship with Autoteam based on the allegations in the original OOD. However, when a pleading is amended, it "supersede[s] the original pleading." *See Rucker v. Rucker,* 257 Or App 544, 552, 307 P3d 498, 503 (2013) (quoting *Balboa Apartments v. Patrick*, 351 Or. 205, 212, 263 P.3d 1011 (2011)) (internal quotation marks omitted). Accordingly, because the Amended OOD asserts the *successor* employer theory, the allegations in the original OOD asserting that Global and Drive were the *actual* employers of Claimant are no longer at issue in this matter.[5] Accordingly, this element of the prima facie case is satisfied only as to Autoteam.

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[4] As stated earlier, the parties agreed that the "successor employer" theory of liability as to Global and Drive would be addressed at a later hearing date, if necessary.

[5] Even if the allegations in the original OOD were still at issue, there was insufficient evidence to establish that Global and Drive employed Claimant. The Agency has the burden of proving that Global and Drive were employers and that Claimant was an employee. *In the Matter of Laura M. Japp*, 30 BOLI 110, 125 (2009). Under ORS 652,310(1), an "employer" is "any person who in this state, directly or through an agent, engages personal services of one or more employees . . . ." Under ORS 652.310(2), an "employee" is:

> "any individual who otherwise than as copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled . . . ."

The evidence related to Global and Drive consisted of documents from Oregon's Secretary of State and the Multnomah County tax assessor in the Agency's investigative file. (Ex. X-7 – X-14) Aside from a physical proximity to Autoteam, there is no evidence in the record as to the relationship between

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

The parties stipulated the Claimant was to be paid the greater of commission or minimum wage. At the time of Claimant's employment, minimum wage in Oregon was $9.10 per hour. There was no evidence to indicate that Claimant earned a commission. Accordingly, the forum concludes he was entitled to be paid at $9.10 per hour.

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR AUTOTEAM

It is undisputed that Claimant performed some amount of work for Autoteam. However, although Autoteam acknowledges employing Claimant for a short period of time, it failed to produce any records showing the hours worked. It is the employer's duty to maintain an accurate record of an employee's time worked. S*ee In the Matter of J. Guadalupe Campuzano*-Cazares, 30 BOLI 48, 59 (2008) (citing *In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997)).

When the employer produces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." *In the Matter of J & S Moving & Storage, Inc.*, 31 BOLI 286, 296 (2012), *citing In the Matter of Joseph Francis Sanchez*, 29 BOLI 211, 221 (2007). For example, without contrary evidence, the forum may rely on a credible testimony as to the amount of hours worked. *See J & S Moving*, 31 BOLI at 296 (relying on Claimant's credible testimony to conclude that he worked nine hours). Notably, as set forth in greater detail below, the credible testimony to support a wage claim need not come from the wage claimant himself, but can be supported with credible testimony from a co-worker or other person familiar with the hours worked by Claimant. *See In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260-64 (1999). Therefore, the fact that Claimant failed to appear at the hearing, in and of itself, does not warrant an automatic dismissal of the claims.

Ultimately, a wage claimant always bears the burden of proving he performed work for which he was not properly compensated. *J & S Moving*, 31 BOLI at 299. "In the past, the forum has declined to speculate or draw inferences about wages owed based on insufficient, unreliable evidence." *Id.*, citing *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 12 (1997). *See also J. Guadalupe Campuzano-Cazares*, 30 BOLI at 59-60 (stating that "the forum will not speculate or draw inferences" about the wages owed to a claimant when there is no credible evidence to support the assertion that the claimant maintained a daily record of the hours he worked).

More specifically, "[t]he forum has historically rejected wage claims in cases where claimants do not testify at hearing and no witnesses testify to support their claims of … unpaid wages." *In the Matter of John Steensland & Pacific Yew Products, LLC,* 29 BOLI 235, 267 (2007). For example, the forum previously rejected claims for unpaid

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Autoteam and those two businesses. There was also no evidence to establish that Claimant performed any services for Global or Drive.

wages based on two claimants' "unsworn calendars and incomplete tally sheets." *Id.* Similarly, the forum rejected the claim of a claimant who did not appear at hearing, noting that "[w]hile hearsay is admissible in administrative hearings, there was no further evidence to support the hours claimed [on timecards submitted to the Agency] … [and] there were no witnesses to confirm Claimant Bermudez's presence or work efforts." *In the Matter of La Estrelita, Inc.*, 12 BOLI 232, 245 (1994). As well, the forum rejected 11 wage claims under the following circumstances:

> "Although it is undisputed that [the 11 wage claimants] all worked for ICI, they did not appear to testify and there was no testimony either in an affidavit form or elicited from an Agency witness, that established their agreed rate of pay or the amount and extent of their work. The only evidence supporting their claims was the fact that each was clearly employed by ICI, the information each wrote on their wage claim forms stating their tenure of employment and salary or wage rate, the calendar of hours worked each completed at the time they filed their wage claims, and Compliance Specialist Sheppard's testimony."

Catalogfinder, 18 BOLI at 260-61 (1999). After conducting an "extensive review" of final orders in wage claims, the forum noted that it "has universally relied on credible testimony and documentation from claimants or witnesses to the claimants' employment to establish the nature and extent of work performed in wage claim cases." *Id.* at 260-64. Because there was no testimony from either Claimant or any other credible witness to support the hours he claimed he worked, this element of the prima facie case has not been established.

THERE IS INSUFFICIENT EVIDENCE TO CONCLUDE THAT CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Because there was insufficient evidence to establish the number of hours worked by Claimant, there is also a lack of evidence as to whether the amounts paid to him were proper compensation for his hours worked. Therefore, this element of the prima facie case was also not met.

SUCCESSOR EMPLOYER ALLEGATIONS AGAINST GLOBAL AND DRIVE

Because there is insufficient evidence to support the elements of a prima facie case, it follows that Global and Drive cannot be liable under the successor employer theory for any unpaid wages.

ORDER

NOW, THEREFORE, as Respondents have been found not to owe Claimant James Cleary wages, the Commissioner of the Bureau of Labor and Industries hereby orders that James Cleary's wage claim against Autoteam LLC, Global Auto Motors, LLC, and Drive Credit LLC be and is hereby dismissed.

In the Matter of

Christopher Lee Ruston and Christine M. Stahler

Case No. 16-15
Final Order of Commissioner Brad Avakian
Issued May 15, 2015

SYNOPSIS

Respondents Christopher and Christina[1] Stahler employed Claimant as a babysitter from December 7, 2013, through December 21, 2013, at the agreed rate of $5.00 per hour. Claimant earned a total of $450.00 and was paid $85.00 for her work. Respondents were ordered to pay Claimant $365.00 in unpaid, due and owing wages. Respondents willfully failed to pay these wages and were ordered to pay Claimant $1,200.00 in ORS 652.150 penalty wages.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 27, 2015, in the Salem conference room of the Oregon Bureau of Labor and Industries, located at 3865 Wolverine St NE, Building E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Wage claimant Patricia Foltz ("Claimant") was not present, but testified by telephone. Respondents Christopher and Christina Stahler were present.

The Agency called the following individuals as telephone witnesses: BOLI Wage and Hour Compliance Specialist Maria Perez, Claimant Patricia Foltz, and Sean Paul Chadbourne. Respondents called Christopher and Christina Stahler as witnesses (in person).

The forum received into evidence: a) Administrative exhibits X1 through X8; b) Agency exhibits A1-A6 and A8-A22; and c) Respondents' exhibits R1, R3, R9-R11.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following

[1] Although the caption lists "Christine" Stahler as a Respondent, her name is actually "Christina" Stahler.

Findings of Fact (Procedural and on the Merits[2]), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or before January 23, 2014, Claimant filed a wage claim and assignment of wages with the Agency. (Testimony of Perez, Ex. A1)

2) On May 15, 2014, the Agency issued Order of Determination ("OOD") No. 14-0090 based on the wage claim filed by Claimant and the Agency's investigation. In pertinent part, the OOD alleged that:

- Claimant was employed by and performed work for Respondents from December 7 through 21, 2013, at the rate of $5.00 per hour.
- Claimant earned was paid $85.00 for her work and is owed the balance of $365.00 in unpaid, due and owing wages.
- Employers willfully failed to pay these wages and owe Claimant $1,200.00 in penalty wages under ORS 652.140 and ORS 652.150.

(Ex. X1a)

3) On June 10, 2014, each Respondent filed an answer and request for hearing. Respondents denied owing $365.00 in wages and $1,200.00 in penalty wages, and asserted that Claimant "didn't work for those wages before being fired." (Ex. X1g)

4) On November 6, 2014, BOLI's Contested Case Coordinator issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on January 27, 2015, at BOLI's Salem office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a multi-language warning notice, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a–X2e)

5) On November 12, 2014, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by January 13, 2014, and notified them of the possible sanctions for failure to comply with the case summary order. (Ex. X3)

[2] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

6) Respondents filed a case summary on January 12, 2014. The Agency filed a case summary on January 13, 2014. (Exs. X6, X7)

7) The Agency and Respondents stipulated to the follow facts:

- Respondents employed Claimant as a babysitter.
- Claimant was to be paid $5.00 per hour.
- Claimant was paid $85.00 for wages owed.

(Stipulation of Participants)

8) Both sides were given the opportunity to present witness testimony and evidence on the issues of the amount of hours worked, liability for unpaid wages and penalty wages, and the record was closed. (Entire Record)

9) The ALJ issued a proposed order on April 15, 2015, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 28, 2015, Respondents filed exceptions. Those exceptions are discussed at the end of the Opinion section of this Final Order.

RULING ON RESPONDENTS' MOTION

After the ALJ's opening statements, Respondents argued that Claimant was not an employee and asserted that Claimant was self-employed. The Agency objected to the argument, asserting that self-employment was an affirmative defense and it had not been not been raised in Respondents' answer.[3] The ALJ stated that Respondents' argument regarding self-employment would be considered as a motion to dismiss and would be taken under advisement and ruled upon in the Proposed Order.

Upon further review of the record, it is noted that Respondents stipulated that they employed Claimant. The parties' stipulation regarding a question of fact is binding. *See Allstate Ins. Co. v. Stone*, 319 Or 275, 279, 876 P2d 313, 315 (1994) (citing *Norris and Norris*, 302 Or 123, 125, 727 P2d 115 (1986)). Accordingly, the fact of Claimant's employment by Respondents is not at issue. Therefore, Respondents' motion to dismiss is denied.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondents engaged the personal services of one or more employees. (Stipulation of Participants)

[3] The allegation that Claimant was self-employed is essentially an argument that Claimant was an independent contractor, which is an affirmative defense that must be raised in a respondent's answer. *In the Matter of Computer Products Unlimited, Inc.*, 31 BOLI 209, 223-24 (2011); OAR 839-050-0130(3).

2) In December of 2013, Respondents hired Claimant to work as a babysitter in their home. They agreed to compensate Claimant at the rate of $5.00 per hour worked. (Stipulation of Participants; Testimony of Foltz, Christina Stahler)

3) Claimant began work on December 7, 2013. Her last day of work was December 21, 2013. (Testimony of Foltz; Exs. A1, A2)

4) Claimant worked 17 hours from December 7-10, 2013. On December 10, 2013, she received a check in the amount of $85.00 from Respondents. The check was returned for insufficient funds. On January 3, 2014, Respondents provided Claimant with a cashier's check in the amount of $97.00, which included $85.00 in wages plus the $12.00 non-sufficient funds fee Claimant was charged by her bank. (Testimony of Foltz; Testimony of Christopher Stahler; Ex. A4, p. 8; Ex. A13)

5) Claimant worked a total of 73 hours from December 11-21, 2013, earning $365.00 (73 x $5.00 per hour = $365.00). (Ex. A2; Testimony of Foltz)

6) Respondents allowed Claimant to use their computer and fax machine for personal tasks. She always "clocked out" before performing personal business at their home. (Testimony of Foltz)

7) Respondents provided Claimant with the use of their car when Claimant experienced car trouble. While Claimant was using Respondents' car, they had to rent another car for their own use. Respondents thought that they could have Claimant "work off" any amounts they believed Claimant owed to them for the cost of the rental car. There was no evidence that the parties had a written agreement stating that Respondents could make deductions to Claimant's wages for the cost of the rental car or for any other reason. (Testimony of Foltz; Testimony of Christine Stahler; Exs. R1, X8; Entire Record)

8) Agency Compliance Specialist Margaret Trotman was assigned to investigate Claimant's wage claim. (Ex. A5; Testimony of Perez)

9) On approximately January 30, 2014, a Notice of Wage Claim was sent to Respondents, and it stated as follows:

> "You are hereby notified that PATRICIA FOLTZ has filed a wage claim with the Bureau of Labor and Industries, alleging:
>
> "Unpaid Wages Agreed Rate of $286 at the rate(s) of $5 per hour from December 11, 2013 to December 20, 2013.
>
> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address.

> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant * * *.
>
> "If your response is not received on or before **FEBRUARY 13, 2014**, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

(Ex. A3; Testimony of Perez)

10) On May 7, 2014, Compliance Specialist Margaret Trotman sent Respondents a letter which stated:

> "On March 10, 2014, you provided information regarding the 17 hours that Patricia Foltz worked for you from December 7, 2013, at $5.00 per hour = $85. On March 17, 2014, Patricia Foltz * * * provided her original time records showing additional hours worked December 11, 2014, through December 21, 2014.
>
> "I am enclosing[ing] another copy of Oregon's deduction laws along with a copy of her Wage Transcription and Computation Sheet. It appears that Patricia Foltz is still owed $365.00 in unpaid wages.
>
> "Please send $365.00, in the form of a cashier's check or money order, payable to Patricia Foltz by May 21, 2014, regarding setting up a monthly payment plan. Thank you."

(Ex. A16; Testimony of Perez)

11) Claimant's penalty wages are calculated as follows: $5 per hour x 8 hours x 30 days = $1200. (Calculation of ALJ)

12) With the exception of Respondents' assertions that Claimant falsified her work time records,[4] all witnesses were credible. (Entire Record)

CONCLUSIONS OF LAW

1) At all times material herein, Respondents were Oregon employers who employed Claimant and were subject to the provisions of ORS 652.110 to 652.332.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 652.310 to 652.405.

[4] A more detailed discussion of this finding is contained within the Opinion below.

3) Respondents violated ORS 652.140(2) by failing to pay all wages earned and unpaid to Claimant not later than five days, excluding Saturdays, Sundays and holidays, after Claimant left Respondents' employment.

4) Respondents owe $365 in unpaid, due, and owing wages to Claimant. ORS 652.140(2).

5) Respondents willfully failed to pay Claimant all wages due and owing and owe $1,200.00 in penalty wages to Claimant. ORS 652.150.

6) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondents to pay Claimant her earned, unpaid, due and owing wages and penalty wages. ORS 652.332.

OPINION

INTRODUCTION

In a wage claim case, the Agency must first establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011). In this case, the elements of the Agency's prima facie case are: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondents; and 4) Claimant performed work for which she was not properly compensated. *See, e.g., In the Matter of Dan Thomas Construction, Inc.,* 32 BOLI 174, 180 (2013).

CLAIMANT WAS EMPLOYED BY RESPONDENTS

The Agency and Respondents stipulated that Respondents employed Claimant as a babysitter.

THE PAY RATE TO WHICH RESPONDENT AND CLAIMANT AGREED

The Agency and Respondents stipulated that Claimant was to be paid $5 for each hour worked.[5]

AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED

The Agency asserts that Claimant worked for Respondents between December 7 and December 21, 2013, and that, with the exception of $85.00, no part of her wages have been paid, leaving a balance due and owing of $365.00 in unpaid wages. Claimant and Respondents agree that Claimant worked a total of 17 hours from

[5] This rate of pay is lower than the minimum wage. However, an individual who performs child care services in the home of the child is exempt from minimum wage and overtime law. ORS 653.020(13).

December 7-10, 2013. However, the parties disagree about the number of hours Claimant worked from December 11-21, 2013. Claimant provided detailed handwritten notations in her personal calendar of hours she claimed she worked during her employment. Specifically, she asserts that she worked the following hours December 11-21, 2013:

Date	Hours Worked[6]
Wednesday, December 11, 2013	6
Thursday, December 12, 2013	8
Friday, December 13, 2013	8
Tuesday, December 17, 2013	6
Wednesday, December 18, 2013	5
Thursday, December 19, 2013	9
Friday, December 20, 2013	14.5 (Included overnight 3 pm-12 am)
Saturday, December 21, 2013	16.5 (Included overnight 12 am-4:30 pm)

Total hours Claimant recorded December 11-21, 2013: **73**

Respondents admit that they did not keep track of the hours Claimant worked, but offered the following evidence in support of their argument that Claimant did not work all of the hours she claimed to work:

- After Claimant's initial training period ended on December 10, 2013, Respondents only asked Claimant to babysit when both parents were working. Respondents provided copies of their work shift records to attempt to contradict the hours recorded by Claimant.

- Respondents allowed Claimant to use their computer and fax machine for personal tasks. Therefore, they assert that she should not be compensated for the time spent at their home using the computer for her personal matters.

[6] The hours Claimant asserts that she worked were sometimes recorded with a starting and stopping time, and at other times her notes simply indicated a total number of hours worked for the day. For the sake of clarity, this chart reflects the total work hours recorded each day, even if Claimant wrote a starting and stopping time only.

- Respondents were under the impression that Claimant could "work off" the cost of a rental car they obtained so that Claimant could use their car when her car was under repair.

- For Claimant's time spent watching Respondents' son overnight December 20-21, 2013, Respondents provided their son with a choice as to whether he would stay home with Claimant or accompany his parents on an out-of-town trip. Respondents assert that they believed that Claimant voluntarily stayed overnight with their son, not as an employee.

It is the employer's duty to maintain an accurate record of an employee's time worked. S*ee In the Matter of J. Guadalupe Campuzano*-Cazares, 30 BOLI 48, 59 (2008). When the employer produces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." *In the Matter of J & S Moving & Storage, Inc.*, 31 BOLI 286, 296 (2012), *citing In the Matter of Joseph Francis Sanchez*, 29 BOLI 211, 221 (2007). For example, without contrary evidence, the forum may rely on a Claimant's credible testimony as to the amount of hours worked. *See J & S Moving*, at 296 (relying on Claimant's credible testimony to conclude that he worked nine hours).

In this case, Claimant credibly testified that she recorded her hours in her calendar each day that she worked. Respondents offered evidence in an attempt to raise questions as to the accuracy of the number of hours recorded on Claimant's calendar. They claimed that the evidence Claimant submitted was "falsified." Importantly, the accuracy of Claimant's calendar entries were supported by the fact that the calendar contained notations as to her other activities, such as appointments, house sitting obligations, etc. Those notations support her assertion that she regularly made daily notes on her calendar of her activities and that this was not created after-the-fact to support her claim. She also credibly testified that she always "clocked out" when one of the Respondents returned home and she remained on the premises to use their computer.

Unlike Claimant, Respondents did not maintain contemporaneous records of the hours worked by Claimant. Their testimony as to her hours worked was essentially based on their pattern of only having her babysit when they were both not home. However, without their own records as to her hours worked, this evidence is not persuasive to overcome the hours Claimant recorded at the time she worked.

Moreover, the additional arguments made by Respondents were also not persuasive. Even though Respondents believed that Claimant should not be paid for babysitting their son overnight on December 20-21, 2013, she was entitled to be paid for all work her employer suffered or permitted her to perform on their behalf. *See In the Matter of Hey Beautiful Enterprises, Ltd.*, 33 BOLI 189, 202-03 (2014). Additionally, because there was no evidence of a written agreement allowing Respondents to make deductions from Claimant's wages, they could not make her "work off" any amounts allegedly owed to them. *See In the Matter of Petworks, LLC*, 30 BOLI 35, 44 (2008).

Accordingly, the forum concludes that Claimant's calendar entries reflect that she worked a total of 73 hours from December 11-21, 2013. When combined with the 17 hours all parties agree Claimant worked December 7-10, 2013, the forum concludes that Claimant worked a total of 90 hours as a baby sitter for Respondents.

CLAIMANT PERFORMED WORK FOR WHICH SHE WAS NOT PROPERLY COMPENSATED

Claimant was not paid for the 73 hours that she worked December 11-21, 2013, and is owed $365.00 in gross, unpaid wages (73 hours x $5.00 = $365.00). The forum, therefore, awards Claimant $365.00 in unpaid wages.

CLAIMANT IS OWED ORS 652.150 PENALTY WAGES

The forum may award penalty wages when a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency proved that Claimant was not paid for work performed between December 11-21, 2013. Respondents were under the impression that they did not have to pay Claimant for watching their son overnight as they did not believe they had hired her to babysit, but that she essentially voluntarily agreed to do so. Respondents also believed that they could require Claimant to "work off" the cost of a car rental. As previously stated, these are not permissible reasons for failing to pay wages to an employee. Moreover, the fact that Respondents were ignorant of the law does not excuse them from compliance. *See In the Matter of Susan C. Steves*, 32 BOLI 43, 55 (2012). Respondents were aware of Claimant's claim for wages and acted willfully in failing to pay her for 73 hours worked. Therefore, Respondents are liable for ORS 652.150 penalty wages.

ORS 652.150(1) and (2) provide, in pertinent part:

> "(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.
>
> "(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days

after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *"

The Agency provided documentary and testimonial evidence that, on January 30, 2014, and May 7, 2014, its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimant's wages. The Agency's OOD, issued on May 15, 2014, repeated this demand. Because Respondents failed to pay Claimant her unpaid wages after receiving the notices, the forum computes penalty wages at the maximum rate set out in ORS 652.150(1) ($5.00 per hour x 8 hours x 30 days = $1,200.00).

RESPONDENTS' EXCEPTIONS

Respondents' exceptions to the Proposed Order are summarized below:

1. Respondents question why there are two different amounts of alleged wages owed to Claimant reflected on pages 5 and 6 of the Proposed Order.

2. Respondents dispute the number of hours worked by Claimant, and reference Respondents' personal time records from their jobs to show that she was not working when they were at home. Respondents further disagree with the date that Claimant claimed the overnight babysitting job ended, asserting that it was incorrect because December 21, 2015, was their son's birthday.

3. Respondents cite two letters from other people about Claimant to prove that "she's not an honest person."

4. Respondents refer to a settlement offer that Claimant allegedly turned down.

The forum rejects all of the exceptions because they were not timely filed. The Proposed Order was issued on April 15, 2015. Any exceptions to the Proposed Order were due 10 days later. Since the tenth day, April 25, 2015, fell on a Saturday, Respondents had until Monday, April 27, 2015, to file any exceptions. The exceptions were filed one day later on April 28, 2015. Respondents did not file a motion prior to that date seeking an extension. Moreover, although Respondents asserted that it was difficult to "get up here" (from their home in Salem to Portland), the exceptions could have been filed by mail. Thus, there was no demonstration of "good cause" for an extension of time. *See In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 189 (2013) (failure to follow written directions in the Proposed Order's "Exception Notice" did not constitute "good cause" for granting an extension).

Even if the exceptions could be considered as timely filed, the exceptions are rejected by the forum for the reasons set forth below.

Exception No. 1 asked why there were different amounts allegedly owed on pages 5 and 6 of the Proposed Order. The amount on page 5 was a Finding of Fact and the amount on page 6 recited what was written on the initial Notice of Wage Claim.

Because the amount in the Finding of Fact on page 5 was based on the credible evidence presented at hearing, it is not significant that the amount differed from the initial wage claim.

Exception No. 2 is rejected because, as stated above, the forum credited Claimant's credible testimony that she contemporaneously recorded her hours worked in her personal calendar. Additionally, Respondents admitted that Ms. Foltz was not paid for the overnight babysitting, but simply dispute the date it occurred because it was their son's birthday. However, there was no evidence presented at hearing regarding that alleged fact.

The letters referenced in Exception No. 3 were marked as Exhibits R5 and R6. Respondents agreed on the record that they were withdrawing those exhibits and would not be introducing them into evidence.

The alleged settlement offer discussed in Exception 4 is not admissible as evidence under Oregon's Evidence Code. *See* OEC 408.

ORDER

NOW, THEREFORE, as authorized by ORS 652.140(2), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Christopher and Christina Stahler** 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, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant **Patricia Foltz** in the amount of **ONE THOUSAND FIVE HUNDRED AND SIXTY FIVE DOLLARS ($1,565.00)**, less appropriate lawful deductions, representing **$365.00** in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from January 1, 2014, until paid; and **$1,200.00** in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from February 1, 2014, until paid.

_____

In the Matter of

Leo Thomas Ryder dba Leo's BBQ Bar & Grill

Case No. 21-15
Final Order of Commissioner Brad Avakian
Issued May July 1, 2015

SYNOPSIS

In a default case, the Agency proved that Respondent fired Complainant because she suffered an on-the-job injury and utilized the provisions of ORS chapter 656. The forum awarded Complainant $22,092 in back pay and lost tips and $120,000 in emotional, mental, and physical suffering damages. Respondent was also ordered to undergo training on the correct interpretation and application of the Oregon laws pertaining to injured workers.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 28, 2015, at the offices of the Oregon Employment Department located at 119 N. Oakdale Ave., Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Cristin Casey, an employee of the Agency. Complainant Robin Sausedo was present throughout the hearing and was not represented by counsel. Respondent was held in default prior to the hearing and did not appear at the hearing.

The Agency called the following witnesses: Complainant, and Tiffany Ray, senior investigator, BOLI Civil Rights Division (telephonic).

The forum received into evidence: a) Administrative exhibits X-1 through X-13 (submitted or generated prior to hearing); and b) Agency exhibits A-1 through A-19 (submitted prior to hearing).

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,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 14, 2014, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. After investigation, the Agency issued a Notice of Substantial Evidence Determination on August 1, 2014, in which it found substantial evidence that Respondent had engaged in unlawful employment practices in violation of ORS 659A.040 by terminating Complainant for filing a workers' compensation claim. (Exs. A1, A16)

2) On January 23, 2015, the Forum issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as April 28, 2015, beginning at 9:00 a.m., at the Oregon Employment Department, 119 N. Oakdale Ave., Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal 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) The Agency's Formal Charges alleged that Respondent terminated Complainant on November 10, 2013, because she suffered a compensable injury while working for Respondent, thereby violating ORS 659A.040(1), OAR 839-006-0115, and OAR 839-006-0117. The Formal Charges asked for lost wages estimated to be "at least $67,200," out-of-pocket expenses to be proven at hearing, and damages for emotional, mental and physical suffering in the amount of "at least $30,000." The Formal Charges also asked that Respondent be trained, at his expense, "on the correct interpretation and application of the Oregon laws pertaining to injured workers" and enjoined from violating laws pertaining to injured workers. (Ex. X2)

4) On March 9, 2015, the Agency filed a motion for default based on Respondent's failure to file a timely answer. (Ex. X5)

5) On March 23, 2015, the ALJ issued an interim order granting the Agency's motion for default against Respondent. The order read as follows:

> "On March 9, 2015, the Agency moved for an Order of Default based on Respondent's failure to file an answer to the Formal Charges. The Agency represented that the Formal Charges were issued on January 23, 2015, that Respondent Leo Thomas Ryder was personally served with the Formal Charges on February 12, 2015, and that Respondent had not filed an answer.

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

"ANALYSIS

"OAR 839-050-0130(4) requires that 'a party must file an answer within 20 days after service of the [Formal Charges].' OAR 839-050-0030(1) provides that service of Formal Charges is complete 'upon * * * (a) Receipt by the party or the party's representative[.]' OAR 839-050-0330(1) provides that default may occur when '[a] party fails to file a required response, including * * * an answer, within the time specified in the [Formal Charges].'

"In this case, the forum takes official notice that the Formal Charges were issued on January 23, 2015, and that the Notice of Hearing affixed as a cover page to the Formal Charges conspicuously stated:

> '**Respondent's Answer is due 20 days from service of this Notice. If Respondent does not file an answer within 20 days, it may be held in DEFAULT**. If held in default, Respondent will not be allowed to participate in the contested case hearing, examine witnesses, or introduce evidence.' (emphasis in original).

"In support of its motion, the Agency attached an Affidavit of Service completed by Charles Simons of Nationwide Process Service, Inc., in which Simons swore that he delivered the Formal Charges to '**LEO THOMAS RYDER**, personally and in person * * * on February 12, 2015[.]' Accordingly, the forum concludes that Respondent was served with the Formal Charges on February 12, 2015, making Respondent's answer due on March 4, 2015. 39 days have elapsed since February 12, 2015, and Respondent has not yet filed an answer.

"Based on Respondent's failure to file an answer in the time set out in the Notice of Hearing, this forum **GRANTS** the Agency's motion and finds Respondent in default. If Respondent is not granted relief from default, Respondent will not be allowed to participate in any manner in the hearing, including, but not limited to, presentation of witnesses or evidence on Respondent's behalf, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, and filing exceptions to the Proposed Order. OAR 839-050-0330(4).

"Relief from default may be granted if Respondent shows good cause, within ten days after the date of this order, for failing to timely file an answer. Respondent's request for relief must be in writing and accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause. OAR 839-050-0340.

"**IT IS SO ORDERED**"

(Ex. X6)

6) Respondent did not file a request for relief from default. (Entire Record)

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

8) On May 29, 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. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Leo Thomas Ryder was a person doing business under the assumed business name of Leo's BBQ Bar & Grill ("Leo's") in Grants Pass, Oregon, and employed six or more persons, including Complainant. (Testimony of Complainant; Exs. A4, A5)

2) At all times material herein, Respondent's fiancé Roberta Bray managed Leo's. (Testimony of Complainant; Ex. X13)

3) Complainant was employed by Respondent as a waitress/bartender in November 2012. Complainant left her previous job to work for Respondent. (Testimony of Complainant; Ex. A12)

4) Complainant worked an average of 32 hours per week while employed by Respondent. She was paid a wage of $9 per hour and averaged another $10 per hour in tips. (Testimony of Complainant; Ex. A19)

5) On July 14, 2014, Complainant injured her left hand at work while lifting a heavy tray. The next day, she told Bray that she had injured her hand at work the day before. On July 16, she also told Respondent about her injury. (Testimony of Complainant; Ex. A18)

6) For the next three weeks, Complainant, who described herself as "tough," self-treated her injury by wearing a brace that she purchased and icing her hand. On August 2, 2013, she finally visited a doctor, who diagnosed her injury as De Quervain's Tenosynovitis, prescribed Naproxen, an anti-inflammatory drug, and had her fill out a workers' compensation claim form. (Testimony of Complainant; Ex. A18)

7) When Complainant returned to work after her doctor's visit, Bray was angry at Complainant because she went to the doctor. Before her injury, Complainant had always been Respondent's most-favored worker. After August 2, Bray treated Complainant less favorably. One day, Bray assigned Complainant the job of spraying the entire outside of Respondent's business, including the roof, with "Home Defense." This job required using a sprayer that was operated by manually squeezing a trigger and caused Complainant considerable pain. (Testimony of Complainant)

8) Complainant continued to work all of her scheduled shifts. She also worked additional shifts for absentee co-workers between July 14 and November 10, 2014. (Testimony of Complainant)

9) Sometime between August 2 and November 10, 2014, Bray complained to Complainant that Respondent had been fined $8,000 because Respondent did not have workers' compensation insurance. (Testimony of Complainant)

10) On November 10, 2013, Complainant went to work and Bray handed her some workers' compensation paperwork to sign that constituted Complainant's formal filing of a workers' compensation claim. Complainant had the same paperwork at home but had not yet signed it or mailed it in. Complainant signed the paperwork Bray gave her. Then, with her eyes "blazing," Bray angrily stated "so you're really filing a workers' comp claim! I would scratch that out if I were you." Complainant crossed out her signature, believing she would otherwise be fired. Bray took the papers into her office, then came out a few minutes later and told Complainant she was "letting her go." Bray added that she didn't have to give Complainant a reason for firing her. Complainant had a duplicate copy of the same workers' compensation paperwork at home and subsequently signed it and mailed it in. (Testimony of Complainant)

11) Complainants' workers' compensation claim was accepted. (Testimony of Complainant; Ex. A18)

12) Prior to November 10, 2013, Complainant had never received any warnings or disciplinary action regarding her work performance with Respondent. (Testimony of Complainant)

13) Complainant has actively sought employment since her termination. At the time of hearing, she had not yet found comparable employment. Since her termination, she has lived off her savings, child support payments, and the approximate $3,000 she has earned doing miscellaneous work, $500 of which she earned between November 10, 2013, and July 29, 2014. (Testimony of Complainant)

14) On July 29, 2014, Respondent registered his business as a limited liability company and opened a family-oriented barbecue restaurant in another location in Grants Pass. Around that same time, the business location where Complainant worked was closed. Since then, the limited liability company has only employed members of Respondent's family and has not employed a bartender. (Testimony of Complainant; Ex. A5)

15) Had Complainant not been terminated, she would have worked for Respondent until July 29, 2014. Between November 10 and December 31, 2013, she would have earned $2,016 in wages (7 weeks x 32 hours x $9 per hour) and $2,240 in tips (7 weeks x 32 hours x $10 per hour), for a total of $4,256. Between January 1 and July 29, 2014, she would have earned $8,736 in wages (30 weeks x 32 hours x $9.10

per hour[2]) and $9,600 in tips (30 weeks x 32 hours x $10 per hour), for a total of $18,336. In total, she would have earned $22,592 in wages and tips, had she not been terminated. (Testimony of Complainant; Calculation of ALJ)

16) Complainant has a daughter who was 11 years old when Complainant was fired. Prior to Complainant's termination, Complainant and her daughter had been friends with Respondent, Bray, and their two sons, Spencer and Scotty. The sons were frequent visitors at Complainant's house and had stayed at Complainant's house the weekend before Complainant was fired. Complainant's daughter was especially fond of Respondent's older son and her first question after Complainant was fired was whether Scotty could still come over. Complainant's daughter was "heartbroken" when she realized she would no longer be able to spend time with Scotty after Complainant was fired. Her daughter's reaction has caused Complainant considerable emotional pain.[3] (Testimony of Complainant)

17) Complainant sincerely believed that she and Respondent were good friends. She felt betrayed when she was fired, "like when you find out your wife's been cheating with your best friend." Complainant has always taken pride in her work and being fired was a "big blow" to her self-esteem and felt like a "knife in the back" to her. (Testimony of Complainant)

18) Complainant is a single parent. Before she was fired, Complainant had made plans to take her daughter to Disneyland to fulfill a promise she had made two years earlier. Shortly before she was fired, Complainant told her daughter that they would be going to Disneyland at the end of November. Complainant took her daughter to Disneyland but worried about money constantly during their visit because she had no job to earn money to replace the money she spent on the trip. (Testimony of Complainant)

19) Complainant has been constantly employed her entire adult life and had never before been fired. She currently lives in the small town of Rogue River, Oregon, and had worked in Rogue River for 11 years at the time of hearing. She is known by a large number of people in Rogue River. She was embarrassed when she was fired because everyone in town knew about it. Previous to working for Respondent, she had worked in jobs where she was responsible for hiring employees and had always assumed that if an applicant had been fired from a job it meant they had "done something wrong." Based on her this assumption, Complainant believed that prospective employers and the people she knew would assume she had been fired because she had "done something wrong." (Testimony of Complainant)

[2] Oregon's minimum wage rose to $9.10 per hour in 2014. Without more evidence, the forum calculates Complainant's 2014 back pay at the minimum rate that Respondent would have been required by law to pay.

[3] Complainant testified "[i]t breaks my heart as well as hers."

20) Before she was fired, Complainant had made a number of friends in connection with her work as a bartender for Respondent. It was common for these friends to visit her at home. These relationships felt "tight-knit, family close" to Complainant. After she was fired and these friends no longer saw her at work, they have mostly stopped visiting her at home. Complainant feels that she has been forgotten. (Testimony of Complainant)

21) Complainant has a lot of self-pride, which has been "much diminished" by the fact that she has to use her daughter's child support to pay for household expenses. It has been hard for Complainant to have to tell her daughter that they cannot afford things because of Complainant's lack of income. A month prior to the hearing, Complainant had to ask her elderly parents and her oldest daughter to borrow $450 to pay for a school trip to Disneyland for her younger daughter. This was very difficult for Complainant, as she considers herself a "very good mom" and has prided herself on being a "good provider." Complainant had never borrowed money from her family before. She continues to feel badly about having to use the money from child support payments to pay ordinary household expenses. In general, the financial stress from the loss of her job has caused and continues to cause her significant stress. (Testimony of Complainant)

22) Ray and Complainant were both credible witnesses. In particular, the forum takes note of Complainant's exceptional candor during her testimony. (Testimony of Ray, Complainant)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Leo Thomas Ryder was an "employer" as defined in ORS 659A.001(4) who employed six or more persons, including Complainant.

2) The actions, statements, and motivations of Roberta Bray, Respondent's fiancé and manager, are properly imputed to Respondent.

3) Complainant suffered a compensable injury and invoked the provisions of ORS chapter 656 while employed by Respondent.

4) Respondent, acting through his manager Bray, terminated Complainant on November 10, 2014, because she invoked the provisions of ORS chapter 656, thereby violating ORS 659A.040(1), OAR 839-006-0115(1), and OAR 839-006-0117(1)(a).

5) 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.

6) 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, mental, and physical suffering sustained and to protect the rights of Complainant and others similarly

situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

INTRODUCTION

In its Formal Charges, the Agency alleges that Respondent violated ORS 659A.040(1), OAR 839-006-0115(1), and OAR 839-006-0117(1)(a) by firing Complainant. ORS 659A.040(1) provides:

> "It is an unlawful employment practice for an employer to discriminate against a worker with respect to * * * tenure * * * because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 or has given testimony under the provisions of those laws."

OAR 839-006-0115(1) provides:

> "As provided in ORS 659A.040, an employer may not discriminate against employees * * * with respect to * * * 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 * * *."

OAR 839-006-0117(1) provides, in pertinent part:

> "(1) Pursuant to ORS 659A.040, unlawful employment practices include:
>
> "(a) * * * to bar or discharge from employment * * * because a person applies for benefits under or in other ways invokes or uses Oregon Worker's Compensation system as provided for in ORS Chapter 656."

When the Agency has issued Formal Charges and the respondent defaults, the Agency needs only to establish a prima facie case to support the allegations of its charging document in order to prevail. *In the Matter of Peggy's Cafe,* 7 BOLI 281, 286 (1989). The Agency's prima facie case consists of the following elements: (1) Respondent is an Oregon employer at times material herein who employed six or more persons, including Complainant; (2) Complainant applied for benefits or invoked or utilized the workers' compensation procedures in ORS chapter 656; (3) Respondent knew that Complainant applied for benefits or invoked or utilized the workers' compensation procedures in ORS chapter 656; (4) Respondent terminated Complainant; (5) There is a causal connection between Complainant's application for benefits or invocation or utilization of the workers' compensation procedures in ORS chapter 656 and Complainant's termination; and (6) Complainant was harmed by her termination. *See, e.g., In the Matter of Tony Chan,* 15 BOLI 68, 76 (1996); OAR 839-005-0010(1).

The undisputed facts supporting the Agency's prima facie case are unusually straightforward and can be summarized in a paragraph. Respondent employed six or

more persons during Complainant's employment with Respondent as a bartender. Complainant was Respondent's star employee until she suffered a compensable injury while lifting a heavy tray at work on July 29, 2013. Complainant reported her injury to Respondent and Bray, Respondent's fiancé and manager, and self-treated her injury for three weeks before she visited a doctor. While at the doctor's office, Complainant reported that she had been injured while working for Respondent. Not long afterward, Bray complained to Complainant that Respondent had been fined $8,000 because Respondent did not have workers' compensation insurance. On November 10, 2013, Bray asked Complainant to sign some workers' compensation paperwork. When Complainant signed it, Bray confronted her in a hostile manner and advised her to "scratch out" her signature. Complainant understood she would be fired if she did not do this and crossed out her signature. A few minutes later, Bray emerged from her office and told Complainant she was fired, giving no reason. Complainant suffered considerable harm from the termination, as set forth in greater detail later in this Opinion. These facts establish all the elements of the Agency's prima facie case except for element (5), the causation element, which requires the Agency to show a connection between these facts and Complainant's termination.

The forum concludes that the Agency established the causation element based on the following: (1) Bray's hostility towards Complainant because of the $8,000 fine levied on Respondent for not having workers' compensation insurance after Complainant reported her injury to her doctor; (2) Bray's threatening statements to Complainant on November 10, 2013, in connection with Complainant's signature on her workers' compensation paperwork; (3) Bray's termination of Complainant only minutes after Complainant signed, then crossed out her signature on her workers' compensation paperwork;[4] and (4) the absence of any reliable evidence in the record of any legitimate, nondiscriminatory reason Respondent may have had for terminating Complainant.[5]

In summary, the Agency established all the elements of its prima facie case by reliable, credible, and undisputed evidence, leading the forum to conclude that Respondent violated ORS 659A.040(1), OAR 839-006-0115(1), and OAR 839-006-0117(1)(a) in terminating Complainant.

DAMAGES

The Agency seeks $67,200 in lost wages and tips and "at least $30,000" in damages for mental, emotional, and physical suffering.

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[4] *See In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI 121, 156 (2014) (In a case alleging discharge because of cooperation with a law enforcement agency conducting a criminal investigation, causal connection was shown by respondent's discharge of complainant only an hour after respondent learned that complainant had made statements to police).

[5] Ex. A15, offered and received at hearing, contains statements made by Bray to the Employment Department in connection with Complainant's claim for unemployment benefits. Bray stated to an Employment Department representative that Complainant was discharged for "bad mouthing" Respondent to customers. These notes constitute double hearsay and the forum gives them no weight.

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).

Through Complainant's credible testimony, the Agency established that she has diligently sought other suitable employment after her discharge and had not yet found such employment at the time of the hearing. Complainant's credible testimony also established that, had she not been fired, she would have continued to work for Respondent until on or about July 29, 2014.[6] While employed by Respondent, Complainant was paid $9 per hour, worked an average of 32 hours per week, and received an average of $10 in tips per hour. At a minimum, her wage would have increased to $9.10 per hour as of January 1, 2014. Between November 10 and December 31, 2013, she would have earned $4,256 in wages and tips.[7] Between January 1 and July 29, 2014, she would have earned $18,336 in wages and tips.[8] In total, she would have earned $22,592 in wages and tips, had she not been terminated. Between November 10, 2013, and July 29, 2014, she earned $500 in mitigation of her wage loss. Subtracting $500 from $22,592, the forum concludes that $22,092 is the amount of wages and tips Complainant lost as a result of her termination.

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).

In this case, the evidence of Complainant's emotional and mental suffering was her own compelling testimony. She testified at length and in considerable detail about the emotional and mental suffering she experienced as a result of her termination.

[6] *See* Finding of Fact #13 – The Merits.

[7] *See* calculations in Finding of Fact #14 – The Merits.

[8] *Id.*

Complainant is a person who has always prided herself in her work and being a loyal employee and felt especially that way towards Respondent. She testified convincingly that she did everything she could to mitigate the effects of her workplace injury on Respondent, to the extent of even offering to pay part of her medical bill. She continued to work through considerable physical pain, working extra shifts for employees who had unexpected absences, and manually coating the entire outside of Respondent's business with Home Defense. She had never been fired from a job before and has always been self-sufficient. At one point while she was testifying about the effects of her termination, she became so distraught that the ALJ had to temporarily adjourn the hearing so that she could recover enough to continue her testimony. Based on her testimony and demeanor, the forum has no doubt that, at the time of the hearing, Complainant still experienced the types of suffering related to her termination that are summarized below. The forum's findings about the type, extent, and duration of her suffering are set out in detail in Findings of Fact #15-20 and need not be repeated in their entirety here. Summarized, Complainant has suffered the following as a result of her termination:

- An intense feeling of betrayal
- Severe financial stress caused by loss of income and anxiety from that stress
- Embarrassment
- Loss of many friends
- Emotional pain from her daughter's heartbreak
- Major loss of self-esteem
- Belief that all the people she knew in the community of Rogue River would think she was fired because she "did something wrong"
- Feeling bad and loss of self-pride because she has had to use the money from child support payments to pay ordinary household expenses, had to borrow money from her elderly parents and her older daughter to send her younger daughter on a school trip, and has had to tell her daughter they cannot afford things because of Complainant's lack of income.

In conclusion, Respondent's discriminatory conduct has seriously affected Complainant's emotional well-being and continues to do so. The Formal Charges seek "at least $30,000" in damages for emotional, mental, and physical suffering. The forum concludes that $30,000, the minimum amount sought by the Agency's pleading, is a wholly inadequate sum to compensate Complainant for her continuing emotional and mental suffering caused by her termination. Based on the above and the amount of damages awarded in a comparable, recent BOLI Final Order, the forum finds that $120,000 is an appropriate sum. *See In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 40-41 (2012) (complainant awarded $120,000 for emotional and mental suffering comparable to that experienced by Complainant in this case).

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

34 BOLI ORDERS

In its Formal Charges, the Agency asked that Respondent be trained, at his expense, "on the correct interpretation and application of the Oregon laws pertaining to injured workers, 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 to undergo training of the type sought in the Formal Charges. The forum finds that this requirement is appropriate in this case.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent **Leo Thomas Ryder's** violations of ORS 659A.040(1), OAR 839-006-0115(1), and OAR 839-006-0117(1)(a), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Leo Thomas Ryder** 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 **Robin Sausedo** in the amount of:

1) TWENTY-TWO THOUSAND AND NINETY-TWO DOLLARS ($22,092), less lawful deductions, representing wages lost by Robin Sausedo between November 10, 2013, and July 29, 2014, as a result of Respondent's unlawful employment practice found herein; plus,

2) ONE HUNDRED AND TWENTY THOUSAND DOLLARS ($120,000), representing compensatory damages for emotional and mental suffering experienced by Robin Sausedo as a result of Respondent's unlawful employment practice found herein; plus,

3) Interest at the legal rate on the sum of ONE HUNDRED AND FORTY-TWO THOUSAND AND NINETY-TWO DOLLARS ($142,092) until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 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 **Leo Thomas Ryder** to participate in training on the correct interpretation and application of the Oregon laws pertaining to injured workers 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 Respondent's unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Leo Thomas Ryder** to cease and desist from violating the provisions of ORS 659A.040 to ORS 659A.052 relating to unlawful employment discrimination against injured workers.

In the Matter of

HEY BEAUTIFUL ENTERPRISES, LTD., and
KIMBERLY SCHOENE, individually as aider and abettor

Case No. 41-15
Final Order of Commissioner Brad Avakian
Issued July 21, 2015

SYNOPSIS

Complainant, an esthetician, was employed by Respondent Hey Beautiful Enterprises, Ltd. ("HBE"), which paid its employees every week. After three weeks, Complainant had worked 129 hours and earned $1,161 in wages but had been paid nothing. When Complainant told her manager that she had called the Better Business Bureau to ask advice about getting paid, her employment status was reduced from fulltime to on-call. The next day, when Complainant visited BOLI to inquire about filing a wage claim, she was discharged. HBE violated ORS 652.355, OAR 839-010-0100(4), ORS 659A.199, OAR 839-010-0100(4), ORS 659A.030(1)(f), and OAR 839-050-0125(2) in changing Complainant's employment status from fulltime to on-call and discharging Complainant. Respondent Schoene, HBE's president, was responsible for these unlawful employment practice, thereby violating ORS 659A.030(1)(g) by aiding and abetting HBE's actions. The forum awarded Complainant $10,000 in damages for mental and emotional distress stemming from Respondents' unlawful employment practices and $644.00 for lost wages and tips.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 19, 2015, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Amber R. Walker ("Complainant") was present throughout the hearing and was not represented by counsel. Respondent Kimberly Schoene ("Schoene") represented herself and was present throughout the hearing. Respondent HBE was held in default prior to the hearing and was not represented at the hearing.

The Agency called the following witnesses: Amber Walker, Complainant, and Monica Mosley, Senior Investigator, BOLI Civil Rights Division. Respondent Schoene called herself as a witness.

The forum received into evidence: a) Administrative exhibits X1 through X12; b) Agency exhibits A1 through A19; and c) Respondent exhibits R1 through R6.

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,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 27, 2013, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent HBE. On April 28, 2014, the complaint was amended to name Respondent Schoene as an aider and abettor. On August 28, 2014, the complaint was amended a second time to correct Respondents' addresses. After investigation, the Agency issued a Notice of Substantial Evidence Determination on December 12, 2014, in which it found substantial evidence that Respondents had engaged in unlawful employment practices in violation of ORS 652.355, ORS 659A.199, ORS 659A.230, ORS 659A.030(1)(f), and ORS 659A.030(1)(g) by retaliating against Complainant and terminating her for reporting a violation of state law, whistleblowing, filing a wage claim, and aiding and abetting these unlawful employment practices. (Exs. A1, A3, A5, A17)

2) On February 13, 2015, the Forum issued a Notice of Hearing to Respondents, the Agency, and Complainant stating the time and place of the hearing as May 19, 2015, beginning at 9:00 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal 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 Formal Charges alleged the following unlawful employment practices:

a. HBE discriminated against Complainant "because Complainant made a wage claim or discussed, inquired about or consulted an attorney or agency about a wage claim in violation of ORS 652.355 and OAR 839-010-0100(4)."

b. HBE "unlawfully discharged, demoted, suspended, discriminated and/or retaliated against Complainant with regard to promotion, compensation or other terms, conditions or privileges of employment because Complainant, in

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

good faith, reported information that Complainant 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)."

c. HBE unlawfully discharged, expelled or otherwise discriminated against the Complainant because Complainant opposed Respondents' unlawful practice and/or practices or because Complainant has filed a complaint, testified or assisted in any proceeding under ORS Chapter 659A or has attempted to do so in violation of ORS 659A.030(1)(f) and OAR 839-005-0125."

d. Schoene aided, abetted, incited, compelled or coerced or attempted to aid, abet, incite, compel or coerce HBE's unlawful employment practices in violation of ORS 659A.030(1)(g).

The Formal Charges asked for lost wages estimated to be "at least $18,720" and damages for emotional, mental and physical suffering in the amount of "at least $10,000." The Formal Charges also requested that Respondents be trained, at their expense, "on the correct interpretation and application of the Oregon laws pertaining to retaliation" and enjoined from "violating laws pertaining to retaliation for engaging in protected activity." (Ex. X2)

4) On February 26, 2015, Schoene filed an answer in which she denied engaging in the unlawful employment practices alleged in the Formal Charges. (Ex. X3)

5) On March 3, 2015, the ALJ issued an interim order that stated the following:

> "In reviewing the record to date, it appears that Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** is a corporation or legal entity separate and distinct from Respondent **KIMBERLY SCHOENE**. If so, OAR 839-050-0110(1) requires that corporations must be represented at all stages of the proceeding either by counsel or by an authorized representative. An authorized representative includes an authorized officer or regular employee of a corporation. OAR 8390-050-0110(2). **Before a person may appear as an authorized representative, the corporation that is a party to the contested case proceeding must file a letter specifically authorizing the person to appear on behalf of the party.** OAR 839-050-0110(3). The answer and request for hearing filed by **KIMBERLY SCHOENE** does not contain that specific authorization.
>
> "If Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** is in fact a corporation, it is hereby notified that: (1) **HEY BEAUTIFUL ENTERPRISES, LTD.** MUST be represented either by an attorney or by an 'authorized representative' at all stages of this proceeding, including the filing of an answer; (2) At this point in the contested case proceeding, **HEY BEAUTIFUL ENTERPRISES, LTD.** has not yet filed an answer; (3) Except for a letter

authorizing a person to appear on behalf of Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** as an authorized representative, the forum will disregard any motions, filings, or other communications from Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** unless they are through an attorney or authorized representative; and (4) If Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** is not represented in this contested case proceeding by an attorney or authorized representative, Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** will be found in default and will not be allowed to participate in the hearing. OAR 839-050-0330.

"To resolve this potential problem, Respondent **HEY BEAUTIFUL ENTERPRISES, LTD.** must file a letter specifically authorizing an authorized officer or regular employee of **HEY BEAUTIFUL ENTERPRISES, LTD.** to appear as its authorized representative. If Ms. Schoene desires to act as **HEY BEAUTIFUL ENTERPRISES, LTD.**'s authorized representative and is eligible to do so, she can meet this requirement by simply filing a letter authorizing her to appear as **HEY BEAUTIFUL ENTERPRISES, LTD.**'s authorized representative and asking the forum to accept the answer she has already filed as the answer for **HEY BEAUTIFUL ENTERPRISES, LTD**."

(Ex. X6)

6) On March 19, 2015, the Agency filed a motion for default against HBE based on HBE's failure to file a timely answer through an authorized representative. (Ex. X8)

7) On March 23, 2015, the ALJ issued an interim order granting the Agency's motion for default against HBE. The order read as follows:

"**INTRODUCTION**

"On March 19, 2015, the Agency moved for an Order of Default based on the failure of Respondent Hey Beautiful Enterprises, Ltd. ("HBE") to file an answer to the Formal Charges. This order rules on the Agency's motion.

"**ANALYSIS**

"On February 13, 2015, the Agency issued Formal Charges ("Charges") in which it alleged that HBE was an active business corporation that was Complainant's employer and terminated Complainant in violation of ORS 652.355 and OAR 839-010-0100(4). The Charges further alleged that Respondent Kimberly Schoene was HBE's president and secretary and that Schoene terminated Complainant, thereby aiding and abetting HBE in violation of ORS 659A.030(1)(g).

"The forum takes official notice that the Notice of Hearing affixed as a cover page to the Formal Charges conspicuously stated the following two requirements that are directly relevant to this Notice of Default:

> (1) '**Respondent's Answer is due 20 days from service of this Notice. If Respondent does not file an answer within 20 days, it may be held in DEFAULT**. If held in default, Respondent will not be allowed to participate in the contested case hearing, examine witnesses, or introduce evidence.' (emphasis in original).
>
> (2) 'All partnerships, corporations, unincorporated associations, including limited liability companies * * * MUST be represented by an attorney or by an "authorized representative" at all stages of the hearing, including the filing of an answer. * * *'

"On March 2, 2015, Respondent Schoene filed an answer to the Charges in which she denied the majority of the allegations in the Charges and asked that the Charges be dismissed. On March 3, 2015, I issued an interim order setting out the requirement in OAR 839-050-0110(1) for HBE to be represented by an attorney or an authorized representative. In pertinent part, my order read:

> [The order referred to is quoted verbatim in Proposed Finding of Fact #5 – Procedural, *supra*.]

"On March 5, 2015, the Agency filed a Notice of Intent to File a Motion for Default if HBE did not file an answer to the Formal Charges on or before March 16, 2015, then filed the present motion on March 19, 2015. As of today, neither Respondent HBE nor Schoene have complied with the terms of my March 3, 2015, interim order

"OAR 839-050-0130(4) requires that 'a party must file an answer within 20 days after service of the [Formal Charges].' OAR 839-050-0030(1) provides that service of Formal Charges is complete 'upon * * * (a) Receipt by the party or the party's representative; or (b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.' OAR 839-050-0330(1) provides that default may occur when '[a] party fails to file a required response, including * * * an answer, within the time specified in the [Formal Charges].'

"In support of its motion, the Agency attached a receipt showing that the Formal Charges were mailed on February 13, 2015, by certified mail, return receipt requested, to Michael Redden, HBE's registered agent, and delivered and signed for on February 18, 2015. Respondent Schoene raised no argument in her answer that Redden was not HBE's agent or that the Charges were not mailed to Redden's correct address. Accordingly, HBE's answer was due no later than March 5, 2015. 38 days have elapsed since February 13, 2015, and

HBE has yet to file an answer, despite two written reminders, one from the forum and one from the Agency, that it would be held in default if it did not do so.

"Based on Respondent HBE's failure to file an answer in the time set out in the Notice of Hearing, this forum **GRANTS** the Agency's motion and finds HBE in default. If HBE is not granted relief from default, HBE will not be allowed to participate in any manner in the hearing, including, but not limited to, presentation of witnesses or evidence on HBE's behalf, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, and filing exceptions to the Proposed Order. OAR 839-050-0330(4).

"Relief from default may be granted if HBE shows good cause, within ten days after the date of this order, for failing to timely file an answer. HBE's request for relief must be in writing and accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause. OAR 839-050-0340. Any request for relief from default must be made by an attorney or authorized representative or the forum will not consider it."

"**IT IS SO ORDERED**"

(Ex. X9)

8) HBE did not file a request for relief from default. (Entire Record)

9) On March 30, 2015, Schoene filed a letter with the forum that stated the following: "HEY BEAUTIFUL ent [sic] authorizes Kimberly Schoene to represent on the business behalf. All documents that have been submitted where [sic] in the behalf of HEY BEAUTIFUL Ent with Kimberly Schoene as the reprehensive [sic]." (Ex. X10)

10) At the start of the hearing, the ALJ orally advised Casey and Schoene of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

11) On June 16, 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 no exceptions. On June 26, 2015, the Agency timely filed exceptions to the ALJ's conclusions that HBE did not violate ORS 659A.030(1)(f) and that Complainant was not entitled to any back pay. Those exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, HBE was a corporation doing business in Oregon and engaged or utilized the personal services of one or more employees, including Complainant. (Testimony of Complainant; Ex. A8)

2) At all times material herein, Schoene was HBE's president, secretary, and manager. (Testimony of Schoene, Mosley; Ex. A8)

3) Complainant worked for HBE from December 6 through December 27, 2012, as a licensed esthetician and nail technician. She was hired as a full-time employee at the agreed wage rate of $9 per hour. During her short tenure of employment with HBE, she was scheduled to work approximately 40 hours per week. When she was not working with a client, she was expected to remain in HBE's salon. She was trained by Schoene, whom she looked up to as a boss and mentor. (Testimony of Complainant; Exs. A7, A19)

4) Before Complainant started work, HBE required her to sign a document entitled "Contracting Statement agreement for employees of Kalista salon"[2] that included the following language:

> "The employee Amber acknowledges that he/she will only be compensated for services performed by the employee on an hourly and commission scale of services paid by client[.] If the technician has a client she will be paid for that client within the time she is given to perform the service, unless otherwise agreed in writing. Hourly rate 9 commissions of service 15% commissions of retail 10%"[3]

(Ex. A19)

5) Complainant was trained by Schoene. Complainant's immediate supervisor was Aida Magana, HBE's spa manager. (Testimony of Complainant, Schoene; Ex. R1)

6) On December 20, 2012, Complainant received a written evaluation that concluded with the words "everything is great." While she worked for HBE, her work ethic and her work was "really good." (Testimony of Complainant, Mosley; Exs. A13, A14)

7) HBE paid its employees once a week during Complainant's employment. Complainant was not paid after her first week of employment because of HBE's policy that new employees are not paid until "the second payroll." (Testimony of Complainant, Mosley; Ex. A14)

8) HBE's regular payday was December 22, 2012. Complainant did not receive a paycheck on that date. At lunchtime, she asked Schoene for her paycheck. Schoene told Complainant there could have been "problems with the payroll" and by the next payroll "it would be taken care of." (Testimony of Complainant)

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[2] "Kalista Hair Salon" was an assumed business name that HBE registered with the Sec. of State Corporation Division on August 27, 2008.

[3] Underlined text is handwritten on the original document.

9) HBE's next payday was December 27, 2012. By this time, Complainant had worked 129 hours and earned $1,161 in wages.[4] When Complainant did not get a paycheck, she telephoned the Better Business Bureau ("BBB") in the afternoon to ask for assistance in getting paid. A BBB representative told Complainant that she should demand her pay, ask for a pay stub, and contact BOLI if she was not given both. (Testimony of Complainant)

10) In the afternoon after she called the BBB, Complainant called Magana and left a voicemail message saying that she had contacted the BBB and that the BBB had advised her to demand her pay and ask for a pay stub. Complainant also talked to her coworkers about not being paid. Some of them also said that they had not been paid and Complainant advised them to call BOLI. Complainant followed up her voicemail by sending a text message to Magana at 4:54 p.m. Between 4:54 p.m. and 10:15 p.m. that night, Complainant and Magana exchanged the following text messages, reprinted verbatim below. Complainant's messages are bolded; Magana's are in italics.

- **"Hey I need a print out of my pay for the 7th so I know how to budget for next month. Are you coming back tonight?"**
- *Who is this new phone?*
- **Amber:-)**
- **??**
- *I'm not commit back I'm doing a few things at the moment.*
- *There is a tip from today FYI.*
- **Can Ashley get that?? I need that tonight before I leave**
- *No she can't. And we just print that out. its done when payroll goes.*
- *I can see what we can do but it won't happen until tomorrow*
- **I hope you have that ready for me tomorrow morning**
- *I'll talk to you about it tomorrow. It's not a click away... and any questions you have are done at it one on one. Not when I'm not at the salon. Any print outs have clients information and I can't just print out.*
- **It would be awesome if I could talk to tonight. I don't think ur understanding the seriousness of this situation.**
- *Please come tomorrow so I can give you a copy of your contract and your final check. Thanks.*
- **Final check?**
- **I never quit, so am I fired?? What's going on?**
- *Based on your actions and your involving the whole staff. You quite. I'm so confused!?*

[4] The forum applies the doctrine of issue preclusion to determine this fact. In a Final Order issued on May 9, 2014, in which Complainant's subsequent wage claim against HBE was litigated, including the number of hours she worked, her rate of pay, and her total wages earned, BOLI's Commissioner found that Complainant had worked 129 hours and earned $1,161 in wages for the work she performed for HBE between December 6 and December 27, 2012. *See In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 257 (1999)(issue preclusion bars future litigation on an issue of fact or law when that issue has been actually litigated and determined in a setting when its determination was essential to the final decision reached).

34 BOLI ORDERS

- **Don't be confused, I just want a copy of my pay like I was advised to do.**
- **I am not quitting.**
- *You never had to be there, it is a matter of you building your clientele and getting walk-ins. By not having several ppl waiting for Walk ins we focus on you and having the front desk giving you the walk ins while my other staff is fully licensed. We will be having you on call and you come in when we a client.*
- **I am just told that I needed to make sure I get a copy of my pay roll information. That is fine, will I see u tomorrow the scheduled time?**
- *You're on call. If you have a client we'll call you.*
- **I'm coming in for my copy of contract and my pay roll info what time will be convenient for you?**
- *Ur going to need to talk to Kim from here on out! Your on call and at this point I'm no longer managing u if u have an address we will send u your copy of the contract and we will have your numbers for you! We will not give u the print out but will let u see your numbers and show you them to compare them! I feel u are hostile and I don't feel comfortable around u any longer! You will have to schedule time with Kim*
- **Her # please?**
- *If we need you for clients will contact u! If we call u for a client and u don't show it will be job abandonment! You will need to be in dress store and ready for your client when called. U will not need to stay in the salon after u are done with your client. As a matter of fact it's best your not! U will be written up tomorrow for upsetting the entire staff with your outburst tomorrow! Kim*
- *58353099372*
- *5035309382*
- **Okay thank you**

(Testimony of Complainant; Ex. A11)

11) While Magana and Complainant were exchanging text messages, Magana told Schoene that Complainant had caused a scene with other staff members and that Complainant had contacted the BBB and was demanding a meeting. Schoene and Magana discussed the situation. Schoene told Magana that she thought "we're being set up" and told Magana to stop texting Complainant and arrange a meeting for the next morning. (Testimony of Mosley; Ex. A14)

12) From Magana's text messages, Complainant concluded that her employment status had been changed from fulltime work to on-call status. Complainant wanted to be a fulltime employee, not an on-call employee, and Magana's text messages made her "initially" feel angry and "emotionally distraught." (Testimony of Complainant)

13) On the morning of December 28, 2012, Complainant met with Schoene and Magana at HBE before HBE opened for business. Complainant's purpose in meeting with them was to get paid and obtain a copy of documents that showed how she was being paid. The meeting soon became a confrontation, with Schoene screaming at Complainant. Schoene was furious with Complainant for contacting the

BBB. Schoene told Complainant she had not done anything wrong, that Complainant was "stupid and naive," was "being a bitch," and added "that is how this business works." Schoene offered to give Complainant a copy of her employment contract and told Complainant that she would be called when a client arrived. Schoene also asked Complainant how long it would take her to get to HBE if she had a client; Complainant responded that it would take an hour. At the end of the meeting, Schoene "pushed" Complainant as Complainant attempted to walk around her to leave HBE's salon. (Testimony of Complainant, Schoene)

14) Complainant then waited downstairs for 30 minutes before Schoene gave her a paycheck for $200 and a handwritten note of days Complainant had worked and the different services Complainant had performed. Schoene did not give Complainant a paystub. In response, Complainant told Schoene that she was going to BOLI because Schoene "had not given her what she came in for." (Testimony of Complainant, Mosley; Ex. A14)

15) Later on the morning of December 28, Complainant visited BOLI's Portland office, where she was given information on how to file a wage claim and a civil rights complaint. While at BOLI's office, Magana sent Complainant a text message that read: "so we have a brow wax. Can you be here right now?" Complainant responded that she could not because she was "at BOLI." Magana told Schoene that Complainant was "down at the labor board, turning us in." Schoene responded by saying "I guess she quit. I guess she made her decision." Three minutes after her first text message, Magana sent Complainant a second text message that read: "Never mind she left." (Testimony of Complainant, Schoene; Exs. A10, R2)

16) Before December 27, Complainant had been scheduled to work on December 28-31, 2012. (Testimony of Complainant; Ex. A11)

17) After December 28, HBE did not call Complainant again for work. (Testimony of Complainant)

18) On January 5, 2013, Complainant received a letter from HBE that stated HBE was going to bill her for training and sue her. This letter made Complainant feel depressed and angry and certain that she was not going to be paid for her work and that she had been fired. Prior to receiving the letter, Complainant had not been told that she had been fired. (Testimony of Complainant; Exhibit A11)

19) Complainant received an average of $20 a day in tips during her employment with HBE. (Testimony of Complainant)

20) If Complainant had not been fired, she would have worked an additional seven days between December 28 and January 5, 2013, earning $504 in wages ($9 per hour x 56 hours) and $140 in tips. (Entire record; Calculation of ALJ)

21) On January 30, 2013, Complainant filed a wage claim with BOLI alleging that HBE had employed her and failed to pay all wages earned and due to her. (Testimony of Complainant)

22) During Complainant's employment, HBE had two fulltime estheticians, including Complainant. The other esthetician was an "on-call" employee. In December 2013, HBE shut its doors and closed for business. Up to that time, HBE continued to employ the other esthetician. (Testimony of Schoene)

23) Complainant loved working at HBE and would have continued working there, had she been allowed to do so. She particularly liked the decor of HBE's salon and the opportunity to be trained by Schoene, who had been in the cosmetology business a long time and whom Complainant regarded as a mentor. She also liked her co-workers and felt she had "found her permanent home as a stylist." (Testimony of Complainant)

24) Complainant felt depressed because HBE never called her back to work. She was evicted from her apartment, her car was repossessed, and had to move in with her mom as a result of being unemployed. She filed for and received minimal unemployment benefits that did not cover her expenses. She had difficulty finding another apartment because of her eviction. As a result of "all this stuff happening," her face was completely broken out. She did not start work at a job equivalent to her job with HBE until on or about her birthday on November 24, 2013, when she started work as a hairdresser at Supercuts. (Testimony of Complainant)

25) On March 25, 2014, a contested case hearing was held regarding Complainant's wage claim and the wage claims of three other persons who had been employed by HBE. On May 9, 2014, BOLI's Commissioner issued a Final Order that concluded, among other things, that Complainant was owed $800.15 in unpaid, due, and owing wages for the work she performed for HBE between December 6 and December 27, 2012. In the same Final Order, BOLI's Commissioner concluded that three of Complainant's coworkers were owed unpaid wages, including one coworker who was paid nothing at all for 53 hours of work. The Commissioner also held that HBE's practice of requiring HBE's employees to sign employment contracts in which they agreed not to be paid for "non-client" work was invalid as a matter of law.[5] (Ex. A19; Judicial Notice)

26) Mosley was a credible witness and the forum has credited her testimony in its entirety. (Testimony of Mosley)

27) Although Complainant's memory was not completely reliable and had to be refreshed on two important points -- the date she began work for HBE and her rate of pay, which she initially testified was $10 per hour before the Agency's administrative prosecutor referred her to the Final Order deciding her wage claim -- her testimony was

[5] *See In the Matter of Hey Beautiful Enterprises, Ltd.,* 33 BOLI 189 (2014).

consistent with her prior statements and the documents offered in evidence and the forum finds that she was a credible witness. In particular, the forum has credited Complainant's testimony whenever it conflicted with Schoene's testimony. (Testimony of Complainant)

28) Schoene's testimony was disingenuous and self-serving. She blamed her ultimate business failure in December 2013 on Complainant's rousing her staff to quit because of Complainant's demand for her pay, records of her hours worked, and itemized deductions. A prime example of this was her testimony that she did not do HBE's payroll because "I didn't want anyone to think I would cheat them." In contrast, the Final Order issued on May 9, 2014, based on the wage claims of Complainant and three of her coworkers, concluded that that is exactly what Schoene was doing through HBE's payroll scheme. The forum has only credited Schoene's testimony when it was adverse to herself or HBE. (Testimony of Schoene)

CONCLUSIONS OF LAW

1) At all times material herein, HBE was a corporation doing business in Oregon and engaged or utilized the personal services of one or more employees, including Complainant.

2) At all times material, Respondent Schoene was HBE's corporate president and HBE's manager.

3) At all times material, Aida Magana was Complainant's immediate supervisor.

4) The actions, statements, and motivations of Schoene and Magana are properly imputed to HBE.

5) HBE's action, taken through Schoene, of changing Complainant's employment status from fulltime to on-call, violated ORS 652.355, OAR 839-010-0100(4), ORS 659A.199, and OAR 839-010-0100(4).

6) HBE's action, taken through Schoene, of discharging Complainant from HBE's employment, violated ORS 652.355, OAR 839-010-0100(4), ORS 659A.199, OAR 839-010-0100(4), ORS 659A.030(1)(f), and OAR 839-050-0125(2).

7) Schoene aided and abetted HBE's change of Complainant's employment status from fulltime to on-call and discharge of Complainant, thereby violating ORS 659A.030(1)(g).

8) BOLI's Commissioner has jurisdiction over the subject matter and Respondents herein. ORS 652.330, 652.332.

9) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects

of any unlawful practices found. The sums of money awarded and the other actions required of Respondents HBE and Schoene in the Order below are an appropriate exercise of that authority. ORS 659A.800 to ORS 659A.865

OPINION

Introduction

This is an employment discrimination case in which the Agency alleges that HBE violated three different statutes – ORS 652.355, ORS 659A.030(1)(f), and ORS 659A.199 – and BOLI's administrative rules interpreting those statutes by reducing Complainant's employment status from fulltime to on-call, then discharging her. The Agency further alleges that Schoene, HBE's corporate president, secretary, and manager, aided and abetted HBE in all three violations, thereby violating ORS 659A.030(1)(g). To compensate Complainant for these unlawful employment practices, the Agency seeks "at least $18,720" in back pay and "at least $10,000" in damages for Complainant's emotional and mental suffering.

The Facts

The relevant facts in this case follow. Complainant was hired by HBE as an esthetician and nail technician and as a fulltime employee on December 6, 2012. Schoene, HBE's president, managed HBE and trained Complainant, and Magana was Complainant's immediate supervisor. HBE paid its employees once a week, but Complainant was not paid after her first or second weeks of employment. When Complainant did not receive a paycheck on December 22, 2012, she asked Schoene for her paycheck. Schoene told Complainant there could have been a problem with payroll, but that the problem would be taken care of by HBE's next payday. When Complainant did not get a paycheck on December 27, 2012, HBE's next payday, she called the BBB for advice and was told she should demand her pay, ask for a pay stub, and contact BOLI if she was not given both. Complainant then called Magana and left a voice mail message stating that she had contacted the BBB and repeating the advice given to her by the BBB. She also talked to her coworkers and learned that some of them had not been paid. Over the next five hours, she exchanged a series of text messages with Magana that concluded when Magana told Complainant that she was now an "on call" employee who would only be called for work when she had a client, and that Schoene was now her immediate supervisor. During this text message exchange, Magana told Schoene that Complainant had contacted the BBB and was demanding her wages.

The next morning, Complainant met with Magana and Schoene. Schoene was furious at Complainant for contacting the BBB and screamed at Complainant, telling her that she had done nothing wrong and that Complainant was "stupid and naive." She also told Complainant that she was "being a bitch" and "that is how this business works." At the end of the meeting, Schoene told Complainant that HBE would call her when a client arrived. Schoene also gave Complainant a $200 paycheck, a small portion of the wages earned, due, and owing to Complainant. Complainant left, telling

Schoene that she was going to BOLI because Schoene "had not given her what she came in for."

Later that morning, Complainant visited BOLI's Portland office and was given information on how to file a wage claim and a civil rights complaint. While at BOLI's office, Magana sent Complainant a text message that read: "so we have a brow wax. Can you be here right now?" Complainant texted back that she could not because she was "at BOLI." Magana told Schoene that Complainant was "down at the labor board, turning us in." Schoene's response was "I guess she quit. I guess she made her decision." Complainant was never again called for work.

ORS 652.355 & OAR 839-010-0100(4)

ORS 652.355 provides, in pertinent part:

> "(1) An employer may not discharge or in any other manner discriminate against an employee because:
>
> > "(a) The employee has made a wage claim or discussed, inquired about or consulted an attorney or agency about a wage claim.
>
> "* * * * *
>
> "(2) A violation of this section is an unlawful employment practice under ORS chapter 659A. A person unlawfully discriminated against under this section may file a complaint under ORS 659A.820 with the Commissioner of the Bureau of Labor and Industries."

OAR 839-010-0100(4) interprets this statute as follows:

> "(4) ORS 652.355 prohibits any employer with one or more employees in Oregon from discriminating or retaliating against a current, former, or any other employer's employee because:
>
> "(a) The employee has made a wage claim or has discussed with anyone, inquired of anyone, or consulted an attorney or agency about a wage claim[.]"

In the context of this statute, the words "wage claim" means either (1) having made a formal wage claim with BOLI or (2) having discussed or inquired about unpaid wages with anyone or consulted an attorney or agency about unpaid wages. Complainant's call to the BBB and her discussions with her coworkers on December 27 about not being paid the wages due and owing to her both satisfy the latter definition.

It is undisputed that Complainant was a fulltime employee with a regular work schedule until she called the BBB and talked to employer coworkers about her pay on December 27, 2012. Complainant's testimony and Mosley's interview notes with

Schoene show that Magana and Schoene were both aware that Complainant had contacted the BBB before they decided to make Complainant an on-call employee. The following portions of the December 27, 2012, text message exchange between Complainant and Magana, reprinted verbatim, together with Magana and Schoene's knowledge that Complainant had complained to the BBB[6] and complained to her coworkers about her pay, proves that Complainant was made an on-call employee because of those complaints:

> **Complainant**: "I never quit, so am I fired?? What's going on?"
>
> **Magana**: "Based on your actions and your involving the whole staff. You quite."
>
> **Complainant**: "Don't be confused, I just want a copy of my pay like I was advised to do. I am not quitting."
>
> **Magana**: "You never had to be there, it is a matter of you building your clientele and getting walk-ins. By not having several ppl waiting for Walk ins we focus on you and having the front desk giving you the walk ins while my other staff is fully licensed. We will be having you on call and you come in when we a client."
>
> **Complainant**: "I am just told that I needed to make sure I get a copy of my pay roll information. That is fine, will I see u tomorrow the scheduled time?"
>
> **Magana**: "You're on call. If you have a client we'll call you."

Based on the foregoing, the forum concludes that Complainant's job status was changed from fulltime to on-call in violation of ORS 652.355 and OAR 839-010-0100(4).

Regarding Complainant's alleged discharge, Respondents argue that Complainant voluntarily quit by declining to come to HBE's salon on December 28, 2012, to perform a brow wax on a client. Earlier that morning, Complainant had told Schoene, in response to Schoene's question, that it would take her an hour to get to HBE if called in for work. Complainant was at BOLI's Portland office getting information about filing a wage claim when Magana texted her to come to HBE to do a brow wax. Complainant told Magana she was at BOLI, and Magana told Schoene that Complainant was "down at the labor board, turning us in." Schoene responded by saying "I guess she quit. I guess she made her decision." In contrast, Complainant credibly testified that she never quit, and in fact wanted to continue working for HBE, even though her hours had been cut.

Based mainly on Schoene's testimony, the forum finds that Schoene's excuse for deciding Complainant had quit was pretextual, and the real reason Complainant was never called again for work was in retaliation for her complaints about not being paid. To begin, Schoene was not a credible witness. As alluded to earlier, she testified "I

[6] *See* Finding of Fact #10 – The Merits, for context.

didn't take care of payroll specifically because I didn't want anybody to think that I would ever cheat them. I had a payroll person, a bookkeeper, and ADP wrote the checks. * * * So they just told me how much to transfer into the * * * payroll checking account." Notably, she did not testify about how she kept track of the hours worked by HBE's employees, how ADP determined the amount of the checks, and why Complainant was not paid anything on her first three scheduled paydays. Second, Schoene's testimony that she "was shocked at [Complainant's] behavior," made in reference to Complainant's complaints about her wages, vividly demonstrates her attitude to Complainant's complaints about her wages. Third, Schoene's reference to "when the whole Amber thing happened" and her testimony that the paperwork from the wage claims caused a "constant infection" in her shop is a further indicator of Schoene's attitude towards Complainant's demand for wage accountability. Fourth, Schoene's testimony that had Complainant not "abandoned" her job "I would have let her work because I would have tried to get her to drop the case" confirms her opposition to Complainant's wage claim. Based on the above, the forum concludes that HBE, acting through Schoene, discharged Complainant in violation of ORS 652.355 and OAR 839-010-0100(4).

ORS 659A.199 & OAR 839-010-0100(4)

> ORS 659A.199 provides:
>
> (1) It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment 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) interprets this statute as follows:

> (1) ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging, demoting, suspending, or in any manner discriminating or retaliating against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment 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.

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. *Cf. In the Matter of Logan International Ltd.,* 26 BOLI 254, 279-80 (2005); *In the Matter of Cleopatra's, Inc.,* 26 BOLI 125, 134 (2005); *In the Matter of Hermiston Assisted Living,*23 BOLI 96, 124-25 (2002) (all three cases defining "good faith" in the context of Oregon's laws prohibiting retaliation against whistleblowers of criminal activity). Here, the information reported by Complainant consisted of her complaints that she had not been paid for her work. At the time of her complaint, Complainant had worked through

three of HBE's weekly payday cycles, was told by the BBB that she was legally entitled to a paycheck and paystub for her work, and the forum itself has previously concluded that HBE violated Oregon state law by failing to pay Complainant her earned, due, and owing wages.[7] This satisfies the "good faith" requirement in ORS 659A.199.

Under ORS 659A.199, an employee "report[s]" information when the employee communicates information to "anyone" that the employee believes is evidence of a violation of state law. *Cf. In the Matter of Logan International Ltd.,* 26 BOLI 254, 279-80 (2005) (when complainant told his supervisors that employees in respondent's shipping department were using drugs, this constituted an oral "report" that satisfied the reporting element of the agency's prima facie case); *In the Matter of Cleopatra's, Inc.,* 26 BOLI 125, 134 (2005) (complainant's oral communication to respondent's manager that her payroll deductions constituted theft satisfied the reporting element of the agency's prima facie case). Complainant's complaints to the BBB, Magana, Schoene, and BOLI that she was not being paid for her work all satisfy the reporting requirement of ORS 659A.199.

In the earlier section of this Opinion discussing Complainant's ORS 652.355 allegations, the forum concluded that Complainant was made an on-call employee because she complained to the BBB and to her coworkers about her pay, and that she was fired because she went to BOLI to make a wage claim. Those complaints were good faith reports containing evidence of a violation of state law. As such, HBE's reduction of Complainant's hours and discharge of Complainant also violated ORS 659A.199 and OAR 839-010-0100(1).

ORS 659A.030(1)(f) & OAR 839-005-0125(2)

The Agency excepted to the ALJ's conclusion in the Proposed Order that HBE did not violate ORS 659A.030(1)(f) and OAR 839-005-0125(2). The forum **GRANTS** the Agency's exception. The forum has already concluded that HBE's ORS 652.355 violation establishes an unlawful practice under ORS chapter 659A. The analysis used in determining that HBE violated ORS 659A.199 applies equally to the Agency's ORS 659A.030(1)(f) claim. Accordingly, the forum's conclusion that HBE violated ORS 659A.199 necessarily leads to the conclusion that HBE also violated ORS 659.030(1)(f).

Respondent Schoene Aided and Abetted HBE's Violations

ORS 659A.030(1)(g) provides:

"(1) It is an unlawful employment practice:

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so."

[7] *See* Finding of Fact #23 – The Merits.

In this case, HBE was[8] an Oregon corporation and Schoene was HBE's president and secretary. A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. *In the Matter of Crystal Springs Landscapes, Inc.,* 32 BOLI 144, 166-67 (2012). *See also In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 35 (2012). Aiding and abetting, in the context of an unlawful employment practice, means "to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission." *Id.* Accordingly, the forum examines Schoene's role in HBE's alteration of Complainant's work schedule from fulltime to on-call and Complainant's discharge to determine the extent, if any, of Schoene's liability as an aider and abettor.

Fulltime to On-Call

Complainant's work schedule was changed to on-call on December 27, 2012, during her exchange of text messages with Magana, her immediate supervisor, concerning her unpaid wages. Although Complainant did not speak directly with Schoene about her complaints on December 27 and there is no direct evidence that Schoene made the decision on December 27 to change Complainant's employment status to on-call, the following circumstantial evidence provides ample grounds for the forum to conclude that Schoene made that decision. First, there is no evidence that Magana had the unilateral authority to change Complainant's employment status, whereas Schoene, as HBE's president and manager, clearly had the ultimate authority to make employment decisions. Second, Magana discussed Complainant's complaints with Schoene before Magana texted Complainant with the message that her job status was changed to on-call. Third, Schoene's attitude towards Complainant's complaints about her wages was decidedly hostile. Based on the above, the forum finds that Schoene aided and abetted HBE by making the decision to change Complainant's status to on-call, thereby violating ORS 659A.030(1)(g).[9]

Complainant's Termination

In her Answer and at hearing, Schoene argued that Complainant voluntarily quit by declining to come to HBE's salon on December 28, 2012, to perform a brow wax on a client. When Magana told Schoene that Complainant was "down at the labor board,

[8] The forum uses the past tense because HBE was an inactive corporation at the time of the hearing.

[9] *See, e.g., In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 137 (2012)(an individual respondent who was a professional corporation's sole owner and president and complainant's immediate supervisor and the primary actor in three distinct unlawful employment actions against complainant was held jointly and severally liable as an aider and abettor for all three actions); *In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 35 (2012)(an individual respondent who was the vice president, one third share owner, and CEO of the respondent corporation that employed complainant throughout complainant's employment was found to have aided and abetted the respondent corporation in discharging complainant when he participated in making the joint decision to discharge complainant).

turning us in," Schoene concluded "I guess she quit. I guess she made her decision." Through Complainant's credible testimony, the Agency proved that she had no intention of quitting and wanted to continue working for HBE, even though her hours had been cut. The forum views Schoene's conclusion on December 28 that Complainant had "quit" because Complainant could not come in to do a brow wax, made shortly after Complainant had told Schoene it would take her an hour to get to HBE to see a client and at the very time Complainant told Magana she was at BOLI's office, as transparently pretextual. In fact, Schoene's conclusion that Complainant had "quit" was Schoene's conclusion to discharge Complainant from HBE's employment. This decision makes Schoene liable as an aider and abettor to Complainant's discharge.[10]

Conclusion

As an aider and abettor, Schoene is jointly and severally liable with HBE for all of HBE's unlawful employment practices.

Damages

A. Back Pay

The Agency excepted to the Proposed Order's conclusion that Complainant was not entitled to any back pay. The forum addresses the Agency's exception at the end of this section and grants it in part.

The Agency's Formal Charges asked that Complainant be awarded "an amount to be proven at hearing and estimate to be at least $18,720.00." At hearing, the Agency specifically requested that Complainant be awarded back pay from the date of her termination until she obtained equivalent employment, on or around Thanksgiving 2013.

The purpose of back pay awards in employment discrimination cases is to compensate a complainant for the loss of wages and benefits that complainant would have received but for the respondent's unlawful employment practices. *In the Matter of Oak Harbor Freight Lines, Inc.,* 2014 BOLI Orders 1, 37 (2014). Back pay awards are calculated to make a complainant whole for injuries suffered as a result of discrimination. *In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI Orders 121, 157-58 (2014). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *Maltby at* 157. Typically, the Agency proves that a complainant exercised reasonable diligence through complainant's testimony, often coupled with documentation, about jobs for which the complainant applied or inquired about.[11] At a minimum, there must be some credible evidence that the complainant actively sought work.[12]

[10] *Id*.

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

This is an unusual case, in that Complainant's testimony about her job search after being discharged by HBE on December 28 was sparse to an extreme, consisting of her statement that she found an equivalent job at Supercuts that started on or about November 24, 2013. Relative to that job, she testified that it took her until the Supercuts job to find employment because she did not want to work at a "chain salon," adding:

> "I'm sure interviews did not go well, being stressed out and all of the stuff that was happening. My face was completely broken out * * * from all this stuff happening. You know, when you're going in looking for job where you're an esthetician * * * people look at your skin. So I have a feeling that hindered me."

On cross examination, she also testified that she could not have found a job at Supercuts right after her employment with HBE ended because "[e]motionally, I couldn't. I was pretty much focused on finding a place to live and had to take care of that first."

In its exceptions, the Agency argues that Complainant's testimony quoted above constituted credible testimony that Complainant went on "at least two or more interviews for employment." The forum disagrees and declines to infer from this testimony that Complainant actively sought work or had any actual job interviews. There is no evidence in the record as to any memory issues or other problems on Complainant's part that prevented her from giving any specific testimony as to her job search, and the facts lend equal credence to an inference that Complainant did not actively seek work. Finally, her testimony that she started work at another job 11 months later, absent any specific testimony about her intervening job search, does not demonstrate reasonable diligence in finding other suitable employment.[13]

In its exceptions, the Agency also argues that OAR 839-003-0090(3) gives the forum the discretion to award damages for back wages "even if there was no evidence that Complainant sought employment." That rule provides: "In order to recover

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[12] *See, e.g., In the Matter of Cyber Center, Inc.,* 32 BOLI 11, 37 (2012)(when complainant testified that she actively sought work but her testimony "was not overly specific as to specific jobs that she applied for," her testimony that she actively sought work was unimpeached, and respondents offered no evidence of any other job openings for which complainant was qualified and did not apply, the forum rejected respondent's argument that complainant did not mitigate her damages).

[13] *See, e.g., In the Matter of Loyal Order of Moose,* 13 BOLI 1, 8, 13 (1994)(when complainant was constructively discharged and did not actively seek work until a month later, and nine weeks later removed herself from the job market when she began work as a volunteer caregiver, the commissioner awarded back pay for the nine week period that complainant actively sought work); *In the Matter of Casa Toltec,* 8 BOLI 149, 174 (1989)(commissioner did not award back pay in an AIDS disability case when the evidence showed that complainant applied for only one job between her termination date of May 19, 1987, and October 27, 1987, when she was no longer employable because of her disease); *In the Matter of Lee's Cafe,* 8 BOLI 1, 20-21 (1989)(a complainant who did not seek alternative employment for two months after she was discharged from respondents' café was not entitled to back pay for that period because she voluntarily excluded herself from the job market, thus failing to mitigate her damages).

damages for lost wages, the aggrieved person will generally be required to mitigate damages by seeking employment." The Agency argues that the inclusion of the word "generally" gives the forum the unfettered discretion to award back pay, regardless of whether a discharged complainant seeks work. The forum has never adopted this absolute position in evaluating a back pay claim and declines to do so now.

Alternately, the Agency asks that Complainant be awarded back pay and tips for seven days of work between December 27 and January 5, 2013, based on the fact that Complainant did not know she had been fired until January 5, 2013, and therefore had no obligation to look for replacement work during that time period. This circumstance was not considered in the Proposed Order. The forum agrees with the Agency that Complainant had no obligation to look for work when she was unaware that she had been fired and grants the Agency's alternate request. Complainant is entitled to back pay and tips for the 56 hours she would have worked in this time period. Computed at $9 per hour and $20 a day in tips, the forum awards Complainant $504 in back pay and $140 in lost tips.

Mental and Emotional Distress Damages

This forum has long held that 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 award 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. *See, e.g., Maltby Biocontrol* at 159.

In this case, Complainant testified that she loved working at HBE and would have continued working there, had she been allowed to do so. She particularly liked the decor of HBE's salon and the opportunity to be trained by Schoene, whom Complainant regarded as a mentor. She felt angry and "emotionally distraught" on December 27 after her employment status was changed to on-call. Later, she felt depressed because she was never called back to work. She was evicted from her apartment, had to move in with her mom as a result of being unemployed, and had difficulty finding another apartment because of her eviction. Her car was repossessed. She filed for and received minimal unemployment benefits that did not cover her expenses, and she did not start work at a job equivalent to her job with HBE until almost a year later.

Based on the above, the forum concludes that $10,000, the amount sought by the Agency to compensate Complainant for her mental and emotional distress, is an appropriate award.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent **Hey Beautiful Enterprises, Ltd.'s** violations of ORS 652.355, OAR 839-010-0100(4), ORS 659A.199, OAR 839-010-0100(4), ORS 659A.030(1)(f), and OAR 839-050-0125(2) and Respondent

Kimberly Schoene'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 **Hey Beautiful Enterprises, Ltd.** and **Kimberly Schoene** 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 **Amber Walker** in the amount of:

1) TEN THOUSAND DOLLARS ($10,000.00), representing compensatory damages for emotional and mental distress experienced by Amber Walker as a result of Respondents' unlawful employment practices found herein; plus,

2) SIX HUNDRED AND FORTY-FOUR DOLLARS ($644.00), representing wages and tips lost by Amber Walker between December 28, 2012, and January 5, 2013, as a result of Respondents' unlawful employment practices found herein; plus,

3) Interest at the legal rate on the sum of TEN THOUSAND SIX HUDNRED AND FORTY-FOUR DOLLARS ($10,644.00) until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 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 **Kimberly Schoene** to participate in training on the correct interpretation and application of the Oregon laws pertaining to whistleblowing and retaliation 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 **Hey Beautiful Enterprises, Ltd.** and **Kimberly Schoene** to cease and desist from violating the provisions of ORS 652.355, OAR 839-010-0100(4), ORS 659A.199, OAR 839-010-0100(4), ORS 659A.030(1)(f), OAR 839-050-0125(2), and ORS 659A.030(1)(g).

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34 BOLI ORDERS

In the Matter of

MELISSA and AARON KLEIN dba Sweetcakes by Melissa

Case Nos. 44-14 & 45-14
Final Order of Commissioner Brad Avakian
Issued July 3, 2015

SYNOPSIS

The Agency's Formal Charges alleged that Respondents refused to make a wedding cake for two Complainants based on their sexual orientation and that Respondents published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. In addition, the Formal Charges alleged that Aaron Klein aided and abetted Melissa Klein in the commission of those violations. In this Final Order, the Commissioner concludes that: (1) A. Klein, acting on behalf of Sweetcakes by Melissa, refused to make a wedding cake for Complainants based on their sexual orientation, thereby violating ORS 659A.403; (2) M. Klein did not violate ORS 659A.403; and (3) A. Klein did not aid and abet M. Klein in violation of ORS 659A.406. The Commissioner reversed the ALJ's ruling on summary judgment motions that neither A. nor M. Klein violated ORS 659A.409 and held that both A. and M. Klein violated ORS 659A.409. The Commissioner held that, as partners, A. Klein and M. Klein are jointly and severally liable for all violations. The Commissioner awarded Complainants $75,000 and $60,000, respectively, in damages for emotional and mental suffering resulting from the denial of service.

NOTE: The procedural history of this case is extensive and includes the ALJ's lengthy ruling on Respondents' motion and the Agency's cross-motion for summary judgment. For ease of reading, all procedural facts, pre-hearing motions, and rulings on those motions are included as an Appendix to this Final Order. The Appendix immediately follows the "Order" section of this Final Order that bears the Commissioner's signature.

IMPORTANT: The Judicial Review Notice that customarily follows the "Order section of Commissioner's Final orders may be found on the last page of this Final Order.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held at the Office of Administrative Hearings, located at 7995 S. W. Mohawk Street, Entrance B, Tualatin, Oregon. The evidentiary part of the hearing was conducted on March 10-13, and 17, 2015, and closing arguments were made on March 18, 2015.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by BOLI's chief prosecutor, Jenn Gaddis, and Cristin Casey, administrative prosecutor,

both employees of the Agency. Paul Thompson, Complainants' attorney, was present throughout the hearing. Complainants Rachel Bowman-Cryer and Laurel Bowman-Cryer were both present throughout the hearing. Respondents Melissa Klein and Aaron Wayne Klein were both present throughout the hearing and were represented by Herbert Grey, Tyler Smith, and Anna Harmon, attorneys at law.

The Agency called the following witnesses: Rachel Bowman-Cryer, Laurel Bowman-Cryer, Cheryl McPherson, Aaron Cryer, Jessica Ponaman, Candice Ericksen, Laura Widener, Aaron Klein, and Melissa Klein.

Respondent called the following witnesses: Aaron Klein, Melissa Klein, and Rachel Bowman-Cryer.

At hearing, the forum received into evidence:

a) Administrative exhibits X1 through X95.

b) Agency exhibits A1 through A12, A23 (pp. 1-4), A25, and A27 through A29 were received. Exhibit A30 was offered but not received.

c) Respondents' exhibits R2 (selected "posts" on pp. 3 and 9), R2 through R5, R6 (pp. 1-2), R7 through R12, R13 (pp. 7-18), R15, R16, R18 through R24, R26, R27, R28 (pp. 1-3, part of p. 4, pp. 14-28), R29, R30, R32, R33 (pp. 5-8), and R34 through R41 were received. Exhibits R1, R14, and R17 were offered but not received.

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,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – THE MERITS[2]

1) LBC and RBC are both homosexual females. They met in 2004 while they attended the same college and considered themselves a "couple" for the 11 years preceding the hearing. They lived together in Texas until 2009, when they moved to Portland, Oregon, and have lived together continuously since moving to Portland. (Testimony of LBC, RBC, McPherson)

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

[2] Except for Finding of Fact #43 – The Merits, the findings of fact relevant to the forum's determination of whether Respondents violated ORS 659A.403, ORS 659A.406, and ORS 659A.409 are set out in the forum's ruling on Respondents' Renewed Motion for Summary Judgment and the Agency's Cross-Motion for Summary Judgment. *See* Finding of Fact #28 – Procedural, *supra*. They are duplicated in these Findings of Fact – The Merits only to the extent necessary to provide context to Complainants' claim for damages.

2) LBC first asked RBC to marry her soon after they met and was turned down. LBC continued to propose on a regular basis until October 2012, when RBC finally agreed to marry her. (Testimony of RBC, LBC)

3) Before October 2012, RBC did not want to get married because of her personal experience of failed marriages that "tended to do more damage than good." (Testimony of RBC, LBC, McPherson)

4) In November 2011, Complainants became foster parents for "E" and "A,"[3] two disabled children with very high special needs, after the death of their mother, LBC's best friend. At the time, Complainants were already the children's godparents. When they became the children's foster parents, Complainants decided that they wanted to adopt the children. Subsequently, Complainants became involved in a bitter and emotional custody battle for the children with the children's great-grandparents that continued until sometime after December 2013, when Complainants' December 2013 adoption application was formally approved by the state of Oregon.[4] (Testimony of LBC, RBC, McPherson)

5) In October 2012, RBC decided that she and LBC should get married in order to give their foster children "permanency and commitment" by showing them how much she and LBC loved one another and were committed to one another. RBC told LBC that she wanted to get married, which made LBC "extremely happy." After her long-standing matrimonial reticence, RBC then became excited to get married and to start planning the wedding, wanting a wedding that was as "big and grand" as they could afford. (Testimony of RBC, LBC)

6) Sometime between October 2012 and January 17, 2013, RBC and Cheryl McPherson ("CM"), RBC's mother, attended a Portland bridal show. MK had a booth at the show to advertise wedding cakes made by Sweetcakes by Melissa ("Sweetcakes"). Two years earlier, Sweetcakes had designed, created, and decorated a wedding cake for CM and RBC that RBC really liked. At the show, RBC and CM visited Sweetcakes's booth and told MK they would like to order a cake from her. After the show, RBC made an appointment via email for a cake tasting at Sweetcakes. (Testimony of RBC, CM, MK; Ex. R16)

7) Complainants were both excited about the cake tasting at Sweetcakes because the cake Respondents had made for CM's wedding had been so good and RBC wanted to order a cake like CM's cake. (Testimony of RBC, A. Cryer)

8) On January 17, 2013, RBC and CM visited Sweetcakes's bakery shop in Gresham, Oregon for their cake tasting appointment, intending to order a cake for

[3] The forum uses the children's first name initials instead of their full names to protect their privacy.

[4] Although it is undisputed that Complainants eventually adopted the children, there is no evidence as to what date the adoptions were finalized.

RBC's wedding to LBC. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM, AK)

9) In January 2013, AK and MK were alternately caring for their infant twins at their home. At the time of the tasting, MK was at home and AK conducted the tasting. During the tasting, AK asked for the names of the bride and groom, and RBC told him there would be two brides and their names were "Rachel and Laurel." At that point, AK stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of AK's and MK's religious convictions. In response, RBC began crying. She felt that she had humiliated her mother and was anxious whether CM was ashamed of her, in that CM had believed that being a homosexual was wrong until only a few years earlier. CM then took RBC by the arm and walked her out of Sweetcakes to their car. On the way out to their car and in the car, RBC became hysterical and kept telling CM "I'm sorry" because she felt that she had humiliated CM. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM)

10) In the car, CM hugged RBC and assured her they would find someone to make a wedding cake. CM drove a short distance, then returned to Sweetcakes and re-entered Sweetcakes by herself to talk to AK. During their subsequent conversation, CM told AK that she used to think like him, but her "truth had changed" as a result of having "two gay children." AK quoted Leviticus 18:22 to CM, saying "You shall not lie with a male as one lies with a female; it is an abomination." CM then left Sweetcakes and returned to the car. While CM was in Sweetcakes, RBC remained sitting in the car, "holding [her] head in her hands, just bawling." (Affidavit of AK; Testimony of RBC, CM)

11) When CM returned to the car, she told RBC that AK had told her that "her children were an abomination unto God." (Testimony of RBC; CM)

12) When CM told RBC that AK had called her "an abomination," this made RBC cry even more. RBC was raised as a Southern Baptist. The denial of service in this manner made her feel as if God made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven. (Testimony of RBC)

13) CM and RBC then drove home. RBC was crying when they arrived home and immediately went upstairs to her bedroom, followed by LBC and CM, where she lay in her bed, crying.[5] In the bedroom, LBC asked CM what had happened, and CM told her that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" at AK's statement about same-sex weddings. This upset her and made her very angry. (Testimony of RBC, LBC, CM)

[5] RBC credibly testified as follows:

> "I was beyond upset. I just wanted everybody to leave me alone. I couldn't face looking at my mom, and I didn't even know if I still wanted to go through with getting married anymore. So I just told everybody to leave me alone as much as possible, and I went to my room."

14) LBC, who was raised as a Catholic, recognized Klein's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination," and thought CM may have heard wrong. She took the denial of service in this manner to mean "…this is a creature not created by God, not created with a soul; they are unworthy of holy love; they are not worthy of life." She immediately thought that this never would have happened if she had not asked RBC to marry her and felt shame because of it. She also worried that this might negatively impact CM's acceptance of RBC's sexual orientation. (Testimony of LBC)

15) LBC, who had always viewed herself as RBC's protector, got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper and started yelling that she "could not believe this had happened" and that she could "fix" things if RBC would just let her. After LBC left the room, RBC continued crying and spent much of that evening in bed. (Testimony of RBC, LBC, CM)

16) Back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. She felt overwhelmed because she didn't know how to handle the situation. That night, LBC was very upset, cried a lot, and was hurt and angry. (Testimony LBC, A. Cryer)

17) After CM returned home on January 17, 2013, she telephoned "Lauren" at the West End Ballroom ("WEB"), the venue where Complainants planned to have their commitment ceremony, and told Lauren that Sweetcakes had refused them cake service for their wedding. CM also posted a review on Sweetcakes Facebook wedding page and on another wedding website with a message stating: "If you're a gay couple and having a commitment ceremony or wedding, don't go to this place because they discriminate against gay people." (Testimony of CM; Ex. R22)

18) At 8:22 p.m. on January 17, 2013, Lauren from WEB emailed RBC and LBC to say she had heard from CM and wanted to know the details of the refusal at Sweetcakes. (Testimony of LBC; Ex. R32)

19) At 9:10 p.m. on January 17, 2013, RBC sent a return email to Lauren at WEB in which she stated:

> "Hi Lauren,
>
> "I am sorry to have to bring this to your attention. I want to assure you that we would have gone with Sweet Cakes reguardless (sic) of your recommendation, because we purchased my mother's wedding cake from them and were very happy with the cake. My girlfriend and I purchased my mother's cake as a wedding gift for her. At that time Melissa said nothing about not wanting to work for us because we were gay.

> "I even spoke with them at the Portland Wedding Show and made an appointment then for 1pm today. When we showed up for the appointment it was with Melissa's husband. I did not catch his name because the appointment did not last long enough for me to ask. He took us in the office and asked what the bride and groom names were. When we told him that our names were Rachel and Laurel, he quickly said that they don't do gay weddings because they are Christians and don't believe same-sex marriage is right. My mother asked why they had no problem taking my money when I purchased her cake. She told them that we are a christian family as well and that she used to believe like he believed until God blessed her with two gay children.
>
> "I was stunned and crying. This is twice in this wedding process that we have faced this kind of bigotry. It saddens me because we moved from Texas so that my brother and I could be more accepted in the community.
>
> "We wanted to inform you of all of this because you have a right to know so that other same-sex couples don't have to go through this in the future. It surprisingly that both the West End Ballroom and the caterers we chose, Premier Catering, reccommend (sic) Sweet Cakes and yet neither mentioned to us that they don't do gay weddings. I figure that this must be because no one ever speaks up to let you know. I didn't want to let this pass without saying something.
>
> "My fiancé and I have been together for 10 years. We are adopting our two foster children and wanted to get married as a sign of our commitment to each other and the family that we are creating. It saddens me that my children will grow up in a world where people are an abomination because they love each other. It is my responsibility to set an example for them that you should speak up when you see injustice because that is how we make progress.
>
> "Thank you for your fast response to both my mother and I. I realize that you are not responsible for their poor behavior, and thank you for your understanding. If there is anymore info that I can provide for you please let me know.
>
> "Sincerely,
> Rachel Cryer & Laurel Bowman"

(Testimony of LBC; Ex. R32)

20) Later that same evening, LBC filled out an "Oregon Department of Justice ("DOJ") Consumer Complaint Form," using her smart phone to access DOJ's website. In hard copy,[6] the complaint was two pages long. On the first page, she provided her name, address, phone number and email address, Sweetcakes's name, address, and

[6] The record lacks substantial evidence to establish what the digital format for the complaint form looked like, but Ex. R3 is a hard copy of the complaint that Respondents received. The forum relies on that copy in describing the contents and format of the complaint.

phone number. On the first page, immediately above the space where LBC wrote her name, the following text was printed:

> "By submitting this complaint, I understand a) this complaint will become part of DOJ's permanent records and is subject to Oregon's Public Records Law; b) this complaint may be released to the business or person about whom I am complaining; c) this complaint may be referred to another governmental agency. By submitting this complaint, I authorize any party to release to the DOJ any information and documentation relative to this complaint."

This public records disclaimer was not visible on LBC's smart phone view of DOJ's form. On the second page, LBC described the details of her complaint as follows:

> "In november of 2011 my fiance and I purchased a wedding cake from this establishment for her mother's wedding. We spent 250. When we decided to get married ourselves chose to back and purchase a second cake. Today, January 17, 2013, we went for our cake tasting. When asked for a grooms name my soon to be mother in law informed them of my name. The owner then proceeded to say we were abominations unto the lord and refused to make another cake for us despite having already paid 250 once and having done business in the past. We were then informed that our money was not equal, my fiancé reduced to tears. This is absolutely unacceptable."

(Testimony of LBC; Exhibit R3)

21) Aaron Cryer, RBC's brother, also lived with Complainants at this time. Later on the evening of January 17, 2013, he arrived home from school and work and he and Complainants had a 30 minute conversation about what happened at Sweetcakes that day. (Testimony of A. Cryer)

22) On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of her day in her room, trying to sleep. (Testimony of RBC)

23) In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. RBC also became more introverted and distant in her family relationships. She and A. Cryer, have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. RBC questioned whether she had the ability to be a good mother because of the difficulty she was having in controlling her emotions. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. Previous to that time, she had been "very friendly and happy" in her communications with Candice Ericksen, A and E's great aunt, about her wedding. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, she experienced anxiety over possible rejection because her wedding was a same-sex wedding. (Testimony of RBC, LBC, CM, A. Cryer, Ericksen)

24) In the days following January 17, 2013, LBC experienced extreme anger, outrage, embarrassment, exhaustion, frustration, intense sorrow, and shame as a reaction to AK's refusal to provide a cake. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted be married. Her excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred. (Testimony of RBC, LBC, Ericksen)

25) After January 17, 2013, CM assumed the responsibility for contacting the vendors who would be needed for Complainants' ceremony. Shortly thereafter, she arranged for a cake tasting at Pastry Girl ("PG"), another local bakery. While making the appointment, CM asked Laura Widener, PG's owner/baker, if she was okay with providing a cake for a same-sex wedding ceremony. Widener assured her that this was not a problem. (Testimony of RBC, CM, Widener; Ex. R4)

26) On January 21, 2013, CM and RBC went to PG and met with Widener. While at PG, CM and RBC were both anxious, and CM did most of the talking, while RBC tried not to cry until they started talking about the design of the cake. At that point, RBC became more animated and was able to explain the design she wanted on the cake. By the end of the meeting, the design they settled on was a cake with three tiers that had a peacock's body on top and the peacock's tail feathers trailing down over tiers to the cake plate. When completed, the peacock and its feathers were hand-created and hand-painted by Widener. Widener charged Complainants $250 for the cake. (Testimony of Widener, RBC, CM)

27) Respondents would have charged $600 for making and delivering the same cake. (Testimony of AK)

28) On January 28, 2013, DOJ mailed a copy of LBC's Consumer Complaint to Respondents, along with a cover letter. In pertinent part, DOJ's cover letter stated:

> "We have received the enclosed consumer complaint about your business. We understand that there are often two sides to a problem, and we would appreciate your prompt review of this matter.
>
> "We do not represent the complainant. We do, however, review all complaints to determine whether grounds exist to warrant action by us. Your response to the allegations in the complaint would help us to make that determination.
>
> "In the interest of efficiency, we prefer that you respond directly to the complainant and e-mail copy of the response to our office. Please include the file number shown above on the subject line of your e-mail. Alternatively, you may respond to us by regular mail."

On January 29, AK posted a copy of the first page of LBC's DOJ complaint on his Facebook page, prefaced by his comment "[t]his is what happens when you tell gay

people you won't do their 'wedding cake.'" At that time, AK only had 17 "friends" on his Facebook page. (Testimony of LBC, AK; Exs. R3, A4)

29) On the same day that AK posted LBC's DOJ complaint, LBC received an email telling her of the posting and that she should look at it. LBC did so, then called Paul Thompson, Complainants' attorney in this proceeding. Later that day, the posting was removed. (Testimony of LBC, AK)

30) On February 1, 2013, LBC went to the emergency room of a local hospital at approximately 8:00 p.m. because of an injury to her shoulder that she had suffered three weeks earlier when lifting one of her foster children above her head when they were playing. While in the hospital, she became aware that AK's refusal to make their wedding cake was on the news. This made her very upset and she cried when she was examined by a doctor, telling the doctor that she had an "unpleasant interaction with a business owner, and now this information is on the news." (Testimony of LBC; Exs. A6, R7)

31) On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." RBC refused to talk with Larson and called LBC, who was at the hospital having her shoulder examined. (Testimony of RBC, LBC)

32) As soon as they became aware that LBC's DOJ complaint had become public knowledge through the media, both Complainants greatly feared that E and A would be taken away from them by the state of Oregon's foster care system.[7] Earlier, they had been instructed that it was their responsibility to make sure that the girls'

[7] The level of Complainants' concern over their foster parent status was vividly illustrated in RBC's and LBC's testimony on direct examination by the Agency:

R. Bowman-Cryer

Q: "So how did you react? How did you react to hearing about your case, I guess, or your situation in the news?"

A: "My first concern was that nobody could know that we had these children and that whatever we did had to be to protect them. We did not want their names in the media. We did not want any information about them or our foster parent status or the status of their case to be public knowledge to anyone."

L. Bowman-Cryer

Q: "Was the fear from that initial media release ever lessened for you?"

A: "No, ma'am. That fear was paramount to everything."

Q: "When you say paramount, was it greater for you than the actual refusal of service?"

A: "At that point in time, yes, ma'am."

Q: "Did you still feel emotional effects from the refusal of service?"

A: "Absolutely, yes, ma'am. My children were still suffering. My wife was still suffering, and that was tearing me apart."

information was protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. (Testimony of RBC, LBC)

33) Based on the media or potential media exposure about the case after February 1, 2013, LBC's headaches increased. She felt intimidated and became fearful. (Testimony of LBC; Ex. A12)

34) At some point after February 1, 2013, one of RBC's Facebook "friends" saw an article about the case in her local Florida paper and posted it on Facebook, adding in her comments that RBC and LBC had children. RBC immediately responded, writing: "Jessica – I know you were trying to defend us, but you released information about our kids. The public doesn't know we have kids; that is the whole point of being silent. Please remove your comment immediately." RBC's "friend" responded and said she removed her comment as soon as she read RBC's response. (Testimony of RBC; Ex. A26)

35) On February 8, 2013, Paul Thompson sent a letter regarding Complainants and their situation to the following media sources: KGW, KOIN, The Oregonian, OPB, KATU, KPTV, the Lars Larson Radio Show, The Wall Street Journal, Willamette Week, and Reuters. The letter read as follows:

> "Members of the Media:
>
> "I would like to begin by thanking each of you for your interest in this story. As you know, I represent the lesbian couple who were denied a wedding cake by Sweet Cakes by Melissa. I ask that their names not be printed in regards to this statement, as they would appreciate privacy in this matter.
>
> "The Press Release reads:
>
> "We are grateful for the outpouring of support we have received from friends, family, members of the LGBT community, and our allies. We are especially thankful that LGBT-supportive companies have graciously offered their services to make our special day perfect.
>
> "At this time, the support of the community and other well-wishers is all we require. We ask that individuals and companies that want to provide support, direct their donations in our name to Pride Northwest, our pride organization in Portland, Oregon. They have accepted our request to direct donations and gifts to further awareness of issues affecting the LGBT community, including marriage equality and families. Interested parties can contact Cory L. Murphy of Pride Northwest with any questions. * * *
>
> "We have decided to accept the gracious offer from Mr. Duff Goldman of Charm City Cakes and the TV show 'Ace of Cakes.' At the time Mr. Goldman made his offer we had already contracted with and paid for another local bakery, Pastrygirl,

> to make our wedding cake. It is extremely important to us to honor that contract. With that in mind we have humbly asked Mr. Goldman and Charm City Cakes to prepare a Bride's cake for us in place of the traditional Groom's cake. We are grateful to both bakeries for being a part of making our wedding date incredibly special.
>
> "While we are humbled by the support and mindful of people's interest, this matter has placed us in the media spotlight against our wishes. In order to maintain our privacy, we will not be granting interviews and are asking everyone to respect our privacy at this time.
>
> "Please direct any media inquiries to our attorney, Paul Thompson[.]"

(Exs. A7, R28)

36) On February 9, 2013, there was an organized protest outside Respondents' bakery that was reported by KATU.com. The protest was organized by a person or persons who started a Facebook page called "BoycottSweetCakesByMelissaGRESHAM" ("Boycott") on February 6, 2013, and posted a photo from KATU.com that shows "protesters gathered Saturday outside a Gresham bakery that's at the center of a wedding cake controversy." Complainants were not involved in the protest or subsequent boycott. However, on February 10, 2013, both Complainants made comments on Boycott's Facebook page in which they indirectly identified themselves as the persons who sought the wedding cake and thanked people for their support. (Exs. R9, R13)

37) On February 8, 2013, Herbert Grey, Respondents' lead counsel in this case, sent a letter to DOJ that responded to LBC's January 17, 2013, consumer complaint. In the letter, Grey identified himself as representing Respondents concerning the complaint filed by "Laurel Bowman" and addressed the issues raised in the complaint. Grey also cc'd a copy of his letter to LBC. (Ex. R10)

38) On February 12, 2013, DOJ emailed a copy of LBC's DOJ consumer complaint to a number of media sources, along with a note stating:

> "Hey everyone,
>
> "Please pardon the mob email. But it seems the most efficient and fair thing to do. Attached is the initial Sweet Cakes complaint as well as the newly received response from the bakery owners' lawyer. The other new development is that the complainants have informed the DOJ and BOLI that they plan on filing a complaint with BOLI. That has yet to happen as early this afternoon. But we're told it's the plan. At that point, the DOJ's involvement in the saga will end."

On February 13, 2013, this email was forwarded to Herb Grey, Respondents' attorney, by Tony King, the executive producer of the Lars Larson Show. (Ex. R15)

39) After LBC's DOJ complaint was publicized in the media, Complainants both had negative confrontations from relatives who learned about their complaint against Respondents through the media. In January 2013, LBC had just begun to re-establish a relationship with an aunt who had physically and emotionally abused her as a child and also owned all of the family property. Shortly after LBC's complaint became public, the aunt insisted through social media that LBC drop the complaint. She also called LBC and told her she was not welcome on family property and she would shoot LBC "in the face" if LBC ever set foot on the family's property in Ireland or the United States. This threat "devastated" LBC, as it meant she could not visit her mother or grandmother, both of whom lived on family property. RBC's sister, who believed that homosexuals should not be allowed to get married, wrote a Facebook message to the Kleins to tell them that she supported them. This was a "crushing blow" to RBC, and it hurt her and made her very angry at her sister. (Testimony of LBC, RBC, CM; Ex. A16)

40) On June 27, 2013, Complainants had a commitment ceremony at the West End Ballroom, a venue located at 1220 S.W. Taylor in downtown Portland. On the day of the ceremony, the words "ROMANCE BY CANDLELIGHT – STARRING RACHEL AND LAUREL – JUNE 27, 2013" were posted on a large billboard on the street-facing wall of the WEB. Only invited guests were allowed to attend the ceremony. Just prior to the ceremony, Duff Goldman's free cake was delivered by an incognito motorcyclist. At the ceremony, Complainants and their guests celebrated with their cakes from Pastry Girl and Goldman. After the ceremony, Complainants considered themselves to be married even though they could not be legally married in the state of Oregon at that time. (Testimony of RBC, LBC, Widener; Exs. R18, R19)

41) On August 8, 2013, RBC filed a verified complaint with BOLI alleged that Sweetcakes by Melissa had discriminated against her by refusing to make her a wedding cake because of her sexual orientation. (Testimony of RBC; Ex. A27)

42) On August 14, 2013, BOLI's Communications Director issued a press release related to RBC's complaint. The first paragraph read: "Portland, OR – A same-sex couple has filed an anti-discrimination complaint with the Oregon Bureau of Labor and Industries (BOLI) against a Gresham bakery, Sweet Cakes by Melissa, for allegedly refusing service based on sexual orientation." (Ex. R20)

43) During the CBN video interview described in Finding of Fact #12 in the ALJ's Summary Judgment Ruling, CBN broadcast a picture of a handwritten note taped on the inside of a front window at Sweetcakes' bakery in Gresham. The note read:

> "Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provide on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart. [heart symbol]"

(Ex. 1-I, Respondents' Motion for Summary Judgment)

34 BOLI ORDERS

44) On November 7, 2013, LBC filed a verified complaint with BOLI alleging that Sweetcakes by Melissa had discriminated against her by refusing to make her a wedding cake because of her sexual orientation. (Testimony of LBC; Ex. A28)

45) On January 17, 2014, BOLI's Communications Director issued a press release that began and ended with the following statements:

> "**BOLI finds substantial evidence of unlawful discrimination in bakery civil rights complaint**
> *Sweet Cakes complaint will now move into conciliation to determine whether settlement can be reached*
>
> "Portland, OR – A Gresham bakery violated the civil rights of a same-sex couple when it denied service based on sexual orientation, a Bureau of Labor and Industries (BOLI) investigation has found.
>
> "The couple filed the complaint against Sweetcakes by Melissa under the Oregon Equality Act of 2007, a law that protects the rights of gays, lesbians, bisexual and transgender Oregonians in employment, housing and public places.
>
> "* * * * *
>
> "Copies of the complaint are available upon request. * * *"

(Ex. R24)

46) Complainants were legally married by signing a "legal document of marriage" in 2014, a few days after Oregon's ban on same-sex marriage was struck down in federal court. (Testimony of RBC)

47) From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of various websites that were supportive of Respondents and critical of or threatening to Complainants. These comments and the media attention caused RBC stress, anger, pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would be harassed at home because the DOJ complaint with Complainants' home address had been posted on Facebook, and the feeling that her reputation was being destroyed. (Testimony of RBC, LBC, CM; Ex. A24)

48) The publicity from the case and accompanying threats from third parties on social media made RBC "scared" for the lives of A, E, LBC, and herself. (Testimony of RBC)

49) Although AK has been interviewed by the media on a number of occasions about the case, he did not initiate any contacts with the media. Other than posting LBC's DOJ complaint on his Facebook page, there is no evidence that AK gave Complainants' names to the media. Finally, there is no evidence in the record of any

untruthful statements that AK or MK made to public media regarding their case.[8] (Testimony of AK; Entire Record)

50) Except for Paul Thompson's February 8, 2013, press release, Complainants have never solicited media attention nor been interviewed by the media with regard to this case. (Testimony of RBC, LBC)

51) Candice Ericksen, Laura Widener, Melissa Klein, Jessica Ponaman, and Aaron Cryer were credible witnesses and the forum has credited their testimony in its entirety. (Testimony of Ericksen, Widener, M. Klein, RBC, Ponaman)

52) For the most part, CM's testimony was credible, even though her answers frequently strayed from the subject of the questions. However, the forum did not believe her earlier statements to Ponaman that RBC was "throwing up" because she was so nervous and that "for days [RBC] couldn't get out of bed" because RBC did not testify to those facts and because RBC spent 30 minutes talking with LBC and A. Cryer the night of January 17, 2013, and went to a cake tasting at Pastry Girl on January 21, 2013. Due to these exaggerations, the forum has only credited CM's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of CM)

53) AK was a credible witness except for his testimony that he did not realize that LBC's name and address were on the DOJ complaint that he posted on his Facebook page. LBC's name, address, and phone number are conspicuously printed on the complaint immediately above Sweetcakes's name, address, and phone number, and the forum finds it extremely unlikely that AK would have posted the complaint without reading it, particularly since he posted a comment immediately above it that read: "This is what happens when you tell gay people you won't do their 'wedding' cake." Apart from that testimony, the forum has credited AK's testimony in its entirety. (Testimony of AK)

54) RBC was an extremely emotional witness who was in tears or close to tears during most of her testimony. Despite her emotional state, she answered questions directly in a forthright manner. She did not try to minimize the effect of media exposure on her emotional state as compared to how the denial of service affected her. The forum has credited RBC's testimony about her emotional suffering in its entirety. However, the forum has only credited her testimony about media exposure when she testified about specific incidents. (Testimony of RBC)

55) LBC was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events. On cross examination, she argued repeatedly with Respondents' counsel and had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the denial of service and how it affected her.

[8] Complainants testified that they were upset by Respondents' repeated untruthful statements about them in the media, but did not testify as to any specific incident in which Respondents made untruthful statements of which they were aware and the Agency presented no other evidence of any such statements.

Her testimony was inconsistent in several respects with more credible evidence. First, she testified that she had a "major blowout" and "really bad fight" with A. Cryer between January 17 and January 21, 2013. In contrast, A. Cryer testified, when asked if he fought with LBC, "I wouldn't say we fought." He also testified that this case did not affect his relationship with LBC. Second, she testified that her blood pressure spiked in the hospital to 210/165 on February 1, 2013, when she learned that her DOJ complaint had hit the media, requiring the immediate attention of a doctor and four nurses. Her treating doctor's report notes that she was upset and crying about her situation hitting the news, but there is no mention of a blood pressure spike. Third, she testified that the media were standing outside her and RBC's apartment on February 1, 2013, when she talked to RBC from the hospital. RBC, who was at the apartment at that time, testified that the media were not outside their apartment at that time. Fourth, LBC testified that RBC stayed in bed the rest of the day after she returned from the cake tasting at Sweetcakes. In contrast, A. Cryer testified that he, LBC, and RBC had a 30 minute conversation that evening. Like RBC, the forum has only credited her testimony about media exposure when she testified about specific incidents. The forum has only credited LBC's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of LBC)

CONCLUSIONS OF LAW

1) At all times material herein, Respondents AK and MK owned and operated a bakery in Gresham, Oregon as a partnership under the assumed business name of Sweetcakes by Melissa.

2) At all times material herein, Sweetcakes by Melissa was a "place of public accommodation" as defined in ORS 659A.400.

3) At all times material herein, AK and MK were individuals and "person[s]" under ORS 659A.010(9), ORS 659A.403, ORS 659A.406, and ORS 659A.409.

4) At all times material herein, Complainants' sexual orientation was homosexual.

5) AK denied the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to Complainants based on their sexual orientation, thereby violating ORS 659A.403.

6) AK did not violate ORS 659A.406.

7) AK and MK violated ORS 659A.409.

8) Complainants suffered emotional and mental suffering as a result of AK's violation of ORS 659A.403.

9) As partners, AK and MK are jointly and severally liable for AK's violation of ORS 659A.403 and their joint violations of ORS 659A.409

10) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.

11) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded to Complainants and the orders to cease and desist violating ORS 659A.403 and ORS 659A.409 are an appropriate exercise of that authority.

OPINION

Introduction

In his ruling on Respondents' motion and the Agency's cross-motion for summary judgment, the ALJ concluded that Respondents did not violate ORS 659A.409.[9] This final order reverses that decision. The following discussion explains why.

ORS 659A.409 provides, in pertinent part:

> "* * * [I]t is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation[.]"

The first paragraph in section IV of the Agency's Charges[10] alleges that "Respondents published, issued * * * a communication, notice * * * that its accommodation, advantages * * * would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation." In subparagraphs "a" and "c," the Agency identifies ORS 659A.409 as the statute that was allegedly violated. Earlier in the Charges, the Agency identified statements made by AK that were broadcast on CBN television on September 2, 2013, and on the radio on February 13, 2014, that allegedly communicated an intent to

[9] *See* Finding of Fact #28 – Procedural, *infra*. In the ALJ's ruling on the motions for summary judgment, he noted that the Agency did not allege that AK violated ORS 659A.409, but did not consider this paragraph. *See* footnote 26.

[10] Section IV is prefaced by the caption "UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION."

discriminate based on sexual orientation. The full text of the relevant part of the CBN broadcast is reprinted below:

> **A. Klein**: 'I didn't want to be a part of her marriage, which I think is wrong.'
>
> **M. Klein**: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'
>
> **A. Klein**: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.' (***September 2, 2013, CBN interview***)

The Agency's cross-motion for summary judgment also singles out the text on a handwritten sign that was shown taped to the inside of Sweetcakes' front window during the CBN broadcast:

> "Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart. [heart symbol]"

The full text of the relevant part of the Perkins' broadcast is reprinted below:

> **Perkins**: '* * * Tell us how this unfolded and your reaction to that.'
>
> **Klein**: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'
>
> **Perkins**: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'
>
> **Klein**: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can

> see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know." I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.' **(*February 13, 2014, Perkins' interview*)**

The Agency's cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409, along with the note posted on Sweetcakes' front door.

> "ORS 659A.409 provides, in pertinent part:
>
> '* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.'

In their motion for summary judgment, Respondents argue that "ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance." Respondents further argue that:

> "A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins radio broadcast. * * * A statement of future intention in either media event is conspicuously absent."

In contrast, the Agency argues that the Klein's statements are a prospective communication:

> "Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they 'don't do same sex weddings,' they 'stand firm,' are 'still in business' and will 'continue to stay strong.'"

As stated earlier, the Agency asserts that the three incidents described above – the two interviews and the note -- show Respondents' prospective intent to discriminate. Although the Agency did not include the text or specifically allege the existence of the note in its Formal Charges and the Perkins' interview occurred after the Agency had

completed its initial investigation of the complaint and issued its Substantial Evidence Determination, this does not preclude the Agency from pursuing those incidents at hearing. The Agency's investigation may continue past its substantial evidence determination and charges may include evidence not discovered by the investigator. *See In the Matter of Sears, Roebuck and Company,* 18 BOLI 47, 78 (1999). The only limitation is that the charges be "reasonably related" to the allegations of the initial complaint. *Id.* The allegations and theories of the specific charges define those to be adjudicated through the hearing, whether or not those allegations and theories are consistent with or even based on those in the administrative determination. *See In the Matter of Jake's Truck Stop,* 7 BOLI 199, 211 (1988). Also, the only limitation on charges is that the complainant must have had standing to raise the issues and those issues must encompass discrimination only like or reasonably related to the allegations in the complaint. *See In the Matter of Sapp's Realty, Inc.,* 4 BOLI 93, 94 (1981).

In the present case, both the note and Perkins interview are not only "reasonably related' but, directly related to the allegations and theories of both the original complaint and charges. Whether corroborating evidence or included as a fact underlying a specific charge, they may be considered as evidence to determine whether a violation of ORS 659A.409 occurred.

Whatever Respondents' intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the Commissioner finds that AK's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In addition, they also constitute notice that discrimination will be made in the future by refusing such services. In the Perkins' interview, AK stated "…We don't do same-sex marriage, same-sex wedding cakes…." He continued that in discussing Washington's same-sex marriage law with MK, "we can see this becoming an issue and we have to stand firm." The note similarly said "…This fight is not over. We will continue to stand strong…." On their face, these statements are not constrained to a singular incident or time. They reference past, present and future conduct. AK did not say only that he would not do complainants' specific marriage and cake but, that respondents "don't do" same-sex marriage and cakes. Respondents' joint statement that they will "continue" to stand strong relates to their denial of service and is prospective in nature. The statements, therefore, indicate Respondents' clear intent to discriminate in the future just as they had done with Complainants.

The Commissioner concludes that, through the communications described above, AK and MK both violated ORS 659A.409.[11] However, the Commissioner awards

[11] *See In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub*, 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and

no damages to Complainants based on Respondents' unlawful practice because there is no evidence in the record that Complainants experienced any mental, emotional, or physical suffering because of it.

In their Answers to the Formal Charges, Respondents raised the affirmative defenses that ORS 659A.409 is unconstitutional on its face and as applied. Their defense is set out with particularity in Finding of Fact #7 – Procedural. The forum did not address these defenses in the ALJ's Summary Judgment ruling because the ALJ concluded that Respondents did not violate ORS 659A.409. The Commissioner now addresses them without duplicating the extensive analysis in the ALJ's Summary Judgment ruling.

Oregon Constitution -- Article I, Sections 2 and 3

Article I, Sections 2 and 3 of the Oregon Constitution provide:

> "Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.
>
> "Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience."

ORS 659A.409, like ORS 659A.403, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Accordingly, it is constitutional on its face. *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995). It is also constitutional as applied in this case because Respondents' statements announcing their clear intent to discriminate in future, just as they had done with Complainants, was not a religious practice but was conduct motivated by their religious beliefs. *Id.* at 153. Furthermore, the Oregon Supreme Court has held, in the context of Article I, section 8, that engagement in constitutionally protected expression while engaging in otherwise punishable conduct does not insulate the unlawful conduct from the usual consequences that accompany it. *See, e.g., Hoffman and Wright Logging Co. v. Wade,* 317 Or 445, 452, 857 P2d 101 (1993)("a person's reason for engaging in punishable conduct does not transform conduct into expression under Article I, section 8 [and] speech accompanying punishable conduct does not transform conduct into expression[.]); *State v. Plowman,* 314 Or 157, 165, 838 P2d 558 (1992) ("One may hate members of a specified group all one wishes, but still be punished constitutionally if one acts together with another to cause physical injury to a person

"Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

because of that person's perceived membership in the hated group"). The same should hold true with regard to the protections afforded by Article I, sections 2 and 3.[12]

United States Constitution – First Amendment: Unlawfully Infringing on Respondents' right of conscience** and **right to free exercise of religion

The Commissioner finds ORS 659A.409 constitutional, both facially and as applied, based on the same reasoning set out in the Summary Judgment ruling with respect to the constitutionality of ORS 659A.403.

Oregon Constitution – Section 8: freedom of speech

Article I, Section 8 of the Oregon Constitution provides:

> "**Section 8. Freedom of speech and press.** No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

In *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982), the Oregon Supreme Court established a basic framework, with three categories, for determining whether a law violates Article I, Section 8. ORS 659A.409 falls within *Robertson's* second category because it is "directed in terms against the pursuit of a forbidden effect" and "the proscribed means [of causing that effect] include speech or writing." *Id.* at 417-18.[13] Oregon courts examine a statute in the second category for "overbreadth' to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth." *State v. Babson,* 355 Or 383, 391, 326 P3d 559, 566 (2014).

Respondents assert that ORS 659A.409 prohibits Respondents from "express[ing] their own position" and that ORS 659A.409 amounts to "a speech code." To the contrary, the language of ORS 659A.409 focuses on the discriminatory effect that accompanies certain speech "published, circulated, issued or displayed" **on behalf** of a place of public accommodation. It does not cover expressions of personal opinion, political commentary, or other privileged communications unrelated to the business of a place of public accommodation, and its breadth is narrowly tailored to address the effects of the speech at issue. As such, it is facially constitutional under Article I, Section 8.[14]

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[12] This reasoning also applies to the ALJ's analysis of the constitutionality of ORS 659A.403 in the summary judgment ruling.

[13] In its cross-motion for summary judgment, the Agency concedes that ORS 659A.409 "falls within the second *Robertson* category of laws."

[14] *See also State v. Sutherland*, 329 Or 359, 365, 987 P2d 501, 504 (1999)(for a statute to be facially unconstitutional, it must be unconstitutional in all circumstances, *i.e.*, there can be no reasonably likely circumstances in which application of the statute would pass constitutional muster).

A statute that falls within *Robertson* category two is not subject to an as-applied challenge. *See Leppanen v. Lane Transit Dist*., 181 Or App 136, 142-43, 45 P3d 501, 504-05 (2002), citing *City of Eugene v. Lee,* 177 Or App 492, 497, 34 P3d 690 (2001).

U.S. Constitution – <u>First Amendment: Unlawfully infringing on Respondents' right to free speech</u>

In pertinent part, the First Amendment to the U.S. Constitution provides "Congress shall make no law * * * abridging the freedom of speech * * *." This applies to the State of Oregon under the Fourteenth Amendment. In his Summary Judgment ruling, the ALJ conducted a "compelled speech" analysis to Respondents' defense that baking a wedding cake for Complainants was "speech" that violated the First Amendment. In contrast, the speech that violated ORS 659A.409 – the CBN interview, the "note" on Sweetcakes's door, and the Perkins' interview – was voluntary on Respondents' part.

ORS 659A.409 is an integral part the anti-discrimination public accommodation laws in ORS chapter 659A. The forum first interpreted this statute nearly 30 years ago, when it was numbered as ORS 659.037, in a case in which the Respondent owned a bar and posted a sign on the front door stating "NO, SHOES, SHIRTS, SERVICE, NIGGERS." *In the Matter of The Pub,* 6 BOLI 270, 278 (1987). In her Final Order, the Commissioner held that this statute, then numbered as ORS 659.037, "does not generally operate to deny [a] Respondent his constitutional guarantees of free speech." Subsequently, in *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995), the U. S. Supreme Court held that "modern public accommodations laws are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments."[15] In conclusion, ORS 659A.409 is constitutional on its face. It is also constitutional as applied because the Commissioner only applies it to Respondents' language that indicate Respondents' clear intent to discriminate in future just as they had done with Complainants.

Damages

This case is not about a wedding cake or a marriage. It is about a business's refusal to serve someone because of their sexual orientation. Under Oregon law, that is illegal.

Free enterprise provides great opportunity for entrepreneurs to take an idea, create a business and achieve whatever success they can. It is a system open to all

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[15] *Cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984)("[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections")

but, to participate fairly, businesses must follow the laws that apply to each of them equally. A business that disregards the law erodes the free marketplace for both law abiding businesses and patrons alike.

Respondents' claim they are not denying service because of Complainants' sexual orientation but rather because they do not wish to participate in their same sex wedding ceremony. The forum has already found there to be no distinction between the two. Further, to allow Respondents, a for profit business, to deny any services to people because of their protected class, would be tantamount to allowing legal separation of people based on their sexual orientation from at least some portion of the public marketplace. This would clearly be contrary to Oregon law as well as any standard by which people in a free society should choose to treat each other.

Within Oregon's public accommodations law is the basic principle of human decency that every person, regardless of their sexual orientation, has the freedom to fully participate in society. The ability to enter public places, to shop, to dine, to move about unfettered by bigotry.

When Respondents denied RBC and LBC a wedding cake, their act was more than the denial of the product. It was, and is, a denial of RBC's and LBC's freedom to participate equally. It is the epitome of being told there are places you cannot go, things you cannot do…or be. Respondent's conduct was a clear and direct statement that RBC and LBC lacked an identity worthy of being recognized.

The denial of these basic freedoms to which all are entitled devalues the human condition of the individual, and in doing so, devalues the humanity of us all.

This was clearly reflected in RBC's and LBC's testimony. In addition to other emotional responses, RBC described that being raised a Christian in the Southern Baptist Church, Respondent's denial of service made her feel as if God made a mistake when he made her, that she wasn't supposed to be, and that she wasn't supposed to love or be loved, have a family, or go to heaven. LBC, who was raised Catholic, interpreted the denial to represent that she was not a creature created by god, not created with a soul and unworthy of holy love and life. She felt anger, intense sorrow and shame. These are the reasonable and very real responses to not being allowed to participate in society like everyone else. The personal harm in being subjected to such separation is felt deeply and severely, as the evidence in this case indicated.

The Formal Charges seek damages for emotional, mental and physical suffering in the amount of "at least $75,000" for each Complainant. In addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes' refusal to bake them a cake ("denial of service"), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.

In order, the forum considers the extent of Complainants' emotional suffering and the cause of that suffering; and the appropriate amount of damages. Any damages awarded do not constitute a fine or civil penalty, which the Commissioner has no authority to impose in a case such as this. Instead, any damages fairly compensate RBC and LBC for the harm they suffered and which was proven at hearing. This is an important distinction as this order does not punish respondents for their illegal conduct but, rather makes whole those subjected to the harm their conduct caused.

1. Extent and Cause of Complainants' Emotional Suffering

A. R. Bowman-Cryer

a. Emotional suffering from the denial of service

Prior to the cake tasting, LBC had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of "permanency and commitment." After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding,[16] wanting a wedding that was as "big and grand" as they could afford. Obtaining a cake from Sweetcakes like the one purchased for CM's wedding two years earlier was part of that grand scheme, and both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's wedding.

RBC's emotional suffering began at the January 17, 2013, cake tasting when AK told RBC and CM that Sweetcakes did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that CM, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. Walking out to the car and in the car, RBC became hysterical and kept apologizing to CM. When CM returned to the car after talking with AK, RBC was still "bawling" in the car. When CM told her that AK had called her "an abomination," this made RBC cry even more. RBC, who was brought up as a Southern Baptist, interpreted AK's use of the word "abomination" her mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying.

On January 18, 2013, RBC felt depressed and questioned whether there was something inherently wrong with the sexual orientation she was born with and if she and LBC deserved to be married like a heterosexual couple. She spent most of that day in her room, trying to sleep.

[16] The forum acknowledges that Complainants' "wedding" on June 27, 2013, was only a commitment ceremony, not a legal "marriage." *See* footnote 58, *infra*.

In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and A. Cryer have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during her cake tasting at Pastry Girl because of AK's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, RBC still experienced some anxiety over possible rejection because her wedding was a same-sex wedding. During this same period of time, A. Cryer credibly analogized RBC's demeanor as similar to that of a dog who had been abused.

b. Emotional suffering from publicity about the case

On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." This upset RBC, and she became greatly concerned that E and A would be taken away from them by the foster care system because they had been told that the girls' information had to be protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. This concern continued until their adoption became final sometime after December 2013.

From February 1, 2013, until the time of the hearing, many people have made "hate-filled" comments through social media and in the comments sections of various websites that were supportive of Respondents and critical of or threatening to Complainants. These comments and the media attention caused RBC stress, anger, pain, frustration, suffering, torture, shame, humiliation, degradation, fear that she would be harassed at home because the DOJ complaint with Complainants' home address had been posted on Facebook, and the feeling that her reputation was being destroyed. The publicity from the case and accompanying threats on social media from third parties made RBC "scared" for the lives of A, E, LBC, and herself. In addition, RBC was also upset by a confrontation with her sister who learned about the DOJ complaint through the media and posted a comment in support of Respondents on Respondents' Facebook.

Without giving any specific examples, RBC credibly testified that, in a general sense,[17] the denial of service has caused her continued emotional suffering up to the time of hearing.

[17] The following is RBC's only testimony about her emotional suffering due to the denial of service after the case began to be publicized. It occurred during the Agency's redirect examination:

B. L. Bowman-Cryer

a. Emotional suffering from the denial of service

LBC had been asking RBC to marry her for nine years before RBC finally accepted in October 2012. RBC's acceptance in October 2012 of LBC's marriage proposal made LBC "extremely happy." Both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's earlier wedding. However, LBC, unlike RBC, did not go to the cake tasting.

When CM and RBC arrived home on January 17, 2013, after their cake tasting at Sweetcakes, CM told LBC that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination." LBC was "flabbergasted" and she became very upset and very angry. LBC, who was raised as a Roman Catholic, recognized AK's statement as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination." Based on her religious background, she understood the term "abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life." Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect CM's relatively recent acceptance of RBC's sexual orientation.

LBC views herself as RBC's protector. After RBC climbed into bed, crying, LBC got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper because she could not "fix" things.

When LBC went back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating

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Q: "You testified earlier about the media attention being sort of a secondary layer of stress, and I believe that that term you used during Mr. Smith's cross examination of you. During my examination of you, you testified at length as to the emotional harm that you suffered directly from the refusal of service alone. Do you still feel that harm from the refusal itself -- the January 17, 2013 refusal?"

"* * * * *

A. "Yes, I still experience that."

Q. "Was the primary harm, the harm that resulted from the refusal of service itself, persistent throughout the times where you experienced media attention?"

"* * * * *

A. "Yes, the harm was still present during the media attention."

to her. That night, LBC was very upset, cried a lot, and was hurt and angry. Later that same evening, she filed her DOJ complaint.

In the days immediately following January 17, 2013, LBC experienced anger, outrage, embarrassment, exhaustion, frustration, sorrow, and shame as a reaction to AK's denial of service. She felt sorrow because she couldn't console E, she could not protect RBC, and because RBC was no longer sure she wanted to be married. Her excitement about getting married was also lessened because she was not sure she could protect RBC if any similar incidents occurred.

b. Emotional suffering from publicity about the case

On February 1, 2013, LBC went to the emergency room of a local hospital because of pain from a shoulder injury that she had suffered three weeks earlier and her concern that she might have a broken shoulder. While in the hospital, she heard that AK's refusal to make their wedding cake was on the news. This made her very upset and she was crying when she was examined by a doctor. Based on the media, potential media exposure, and social media attention related to her DOJ complaint after February 1, 2013, LBC's headaches increased. She also felt intimidated and became fearful.

After LBC's DOJ complaint was publicized in the media, LBC also had an "devastating" confrontation with her aunt who had learned about her DOJ complaint against Respondents through the media and threatened to shoot LBC in the face if she ever set foot on LBC's family's property again.[18]

After February 1, 2013, LBC, like RBC, was also greatly concerned that their foster children would be taken away from them because of media exposure.

LBC testified that she still feels emotional effects from the denial of service because E, A, and RBC "were" still suffering and that "was" tearing me apart.[19]

2. Emotional suffering damages based on media and social media attention

In its closing argument, the Agency asked the forum to award Complainants $75,000 each in emotional suffering damages stemming directly from the denial of service, In addition, the Agency asked the forum to award damages to Complainants for emotional suffering they experienced as a result of the media and social media attention generated by the case from January 29, 2013, the date AK posted LBC's DOJ complaint on his Facebook page, up to the date of hearing. The Agency's theory of liability is that since Respondents brought the case to the media's attention and kept it

[18] LBC's intense and visceral display of emotions while testifying about her aunt's behavior made it clear that her aunt's behavior caused her extreme upset.

[19] *See* footnote 7, *supra*. LBC testified in the past tense.

there by repeatedly appearing in public to make statements deriding Complainants, it was foreseeable that this attention would negatively impact Complainants, making Respondents liable for any resultant emotional suffering experienced by Complainants. The Agency also argues that Respondents are liable for negative third party social media directed at Complainants because it was a foreseeable consequence of the media attention.

The Commissioner concludes that complainants' emotional harm related to the denial of service continued throughout the period of media attention and that the facts related solely to emotional harm resulting from media attention do not adequately support an award of damages. No further analysis regarding the media attention as a causative factor is, therefore, necessary.

3. Amount of Damages

There is ample evidence in the record of specific, identifiable types of emotional suffering both Complainants experienced because of the denial of service.

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of C. C. Slaughters, Ltd.,* 26 BOLI 186, 196 (2005). In public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination." *In the Matter of Westwind Group of Oregon, Inc.,* 17 BOLI 46, 53 (1998).

In this case, the ALJ proposed that $75,000 and $60,000, are appropriate awards to compensate Complainants RBC and LBC, respectively, for the emotional suffering they experienced from Respondents' denial of service. The proposal for LBC is less because she was not present at the denial and the ALJ found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects. In this particular case, the demeanor of the witnesses was critical in determining both the sincerity and extent of the harm that was felt by RBC and LBC. As such, the Commissioner defers to the ALJ's perception of the witnesses and evidence presented at hearing and adopts the noneconomic award as proposed, finding also that this noneconomic award is consistent with the forum's prior orders.[20]

[20] See, *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94 (2012) (Complainant, a Christian, subjected to harassment based on her religious belief including the job requirement of attending Scientology trainings suffered anxiety, stress, insomnia, gastrointestinal problems and weight loss requiring medical treatment awarded $350,000); *In the Matter of From The Wilderness, Inc.,*30 BOLI 227 (2009) (Complainant subjected to verbal and physical sexual harassment for two months before being fired and then retaliated against after termination suffered panic attacks requiring medical treatment awarded $125,000); *In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI 121 (2014) (Complainants subjected to racially hostile environment including assault, threats with a firearm, racial epithets and retaliation for reports to police suffered fear, sleeplessness and physical injuries requiring medical treatment awarded

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to eliminate the effects of the violation of ORS 659A.403 by **Respondent Aaron Klein,** and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** 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 **Complainants Rachel Bowman-Cryer** and **Laurel Bowman-Cryer** in the amount of:

1) ONE HUNDRED THIRTY FIVE THOUSAND DOLLARS ($135,000), representing compensatory damages for emotional, mental and physical suffering, to be apportioned as follows:

Rachel Bowman-Cryer: $75,000

Laurel. Bowman-Cryer: $60,000

plus,

2) Interest at the legal rate on the sum of $135,000 from the date of issuance of the Final Order until Respondents comply with the requirements of the Order herein.

B. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violation of ORS 659A.403 by **Respondent Aaron Klein,** the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from denying the full and equal accommodations, advantages, facilities and privileges of Sweetcakes by Melissa to any person based on that person's sexual orientation.

B. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violations of ORS 659A.409 by **Respondents Aaron Klein and Melissa Klein,** the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Aaron Klein and Melissa Klein** to cease and desist from publishing, circulating, issuing or displaying, or causing to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of a place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of sexual orientation.

$50,000 and $100,000 each); *In the Matter of Charles Edward Minor*, 31 BOLI 88 (2010) (Complainant subjected to verbal and physical sexual harassment including respondent striking her in the head with his fist suffered anxiety, reclusiveness and fear awarded $50,000).

APPENDIX

FINDINGS OF FACT – PROCEDURAL

1) On August 8, 2013, R. Bowman-Cryer ("RBC") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Aaron Klein and Melissa Klein, dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. RBC's complaint was subsequently amended to name both Kleins as aiders and abettors under ORS 659A.406. (Ex. A-27)

2) On November 7, 2013, L. Bowman-Cryer ("LBC") filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Aaron Klein ("AK") and Melissa Klein ("MK"), dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. LBC's complaint was subsequently amended to name AK and MK as aiders and abettors under ORS 659A.406. (Ex. A-28)

3) On January 15, 2014, after investigating RBC's and LBC's complaints, the CRD issued a Notice of Substantial Evidence Determination in each case in which the CRD found substantial evidence of unlawful discrimination in public accommodation against Respondents in violation of ORS 659A.403, ORS 659A.406, and ORS 659A.409 (Ex. A29)

4) On June 4, 2014, the Agency issued two sets of Formal Charges, one alleging unlawful discrimination against RBC (case no. 44-14) and the other alleging unlawful discrimination against LBC (case no. 45-14) that alleged the following:

(a) At all times material, Sweetcakes by Melissa ("Sweetcakes") was an assumed business name of Respondent MK doing business in Gresham, Oregon, that offered goods and services to the public, including wedding cakes;

(b) At all times material, AK was registered with the Oregon Sec. of State Business Registry as the authorized representative of MK, dba Sweetcakes by Melissa;

(c) On January 17, 2013, RBC and her mother went to Sweetcakes for a cake tasting related to RBC's wedding ceremony to LBC;

(d) AK conducted the tasting and asked for the names of a bride and groom. RBC said there would be two brides for her ceremony and gave her name and LBC's name. AK told RBC that Sweetcakes did not do "same-sex couples" because it "goes against our religion";

(e) Complainants were injured by Respondents' refusal to provide them with a wedding cake;

(f) MK discriminated against Complainants based on their sexual orientation, in violation of ORS 659A.403(3) and ORS 659.409;

(g) AK aided or abetted MK as the owner of Sweetcakes in MK's violation of ORS 659A.403(3) and ORS 659.409; thereby violating ORS 659A.406;

(h) Complainants are each entitled to damages for emotional, mental, and physical suffering in the amount of "at least $75,000" and out-of-pocket expenses "to be proven at hearing."

(i) Respondents published or issued a communication, notice that its accommodation, advantages would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409.

On the same day, BOLI's Contested Case Coordinator issued Notices of Hearing in both cases stating the time and place of the hearing as August 5, 2014, beginning at 9:00 a.m., at BOLI's Portland, Oregon office. (Exs. X2, X4)

4) On June 6, 2014, Respondents filed a motion to postpone the hearing because Respondent's attorney Herbert Grey had "pre-paid non-refundable vacation plans" during the time scheduled for hearing. The forum granted Respondents' motion. (Ex. X5)

5) On June 18, 2014, Respondents, through attorneys Grey, Tyler Smith, and Anna Adams, filed an "Election to Remove to Circuit Court (ORS 659A.870(4)(b))" and "Alternative Motion to Disqualify BOLI Commissioner Brad Avakian" from deciding issues in these cases. Respondents requested oral argument on both issues. On June 25, 2014, the Agency filed objections to Respondents' motions. On June 26, 2014, the ALJ denied Respondents' request for oral argument. (Exs. X8, X11)

6) On June 19, 2014, the ALJ held a prehearing conference and rescheduled the hearing to start on October 6, 2014. The ALJ also consolidated the cases for hearing. (Ex. X7)

7) On June 24, 2014, Respondents timely filed an answer and response to both sets of Formal Charges. Respondent admitted that AK had declined RBC's request to design and provide a cake for Complainants' same-sex ceremony but denied that any unlawful discrimination occurred. Respondents raised numerous affirmative defenses, including:

- The Formal Charges fail to state ultimate facts sufficient to constitute a claim.

- Because the Oregon Constitution did not provide for or recognize same-sex unions in January 2013 and the state of Oregon did not issue marriage licenses to same-sex couples at that time, BOLI lacks "any legitimate authority to compel Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."

- BOLI is estopped from compelling Respondents to engage in free expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.

- The statutes underlying the Formal Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the following particulars, by unlawfully: (a) infringing on Respondents' right of conscience; (b) infringing on Respondents' right to free exercise of religion; (c) infringing on Respondents' right to free speech; (d) compelling Respondents to engage in expression of a message they do not want to express; (e) denying Respondents' right to due process; and (f) denying Respondents the equal protection of the laws.

- The statutes underlying the Formal Charges, as applied, violate Respondents fundamental rights arising under the Oregon Constitution in one or more of the following particulars, by unlawfully: (a) violating Respondents' freedom of worship and conscience under Article I, §2; (b) violating Respondents' freedom of religious opinion under Article I, §3; (c) violating Respondents' freedom of speech under Article I, §8; (d) compelling Respondents to engage in expression of a message they did not want to express; (e) violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §3.

- The statutes underlying the Formal Charges are facially unconstitutional in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

Respondents also raised four Counterclaims, including:

- Respondents are entitled to costs and attorney fees if they are determined to be the prevailing party.

- The State of Oregon, acting by and through BOLI, has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents, causing economic damages to Respondents in an amount not less than $100,000. BOLI has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county

clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents and causing economic damages to Respondents in an amount not less than $100,000.

- During the period from February 5, 2013 to the present, BOLI's Commissioner published, circulated, issued, displayed, or cause to be published, circulated, issued, displayed, communications on Facebook and in print media to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.

- Under 42 USC § 1983, BOLI is liable to Respondents for depriving Respondents of their rights and protections guaranteed by the United States Constitution "under color of any statute, ordinance, regulation, custom or usage of any State."

(Ex. X10)

8) On July 2, 2014, the ALJ issued an interim order ruling on Respondents' June 18, 2014, motions. That order is reprinted below in pertinent part.[21]

"**Respondents' Putative Election to Circuit Court**

"Respondents assert that they have a 'unqualified right to have these matters removed to the circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).' ORS 659A.870(4)(b) provides, in pertinent part:

> '(b) A respondent or complainant named in a complaint filed under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law may elect to have the matter heard in circuit court under ORS 659A.885. The election must be made in writing and received by the commissioner within 20 days after service of formal charges under ORS 659A.845. If the respondent or the complainant makes the election, the commissioner shall pursue the matter in court on behalf of the complainant at no cost to the complainant.'

"To establish jurisdiction, the Agency's Formal Charges each allege: (1) both cases originated as verified complaints filed by Complainants Rachel Cryer and Laurel Bowman-Cryer; (2) both Complainants were authorized to file their complaints under the provisions of ORS 659A.820; and (3) that the Agency issued a Notice of Substantial Evidence Determination in both cases.

[21] Footnotes from this interim order and other interim orders quoted at length in the Proposed Findings of Fact – Procedural that are not critical to an understanding of the order have been deleted. The deletions are indicated by a "^" symbol.

Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS chapter 659A but do not dispute these jurisdictional allegations. Accordingly, the forum concludes that respondents were named in a complaint filed under ORS 659A.820. Under ORS 659A.870(4)(b), if the Formal Charges allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, Respondents are entitled to elect to have the matter heard in circuit court under ORS 659A.885, subject to the requirement that such election must be made in writing within 20 days of service of the Formal Charges.

"ORS 659A.145 is titled '**Discrimination against individual with disability in real property transactions prohibited; advertising discriminatory preference prohibited; allowance for reasonable modification; assisting discriminatory practices prohibited.**' As indicated by its title, the provisions of ORS 659A.145 are exclusively limited to real property transactions involving people with disabilities. ORS 659A.421 is titled '**Discrimination in selling, renting or leasing real property prohibited**' and prohibits discrimination in real property transactions based on the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person.

"In contrast, these cases allege violations of ORS 659A.403(3), ORS 659A.406, and ORS 659A.409. All three of these statutes appear in a section of ORS chapter 659A titled '**ACCESS TO PUBLIC ACCOMMODATIONS**' that includes ORS 659A.400 to ORS 659A.415. Neither of the Formal Charges contains any allegations related to discrimination under federal housing law or discrimination based on real property transactions. Rather, the Formal Charges both identify Respondent Melissa Klein's business as a 'place of public accommodation' and allege that Respondent Melissa Klein's business, as a public accommodation, discriminated against Complainants based on their sexual orientation.

"Since the Formal Charges do not allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, they are not subject to the provisions of ORS 659A.870(4)(b) and Respondents have no statutory right to elect to have the matter heard in circuit court.

"**MOTION TO DISQUALIFY BOLI COMMISSIONER AVAKIAN BASED ON AVAKIAN'S ACTUAL BIAS**

"Respondents ask that Commissioner Avakian be disqualified from deciding the issues presented in the Formal Charges because he has 'publicly demonstrated actual bias against Respondents and others similarly situated, both as a candidate for re-election and as Commissioner.' Based on that alleged actual bias, Respondents contend that the Commissioner's fulfillment of his statutory role by deciding and issuing a Final Order in these cases will deprive Respondents of due process and other constitutional rights. Respondents

concede that BOLI administrative rules OAR 839-050-000 *et seq* contain no provision related to the disqualification of a BOLI Commissioner deciding and issuing a Final Order. However, both Respondents and the Agency acknowledge that procedural due process requires a decision maker free of actual bias^ and that Respondents have the burden of showing that bias. *See Teledyne Wah Chang v. Energy Facility Siting Council,* 298 Or 240, 262 (1985), *citing Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980).

"To show the Commissioner's actual bias and demonstrate that he has already pre-judged this case, Respondents submitted exhibits containing numerous copies of statements made by Commissioner Avakian to the media, in e-mails sent to Respondents' attorney Herb Grey, or on Facebook posts during the Commissioner's candidacy for re-election and as Commissioner. Summarized, those exhibits include the following statements:

"**E-Mails sent to Respondents' attorney Herb Grey by 'Avakian for Labor Commissioner'**

- "February 16, 2013, in which the Commissioner identified himself as 'Oregon's chief civil rights enforcer,' and (1) noting his effort to convince the Veterans Affairs Department to grant a waiver to retired Air Force Lt. Col. Linda Campbell and her spouse, Nancy Campbell, making them the 'first same-sex couple to receive equal military burial rights' and endorsing the 'Oregonians United for Marriage * * * campaign to bring full marriage equality to Oregon.'
- "April 4, 2013, again noting the Commissioner's efforts on behalf of Linda Campbell, and quoting the comments made by Campbell on the steps of the U.S. Supreme Court a week earlier during the debate on marriage equality.
- "December 10, 2013, in which Commissioner Avakian urged Grey to co-sign his letter to House Speaker Jon Boehner to bring the Employment Non-Discrimination Act up for a vote.
- "December 19, 2013, in which Commissioner Avakian notes his 'progressive' priorities and states '[t]hat's why I defend public education, take on unlawful discrimination, and stand up for equal rights for every last Oregonian.'
- "January 10, 2014, in which Commissioner Avakian stated '[a]t the Bureau of Labor and Industries, it's my job to protect rights of Oregonians in the workplace * * * and protect everyone's civil rights in housing and public accommodations.'
- "March 4, 2014, in which Commissioner Avakian stated: 'I believe in an Oregon where everyone has the opportunity to get married, raise a family and get ahead. Gay or straight, male or female, white, black, or brown -- everyone deserves an equal shot at making it in Oregon. That's why I will continue to fight for marriage equality, a woman's right to choose, better wages, and robust non-discrimination laws that protect gays and lesbians.'
- "March 12, 2014, in which Commissioner Avakian noted that no one filed to run against him as Labor Commissioner and stated, among other things: 'We built a coalition of civil rights champions, business leaders, educators, working families

and labor leaders, and many, many more. Just think – it wasn't very long ago that right-wing activists were calling for my head because of our strong support for civil rights and equality laws in Oregon.'

- "May 19, 2014, in which Commissioner Avakian stated: 'A few minutes ago, we received word that all Oregonians, including same-sex couples, will now have the freedom to marry the person they love. As many had hoped, our federal court ruled Oregon's ban on same-sex marriage unconstitutional under the United States Constitution. This is an important moment in our state's history. The ruling also reflects what so many others have felt all along -- that Oregonians always eventually open their hearts to equality and freedom. The victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. Thank you. The win comes after news earlier this month that the Oregon Family Council has abandoned its campaign for a ballot measure to allow corporations to discriminate against loving same-sex couples. As a result, Oregon's law will continue to say that no corporation can deny service, housing or employment based on sexual orientation or gender identity. And as always, I will continue to hold those responsible that violate the rights of Oregonians and enthusiastically support those that go the extra mile for fairness. Here's to two significant victories that expand freedom for Oregonians – and the incredible efforts by friends and neighbors that made today possible. It's been a remarkable journey.'

"**Independent Media**

- "August 14, 2013, Oregonian article written by Maxine Bernstein entitled 'Lesbian couple refused wedding cake files state discrimination complaint' that contains quotes by Complainant Cryer, Respondent Melissa Klein, and Commissioner Avakian. Commissioner Avakian was quoted as follows:

  - 'We are committed to a fair and thorough investigation to determine whether there is substantial evidence of unlawful discrimination,' said Labor Commissioner Brad Avakian.
  - 'Everybody's entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, speaking generally.
  - 'The goal is never to shut down a business. The goal is to rehabilitate,' Avakian said. 'For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.'

"**Facebook Posts on Commissioner Avakian's Facebook Page**

- "April 26, 2012: 'Today, Basic Rights Oregon honored me with the 2012 Equality Advocate Award. I appreciate this recognition, but I am far more appreciative of all the efforts and accomplishments that BRO has made for Oregon's LGBT community. Thank you for including me in the incredible work that you do.'
- "February 15, 2013, with the same text included in February 16, 2013, e-mail to Herb Grey.

34 BOLI ORDERS

- "February 5, 2013, with a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com:' 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'
- "March 13, 2013: 'Tomorrow morning, I'll be testifying before the U.S. Senate about Oregon Lt. Col. Linda Campbell; she made history when she was the first person to ever get approval to bury her same-sex spouse in a national cemetery...'
- "March 22, 2013, with a link to 'Speakers announced for marriage equality rally in D.C.-Breaking News-Wisconsin Gazette – Lesbian www.wisconsingazette.com:' 'Thrilled to see Lt. Col. Linda Campbell among the headliners for next week's rally in front of the U.S. Supreme Court. LIKE this status if you support marriage equality for all loving, caring couples.'
- "March 26, 2013: 'Our country is on a journey of understanding. As more and more people talk to gay and lesbian friends and family about why marriage matters, they're coming to realize that this is not a political issue. This is about love, commitment and family. I'll be joining Oregon United for Marriage for a rally at the Mark O. Hatfield Courthouse in downtown Portland at 5pm. Join us!'
- "June 8, 2013: 'Proud to support Sen. Jeff Merkley's fight for the Non-Discrimination Act in Congress. All Americans deserve a fair shot at a good job and the opportunity for a better life. – at Q Center.'
- "June 26, 2013: 'Huge day for equality across America! In a few minutes, I'm heading to a celebration rally with Oregon United for Marriage at Terry Schrunk Plaza in downtown Portland – see you there?'
- "March 27, 2013: Link to Commissioner Avakian speaking 'on the importance of people gathering in front of the Hatfield Courthouse on the day the Supreme Court heard arguments on Prop. 8.' and statement 'I just got off the phone with Lt. Col. Linda Campbell, who said that the crowd in front of the Supreme Court was awesome and absolutely electric.'
- "May 9, 2013, with a link to 'Victory! Discrimination measure Withdrawn – Oregon United for Marriage:' 'Really great news. It's also a tribute to the fact that Oregonians are fundamentally fair and have little stomach for such a needlessly divisive fight.'
- "March 12, 2014, shared link: 'Conservative Christian group's call for Labor Commissioner Brad Avakian's ouster falls flat. www.oregonlive.com. Oregon Labor Commissioner Brad Avakian, despite criticism of his enforcement action against a Gresham bakery that refused to serve a lesbian wedding, wound up with no opponent in this year's election.'
- "May 19, 2014: 'Today's victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. If you've talk to your neighbors, collected signatures, or attended a marriage rally,

you've played an important role in Oregon's story. Thank you -- and congratulations!'

"Summarized, these exhibits fall into two categories: (1) the Commissioner's e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon and not addressed to these cases; and (2) remarks specific to the present cases. The vast majority of exhibits fall into the first category. Only two exhibits fall into the second category -- the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article.

"ORS chapter 659A contains Oregon's anti-discrimination laws related to employment, public accommodations, and real property transactions and delegates the enforcement of those laws to BOLI's Commissioner. The Legislature's purpose in adopting the provisions of ORS chapter 659A is set out in ORS 659A.003. In pertinent part, ORS 659A.003 provides that:

> 'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status.'

"ORS 651.030(1) provides that '[t]he Bureau of Labor and Industries shall be under the control of the Commissioner of the Bureau of Labor and Industries * * *.' As such, BOLI's Commissioner has the duty to see that the stated purpose of ORS chapter 659A is carried out. In addition to enforcing the various statutes contained in that chapter through the administrative process created by the Legislature,**^**[22] the Commissioner's duties include, among other things, initiating programs of 'public education calculated to eliminate attitudes upon which practices of unlawful discrimination because of * * * sexual orientation * * * are based.'**^** In short, the Commissioner has been instructed by the Legislature itself to raise public awareness about practices that the Legislature has declared to be unlawful discrimination in ORS chapter 659A. The forum finds that all of the Commissioner's remarks contained in the first category – remarks ***generally*** opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon – fall within the scope of this particular job duty. As more articulately stated by the Agency in its objections, '[n]one of this material is inconsistent with the exercise of the commissioner's statutory obligations as an elected official.'

"The forum next examines the two exhibits that fall within the second category that contain remarks specific to the present cases – the Commissioner's

[22] *See* footnote 21.

February 5, 2013, Facebook post and the August 14, 2013, Oregonian article. The Commissioner's February 5, 2013, Facebook post contains the following content, consisting of a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com' and the following remark by the Commissioner that Respondents contend shows actual bias:

> 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'

"The Oregonian article, printed six days after the two Complainants filed their complaints with BOLI's CRD, contains two remarks attributed to the Commissioner that Respondents contend demonstrate his actual bias against Respondents. Those remarks are:

- '"Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.'
- '"The goal is never to shut down a business. The goal is to rehabilitate," Avakian said. "For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon."'

"In *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985), Samuel, a chiropractor, had his chiropractor's license suspended and his right to perform minor surgery permanently revoked by the Board of Chiropractic Examiners after he performed a vasectomy on a patient. The issue before the Board was whether Samuels had exceeded the scope of his license by performing 'major' surgery, whereas chiropractors are only allowed to perform 'minor' surgery. In their decision, the Oregon Court of Appeals, after determining that a vasectomy was 'major' surgery, considered whether the Board's decision should be overturned based on the alleged bias of two members of the Board, Bolin and Camerer, who participated in the disciplinary hearing and resulting decision to suspend Samuels. Prior to Samuels's hearing, Bolin opined that a vasectomy was not minor surgery. The Court, citing *Trade Comm'n v. Cement Institute,* 333 U.S. 683 (1948), held that Bolin's expression of opinion, which the Court characterized as 'a preconceived point of view concerning an issue of law' -- was 'not an independent basis for disqualification' of Bolin. Camerer, in contrast, met with four chiropractors at a restaurant, brought the Board's file on Samuels, and allowed the other chiropractors to examine it. Prior to the Board's suspension decision, Samuels sought censure against Camerer and sued Camerer for disclosing the contents of the file. The Court held:

> 'As a defendant in the lawsuit which arose out of the very matter pending before the Board, Camerer may have harbored some animosity towards [Samuels]. The possibility of personal animosity and the appearance of a substantial basis for bias is sufficient that, under the circumstances, he should have disqualified himself.'

"To show that the Commissioner has prejudged the cases before the Forum, Respondents quote the Commissioner's two 'second category' statements as follows: 'Respondents are "disobey[ing] laws" and need to be "rehabilitated."' However, this 'quote' combines selected portions of remarks made at two different times and misquotes the latter. Respondents seek to create an inference of bias that cannot reasonably be drawn from Respondents' exhibits as a whole. The Forum finds that the accurately quoted 'second category' remarks, while made in the context of Respondents' alleged discriminatory actions and the Complainants' complaints, are remarks reflecting the Commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, show 'a preconceived point of view concerning an issue of law' that, under *Samuels*, is not a basis for disqualification due to bias.

"**RESPONDENTS' ADDITIONAL ARGUMENTS**

"In addition to their 'actual bias' argument, Respondents contend that the Commissioner should be disqualified for two other reasons: (1) The Commissioner's participation as a decision maker in these cases would violate the policy expressed in ORS 244.010 regarding ethical standards for public officials because of his conflict of interest; and (2) His participation as a decision maker in these cases would violate Oregon Rules of Professional Conduct (ORPC) 3.6 related to lawyers making public statements about matters in litigation[23] and Oregon's Code of Judicial Ethics.**^**

"**Ethical Standards for Public Officials – ORS chapter 244 & Conflict of Interest**

"Respondents contend that the Commissioner's actual bias and conflict of interest demonstrate a partiality towards these cases that requires the Commissioner to disqualify himself from this case. As noted earlier, Respondents have not demonstrated actual bias on the Commissioner's part. Respondents assert that, under ORS chapter 244, 'the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable,' and cite the following 'multiple conflicts of interest on the part of the Commissioner and BOLI as grounds for disqualification:

[23] Commissioner Avakian is an attorney and a member of the Oregon State Bar.

> '(1) [T]he Oregon Constitution and ORS 659A.003, *et seq,* not to mention the U.S. Constitution, require BOLI to respect and protect Respondents' constitutionally-protected religion, conscience and speech rights to an even greater degree than it does complainants' statutory rights; and
>
> '(2) [T]he State of Oregon, including BOLI itself, has potential legal liability as a place of public accommodation under ORS 659A.400(1)(b) and (c) because, at the time of the original defense and the filing of complaints by complainants, the state of Oregon itself refused to recognize same sex marriage relationships, just as Respondents have chosen not to participate in complainants' same-sex ceremony.'

"'Conflict of interest'" is defined under ORS chapter 244 in ORS 244.020:

> '(1) "Actual conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.
>
> '* * * * *
>
> '(12) "Potential conflict of interest" means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated[.]'

"Respondents identify no conflict of interest by the Commissioner based on a pecuniary benefit or detriment that fits within these definitions. As noted by the Agency in its response, the Oregon Government Ethics Commission, not the Administrative Law Judge, is responsible for determining the Commissioner's ethical obligations under ORS chapter 244. ORS 244.250 *et seq*.

"**ORPC & Canons of Judicial Ethics**

"The Administrative Law Judge does not have the authority to enforce the ORPC or Code of Judicial Ethics. However, I note that Respondents have not shown that any of Commissioner Avakian's remarks contained in Respondents' exhibits 'will have a substantial likelihood of materially prejudicing' this contested case proceeding. *ORPC 3.6*. The Code of Judicial Ethics does not apply to the

Commissioner because he is not 'an officer of a judicial system performing judicial functions.'[24]

"**Conclusion**

"Respondents' motion to disqualify Commissioner Avakian from deciding the issues presented in the Formal Charges and issuing a Final Order is **DENIED**."

(Ex. X12)

9) On August 13, 2014, the ALJ issued an interim order that reset the hearing to begin on October 6, 2013, noting that the Agency and Respondents had both stated in an earlier prehearing conference it might take up to a week to complete the hearing. The same day, the ALJ issued an interim order requiring case summaries and setting a filing deadline of September 22, 2014. (Ex. X14)

10) On August 25, 2014, Respondents moved to postpone the hearing based on Respondents' prescheduled plans to be out of town on October 6, 2014. The Agency did not object and the ALJ reset the hearing to begin on October 7, 2014. (Ex. X17, X18)

11) On September 4, 2014, Respondents filed motions to depose Complainants and Cheryl McPherson and for a discovery order related to the Agency's objections to Respondents' informal discovery request for admissions, interrogatory responses, and documents. The Agency filed timely objections to both motions. (Exs. X20 through X24)

12) On September 11, 2014, the Agency moved for a discovery order for the production of four types of documents. (Ex. X25)

13) On September 15, 2014, Respondents filed a motion for summary judgment "on each or all of the claims asserted against them." (Ex. X26)

14) On September 16, 2014, the Agency moved for a Protective Order regarding Complainants' medical records both informally requested by Respondents and in Respondents' motion for a discovery order. The Agency attached five pages of medical records related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." After conducting an *in camera* review, the ALJ made

[24] *See* ORS 1.210 – "Judicial officer defined. A judicial officer is a person authorized to act as a judge in a court of justice." BOLI does not operate a "court of justice," but is an administrative agency whose contested case proceedings are regulated by the Administrative Procedures Act, ORS 183.411 to ORS 183.470.

minor redactions unrelated to LBC's medical diagnosis and released the records to Respondents, accompanied by a Protective Order. (Exs. X27, X44)

15) The ALJ held a prehearing conference on September 18, 2014. After the conference, the ALJ issued an interim order summarizing his oral rulings, including his decision to postpone the hearing to give him time to rule on Respondents' motion for summary judgment before the hearing began. (Ex. X32)

16) On September 24, 2014, the Agency filed Amended Formal Charges in both cases. (Ex. X38)

17) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for documents, interrogatory responses, and admissions. In pertinent part, the ruling read:

> "As an initial matter, the Agency argues that Complainants are not subject to discovery rules under OAR 839-050-0020 because they are not 'parties' and therefore are not 'participants' under OAR 839-050-0200(1). In numerous prior cases with the forum * * * a respondent has been allowed to request a discovery order to obtain documents and information from a complainant through the Agency that are discoverable under OAR 839-050-0020(7). *See In the Matter of Toltec*, 8 BOLI at 152 (noting that although the complainant was not a party, complainant still was 'a compellable witness' and the Agency was ordered to produce evidence over which it had power or authority). *See also In the Matter of Columbia Components, Inc.,* 32 BOLI 257, 259-61 (2013)(requiring complainant to verify that the interrogatory responses were true, and that complainant respond to a specific interrogatory request to which the Agency had objected); *In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 100 (2012) (requiring the Agency to produce any documents responsive to respondents' requests that appeared reasonably likely to produce information generally relevant to the case, including complainant's tax returns for relevant years).
>
> **A. "Interrogatories**
>
> "Respondents requested an order requiring the Agency to fully respond to four separate interrogatories. To the extent this order requires Complainants, through the Agency, to respond to the interrogatories, Complainants must sign them under oath as required by OAR 839-050-0200(6).
>
> ***"Interrogatory No. 7***
>
> "Respondents requested that the Agency explain in detail the nature of the physical harm Complainants allege in the Formal Charges ('Charges'). The Agency responded that both Complainants experienced 'varying physical manifestations of stress' and that '[a]ny further medical information will be provided pursuant to a protective order.' I agree that Respondents are entitled to

know more specifically what physical damages have been allegedly sustained. I order the Agency to have Complainants, through the Agency, respond to this interrogatory.

"Interrogatory No. 8

"Respondents requested an explanation 'in detail [of] the nature of the mental harm Complainants alleged resulted from the events alleged in the Complaint.' The Agency objected on the grounds that the request was redundant and vague, as it was unclear how the interrogatory differed from the interrogatory asking for information as to emotional harm allegedly suffered by Complainants. In its response to the motion, the Agency 'stipulates' that 'emotional, mental' suffering is any suffering not attributed to physical suffering, and that information was provided in response to Interrogatory No. 6. Based on the Agency's stipulation that 'emotional [and] mental' suffering are the same, the response to this Interrogatory appears to be sufficient and, therefore, I DENY Respondents' request for additional information in response to this interrogatory.

"Interrogatory No. 11

"This interrogatory also relates to damages. With this interrogatory, Respondents requested an explanation as to the actions taken by Complainants to remove their public social media profiles after a complaint was filed with the Department of Justice on January 18, 2013. The Agency objected on the basis of relevancy. Respondents assert that this request is relevant because '[m]uch, if not all of the damage Complainants have alleged to this point revolve around the media attention they received as a result of Complainant Laurel Bowman-Cryer's filing a Complaint with the Department of Justice.' Respondents further assert that Complainants have told Respondents they had to travel out of town because of attention and publicity. Respondents claim that the removal of social media profiles is relevant to the assessment of damages or mitigation of damages. In its response to the motion, the Agency reiterates its objection on the basis of relevance, but does not directly address the arguments made in Respondents' motion as to damages allegedly caused by publicity and media attention. On September 22, 2014, the Agency timely filed a statement addressing this issue. In pertinent part, the Agency stated:

> "Respondents caused substantial harm to Complainants, in part, through their intentional posting of the Department of Justice complaint on their social media website, which included Complainants' home address. This affected Complainants by exposing them to unwanted and, sometimes, unnerving contact from the public. * * * Complainants have had little to no contact with media, except through their attorney Mr. Paul Thompson. * * * The agency's position is that Complainants' damages were a direct result of Respondents intentionally posting the DOJ complaint on the Internet."

Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 11 is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"Interrogatory No. 12

"Respondents have requested an explanation 'in detail [of] any involvement or communication Complainants had with any group involved in boycotting Respondents' business.' The Agency objected on the basis of relevance, over breadth, and because the requested information is outside the possession or control of the agency. As to relevancy, I view this request as similar to Interrogatory No. 11. Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 12 is reasonably likely to produce information that is generally relevant to the case. Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"B. Production of Documents

"* * * * *

"Request No. 2

"Respondents requested a copy of records 'in the Agency's possession' as to the state policy in January of 2013 for issuing marriage licenses to same sex couples. The Agency objected on the basis of relevance and also states that such documents are not within the possession or control of the Agency. Respondents claim such documents are relevant to show whether the "Agency is aware" that same sex marriage was not recognized in Oregon at the time of the acts in question in this case. I deny Respondents' motion because (1) the Agency's awareness of the status of same sex marriage in Oregon is not likely to lead to relevant evidence^; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the Agency has indicated it has no such documents in its possession.

"Request No. 7

"This request seeks medical records for any medical visits relating to Complainants' request for emotional, mental or physical damages. Respondents' motion is GRANTED. * * *

"Request No. 9

"Each of these requests for production seeks documentation and photographs of the actual wedding cake served at Complainants' wedding ceremony. The Agency objected to these requests on the basis of relevancy. The fact that a cake was purchased from another cake baker is likely relevant and, thus, I grant this motion only as to a receipt or invoice for showing the purchase of the cake and one photograph of the cake. Any other requested information is overly broad. Furthermore, for the reasons set forth below regarding Request for Production No. 10, the Agency need not produce photographs of Complainants, their families, and the actual wedding ceremony.

"Request No. 10

"In this request, Respondents have asked for photos, videos, or audio recordings of Complainants' wedding ceremony. The Agency has objected on the grounds that the requested documents are irrelevant. The Agency further explains that Complainants are wary of turning over these materials to Respondents because Respondents previously posted Complainants' home address on a social media site. Unless the Agency is intending to offer photos, videos or audio recordings as evidence at the hearing, then I agree with the Agency's objections and DENY the motion as to these documents. If the Agency intends to offer them as evidence at hearing, then the Agency must turn them over to Respondents.

"Request No. 11

"Request No. 11 seeks communications made by Complainants to the media or on social media sites 'relating to Respondents and the events leading to the filing of Formal Charges against Respondents.' I find that this request is reasonably likely to produce information that is generally relevant to the case. * * * Respondents' request is GRANTED.

"Request No. 12

"Request No. 12 seeks '[a]ny social media posts, blog posts, emails, text messages, or other record or communication showing Complainant's involvement with a boycott of Respondents or their business.' Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of

Complainants, Respondents may renew their motion for a discovery order regarding this request.

"Request No. 16

"Request No. 16 seeks the "names and addresses of any person, media outlet, or other entity with whom Complainants or Cheryl McPherson spoke regarding the events leading to this Complaint or the Complaint filed with the Department of Justice." I find that Respondents' request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case, and is GRANTED. Respondents' request with regard to Cheryl McPherson is DENIED.

"Request No. 17

"Request No. 17 seeks the production of '[a]ny receipt, invoice, contract, or other writing memorializing the purchase of the cake by Complainants from Respondent for Cheryl McPherson's wedding.' I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

"Request No. 18

"Request No. 18 seeks the production of '[a]ny photos, videos, or other record of the cake Complainants purchased from Respondent for Cheryl McPherson's wedding.' I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

"Request No. 22

"Request No. 22 seeks '[a]ll posting by Complainants or Cheryl McPherson to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present.' I find that this request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case. * * * However, Complainants are only required to provide postings that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages. Respondents' request with regard to Cheryl McPherson is DENIED.

"Request No. 23

"Request No. 23 seeks '[a]ny recording or documents showing that Complainants ever removed any public social media profiles or caused to be hidden from public view.' Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

B. "Requests for Admissions

"* * * * *

"Request No. 4

"Respondents ask the Agency to admit that the State of Oregon did not recognize same sex marriage on or about January 17 and 18, 2013. The Agency objected on the basis of relevancy. For the reasons set forth above in regards to *Request for Production No. 2*, Respondents' request is DENIED.

"Requests Nos. 7 & 8

"Respondents ask the Agency to admit that Complainants Laurel Bowman-Cryer and Rachel Cryer 'did not at any time on or after January 17, 2013, delete or remove her public Facebook profile.' The Agency objects on the basis of relevance. Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

"Request No. 9

"Respondents ask the Agency to admit that Complainants were not issued a marriage license between January 17, 2013, and May 18, 2014. The Agency objects for the same reasons it objected to *Request for Production No. 2*, which sought similar information. This request is DENIED for the same reasons set out in my denial to *Request for Production No. 2*.

(Ex. X41)

18) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for depositions. In pertinent part, the ruling read:

> **"<u>Complainants Laurel Bowman-Cryer and Rachel Cryer</u>**
>
> "I agree with the Agency that, given the availability of other discovery methods, the forum typically does not allow for depositions, as well as the fact that the Agency typically produces an investigative file with detailed notes of interviews of witnesses. However, this case poses two unique circumstances. First, based on the information I have received to date from Respondents and the Agency, I have been unable to determine whether or not information and documents sought in response to Interrogatories Nos. 11 and 12 and Requests for Production Nos. 12 and 23 are reasonably likely to produce information that is generally relevant to the case. If so, it may result in the production of evidence that bears a significant relationship to Complainants' alleged damages. Respondents should be able to ascertain this in a deposition and, as stated in my interim order related to those Interrogatories and Requests for the Production, may renew their request for a discovery order if they can show that testimony given during the depositions shows those requests are reasonably likely to produce information is generally relevant to the case. I also note that there appears to be a unique damages claim for reimbursement of expenses for out-of-town trips to Seattle, Tacoma (two trips), and Lincoln City, with expenses for lodging, gas, and food at a number of establishments. As Respondents point out in their motion, they 'would use all of their 25 interrogatories just trying to determine exactly how one or two of these alleged expenses was at all related to Respondents' alleged unlawful conduct.' I am persuaded by Respondents that they have sought informal discovery on the issue of damages through other methods and do not have adequate information as to damages.
>
> "In this unusual set of circumstances, I find that Respondents should be permitted to briefly depose Complainants, with the scope of the depositions limited to Complainants' claim for damages. Unless unexpected circumstances arise that require an ALJ's intervention, the depositions should take no longer than 90 minutes per Complainant. After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating a deadline for when the depositions should be completed. The Agency and Complainants' counsel are instructed to cooperate with Respondents so that the depositions can be conducted by that deadline. Respondents are responsible for any court reporter costs associated with the deposition, and Respondents and the Agency must each pay for their own copy of transcripts if transcripts are prepared.

“Cheryl McPherson

“Respondents argue that they are entitled to depose Cheryl McPherson, a material witness in this case, because they:

> “strongly dispute some of the factual claims made by the complainants, Respondents need to know whether Cheryl McPherson will validate complainant's (sic) testimony under oath before the hearing. * * * In this case, multiple parties to the same conversations recall substantially different events, and subtle differences in retelling will substantially affect a credibility determination that Administrative Law Judge must make. Without being able to compare such testimony prior to hearing, the Respondents are substantially prejudiced."

“I do not find that Respondents have demonstrated the need to depose witness Cheryl McPherson. I note that Respondents are typically provided with notes from investigative interviews of witnesses. Neither the Agency nor Respondents have provided information as to whether that occurred in this case. However, unless Respondents did not receive the usual investigative notes of the Agency’s interview with Cheryl McPherson or no such notes exist because McPherson was never interviewed, I deny Respondents' request to take her deposition.”

(Ex. X42)

19) On September 25, 2014, the ALJ issued a discovery order requiring Respondents to produce documents in three of the four categories sought by the Agency in its September 11, 2014, motion. (Ex. X43)

20) On September 29, 2014, the ALJ held a prehearing conference. During the conference, mutually acceptable new hearing dates, discovery status and a possible alternative to depositions, and filing deadlines were discussed and the ALJ made several rulings, summarized in a September 30, 2014 interim order that stated:

> “(1) Subject to the availability of Respondents and Complainants, the hearing is reset to begin at 9:00 a.m. on Tuesday, March 10, 2015, at the Tualatin Office of Administrative Hearings. If the hearing is not concluded by late afternoon on Friday, March 13, the hearing will reconvene at 9:00 a.m. on Tuesday, March 17, 2015, at the same location. The Agency and Respondents’ counsel will let me know this week of the availability of Respondents and Complainants on those dates.
>
> “(2) Respondents have until October 2, 2014, to file answers to the Amended Formal Charges.

"(3) The Discovery ordered in my rulings on the Agency's and Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014. This does not include Complainants' depositions.

"(4) My order requiring Complainants to submit to depositions by Respondents is 'on hold' for the present.

"(5) As a potential means for avoiding the necessity of depositions, Respondents proposed that they be allowed to serve 30 additional interrogatories to the Agency for Complainants' responses. The Agency objected to 30 but agreed to 25. I agreed and ruled that Respondents could serve 25 additional interrogatories to the Agency for Complainants' response, with the responses due 14 days after the date of service. At the Agency's request, I also ruled that, should they elect to do so, the Agency may also serve up to 25 interrogatories to Respondents' counsel for Respondents' response, noting that the Agency is also entitled to do that under the rules since they have issued no prior interrogatories.

"(6) Case Summaries must be filed no later than February 24, 2015.

"(7) We also discussed the most efficient means of procedure regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency has filed Amended Formal Charges since Respondents filed a motion for summary judgment. Respondents' counsel stated their intention in filing the motion was to resolve both cases in their entirety, if possible. After discussion, I ruled that the Agency did not need to respond to Respondents' pending motion for summary judgment and I will not rule on that motion. Rather, Respondents will file another motion for summary judgment that will incorporate the matters raised in the Amended Formal Charges so that all outstanding issues can be addressed in my ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its written response. Accordingly, I order that Respondents must file their amended motion for summary judgment no later than October 24, 2014, and the Agency must file its response no later than November 21, 2014. Respondents' counsel asked if oral argument would be allowed on the motion and I ruled that it would not.

"(8) The Agency stipulated that it is not seeking reimbursement for the out-of-pocket expenses listed in response to Respondents' Interrogatory #16. In response to my question, the Agency stated that it is not willing to stipulate that those trips are not relevant to the issue of damages."

(Ex. X50)

21) On October 2, 2014, Respondents filed Answers to the Agency's Amended Formal Charges. (Ex. X51)

22) On October 24, 2014, Respondents re-filed their motions for summary judgment. (Ex. X53)

23) On November 21, 2014, the Agency filed a response to Respondents' motion for summary judgment and a cross-motion for partial summary judgment "on the same issues moved upon by Respondents." (Ex. X54)

24) On December 8, 2014, the Agency filed a second motion for a discovery order. On December 15, 2014, Respondents filed a response stating that they had "now provided the Agency with all responsive documents * * * not subject to the attorney-client privilege." On December 18, 2014, the Agency withdrew its motion for a discovery order, stating that Respondents had satisfied the Agency's request for production. (Ex. X57)

25) On December 19, 2014, Respondents filed a response to the Agency's cross-motion for summary judgment. (Ex. X61)

26) On January 15, 2015, the Agency moved for a Protective Order regarding "additional medical documentation from Complainants that is subject to discovery." The Agency attached 13 pages of medical records, dated September 30, 2014, through January 20, 2015, related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." Before ruling, the ALJ instructed the Agency to tell the forum whether the Agency contended "that Bowman-Cryer continued to experience "emotional, mental, and physical suffering" caused by Respondents' alleged unlawful actions during the period of time covered by these records. (Ex. X64)

27) On January 15, 2014, Respondents renewed their motion to depose Complainants, based on part on Complainant's alleged inadequate responses to Respondents second set of interrogatories. On January 22, 2014, the Agency objected to Respondents' motion. On January 29, 2014, the ALJ issued an interim order instructing Respondents to provide a copy of the interrogatories and the Agency's responses before the ALJ ruled on Respondents' motion. (Exs. X62, X63, X66)

28) On January 29, 2015, the ALJ issued an interim order ruling on Respondents' re-filed motion for summary judgment and the Agency's cross-motion for summary judgment. The interim order is reprinted verbatim below, pursuant to OAR 839-050-0150(4)(b):

"Introduction

"Respondents operate a bakery under the name of Sweetcakes by Melissa.[25] These cases arise from Respondents' refusal to provide a wedding

[25] At the time of the alleged discrimination, Sweetcakes by Melissa was an inactive assumed business name. On February 1, 2013, Sweetcakes by Melissa was re-registered as an assumed business name

cake for Complainants Rachel Cryer ('Cryer') and Laurel Bowman-Cryer ('Bowman-Cryer') after Respondents Aaron Klein ('A. Klein') and Melissa Klein ('M. Klein') learned that the wedding would be a same-sex wedding.

"As an initial matter, the forum notes Respondents' request for oral argument with regard to their motion. Respondents' request for oral argument is **DENIED.**

"**Procedural History**

"On June 4, 2014, the Civil Rights Division of the Oregon Bureau of Labor and Industries ('Agency') issued two sets of Formal Charges alleging that M. Klein violated ORS 659A.403(3) by refusing to provide Complainants a wedding cake for their same-sex wedding based on their sexual orientation and that A. Klein aided and abetted M. Klein, thereby violating ORS 659A.406. The Charges further alleged that M. Klein and A. Klein, who was acting on behalf of M. Klein, 'published, circulated, issued or displayed or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation,' causing M. Klein to violate ORS 659A.409 and A. Klein to violate ORS 659A.406 by aiding and abetting M. Klein in her violation of ORS 659A.409. The Agency sought $75,000 in damages for 'emotional, mental, and physical suffering' for each Complainant, plus 'out of pocket expenses to be proven at hearing.' On June 19, 2014, the ALJ consolidated the two cases for hearing.

"Respondents, through joint counsel Herbert Grey, Tyler Smith, and Anna Adams (now Anna Harmon), timely filed Answers to both sets of Formal Charges, raising numerous affirmative defenses and four counterclaims.

"On September 15, 2014, Respondents filed a motion for summary judgment with respect to both sets of Charges, based primarily on legal argument supporting the constitutional affirmative defenses raised in their Answers. On September 16, 2014, the Agency moved for an extension of time to respond to Respondents' motion until September 26, 2014. On September 17, 2014, the ALJ granted the Agency's motion. On September 17, 2014, the ALJ held a prehearing conference in which it became apparent that he had ruled on the Agency's motion before Respondents had seen the motion. Accordingly, the ALJ gave Respondents an opportunity to file objections. On September 18, 2014, Respondents filed objections to Agency's motion for extension. On September 22, 2014, the ALJ issued an interim order that sustained his September 17, 2014, order.

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with the Oregon Secretary of State Business Registry, with M. Klein listed as the registrant and A. Klein listed as the authorized representative.

"On September 24, 2014, the Agency amended both sets of Charges to allege that M. Klein and A. Klein both violated ORS 659A.403(3) and that A. Klein, 'in the alternative,' aided and abetted M. Klein in her violation of ORS 659A.403(3), thereby violating ORS 659A.406. Additionally, the Agency alleged that, 'in the alternative,' A. Klein aided and abetted M. Klein's violation of ORS 659A.409.[26]

"On September 29, 2014, the ALJ held a prehearing conference. During the conference, the participants discussed the most efficient means of proceeding regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency had filed Amended Formal Charges ('Charges') since Respondents filed their motion for summary judgment. After discussion, it was agreed that, instead of the Agency filing a response to Respondents' original motion, it would be more efficient for Respondents to file an amended motion for summary judgment that would incorporate the matters raised in the Charges so that all outstanding issues could be addressed in the ALJ's ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its response.

"On October 2, 2014, Respondents filed Amended Answers ('Answers') to the Charges. On October 24, 2014, Respondents timely filed an amended motion for summary judgment. On November 21, 2014, the Agency timely filed a response and cross motion asking that Respondents' motion be denied in its entirety and that the Agency be granted partial summary judgment as to the issues on which Respondents sought summary judgment. On November 25, 2014, the forum granted Respondents' unopposed motion for an extension of time until December 19, 2014, to respond to the Agency's cross motion. Respondents filed a response on December 19, 2014.

"**Summary Judgment Standard**

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. *OAR 839-050-0150(4)(B).* The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> '* * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary

[26] The Agency's amended Charges did not allege that A. Klein violated ORS 659A.409.

> judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

The 'record' considered by the forum consists of: (1) the amended Formal Charges and Respondents' amended Answers to those Charges; (2) Respondents' motion, with attached exhibits; (3) the Agency's response and cross-motion to Respondents' motion, with an attached exhibit; and (4) Respondents' response to the Agency's motion.

"Analysis

A. Facts of the Case

"The undisputed material facts of this case relevant to show whether Respondents violated ORS chapter 659A as alleged in the Charges are set out below.

Findings of Fact

1) "Complainants Cryer and Bowman-Cryer are both female persons.[27] (Formal Charges)

2) "In January 2013, Sweetcakes by Melissa ('Sweetcakes') was a business owned and operated as an unregistered assumed business name by Respondents M. Klein and A. Klein. At all material times, Sweetcakes was a place or service that offered custom designed wedding cakes for sale to the public. (Respondents' Admission; Affidavits of A. Klein, M. Klein)

3) "Before and throughout the operation of Sweetcakes, Respondents M. Klein and A. Klein have been jointly committed to live their lives and operate their business according to their Christian religious convictions. Based on specific passages from the Bible, they have a sincerely held belief that that God 'uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman' and that 'the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.' (Affidavits of A. Klein, M. Klein)

4) "In the operation of Sweetcakes, A. Klein bakes the cakes, cuts the layers, adds filling, and applies a base layer of frosting. M. Klein then does the design and decorating. A. Klein delivers the cake to the wedding or reception site in a vehicle that has 'Sweet Cakes by Melissa' written in large pink letters on the side and assembles the cake as necessary. A. Klein also sets up the

[27] The Charges do not identify either Complainant as a female, but the forum infers from their names and the Agency's reference to each Complainant as "her" that Complainants are both female.

cake and finalizes any remaining decorations after final assembly and placement. In that capacity, he often interacts with the couple or other family members and often places cards showing that Sweetcakes created the cake. (Affidavits of A. Klein, M. Klein)

5) "In or around November 2010, Respondents designed, created, and decorated a wedding cake for Cryer's mother, Cheryl McPherson, for which Cryer paid. (Affidavit of M. Klein)

6) "On January 17, 2013, Cryer and McPherson visited Sweetcakes for a previously scheduled cake tasting appointment, intending to order a cake for Cryer's wedding ceremony to Bowman-Cryer. (Respondents' Admission; Affidavit of A. Klein)

7) "A. Klein conducted the cake tasting at Sweetcakes' bakery shop located in Gresham, Oregon. M. Klein was not present during the tasting. During the tasting, A. Klein asked for the names of the bride and groom, and Cryer told him there would be two brides and their names were 'Rachel and Laurel.' (Respondents' Admission; Affidavit of A. Klein)

8) "A. Klein told Cryer that Sweetcakes did not make wedding cakes for same-sex ceremonies because of A. and M. Klein's religious convictions. In response, Cryer and McPherson walked out of Sweetcakes. (Respondents' Admission; Affidavit of A. Klein)

9) "Before driving off, McPherson re-entered Sweetcakes by herself to talk to A. Klein. During their subsequent conversation, McPherson told A. Klein that she used to think like him, but her 'truth had changed' as a result of having 'two gay children.' A. Klein quoted Leviticus 18:22 to McPherson, saying 'You shall not lie with a male as one lies with a female; it is an abomination.' McPherson then left Sweetcakes. (Affidavit of A. Klein)

10) "On February 1, 2013, Sweetcakes by Melissa was registered as an assumed business name with the Oregon Secretary of State, with the 'Registrant/Owner' listed as Melissa Elaine Klein and the 'Authorized Representative' listed as Aaron Wayne Klein. (Exhibit A1, p. 2, Agency Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment)

11) "On August 8, 2013, both Complainants filed verified written complaints with BOLI's Civil Rights Division ('CRD') alleging unlawful discrimination by Respondents on the basis of sexual orientation. After investigation, the CRD issued a Notice of Substantial Evidence Determination on January 15, 2014, in both cases, and sent copies to Respondents. (Respondents' Admission)

12) "At some time prior to September 2, 2013, A. Klein and M. Klein took part in a video interview with Christian Broadcast Network (CBN) in which A. Klein explained the reasons for declining to provide a wedding cake for Complainants. On September 2, 2013, CBN broadcast a one minute, five seconds long presentation about Complainants' complaints. The broadcast begins and ends with a CBN announcer describing the complaints filed by Cryer and Bowman-Cryer against Respondents while pictures of the bakery are broadcast. A. and M. Klein appear midway in the broadcast, standing together outdoors, and make the following statements:[28] [29]

A. Klein: 'I didn't want to be a part of her marriage, which I think is wrong.'

M. Klein: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'[30]

A. Klein: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.'

(Exhibit 1-I, Respondents' Motion for Summary Judgment)

13) "In September 2013, M. and A. Klein closed their bakery shop in Gresham and moved their business to their home, where they continued to offer custom designed wedding cakes for sale to the public. (Affidavits of A. Klein, M. Klein)

14) "On February 13, 2014, A. Klein was interviewed live on a radio show by Tony Perkins called 'Washington Watch.' Perkins's show lasted approximately 15 minutes. In pertinent part, the interview included the following exchange that occurred, starting at four minutes, 30 seconds into the interview and ending at six minutes, twenty-two seconds into the interview:[31]

Perkins: '* * * Tell us how this unfolded and your reaction to that.'

Klein: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's

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[28] There is nothing in the video to show whether these statements were made in response to a question or if it was part of a longer interview.

[29] This transcript was made by the ALJ from a DVD provided to the forum by Respondents. The DVD includes the September 2, 2013, CBN video, and an mp4 recording of a February 13, 2014, interview with Tony Perkins.

[30] M. Klein's statement is only included to provide context, as the Agency did not allege that her statement was a violation of Oregon law.

[31] *See* footnote 29.

first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'

Perkins: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'

Klein: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know." I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.'

(Exhibit 1-I, Respondents' Motion for Summary Judgment)

"**B. Analysis of Complainants' Claims on the Merits**

"The forum first analyzes whether Respondents' actions violated the applicable public accommodation statutes. If so, the forum moves on to a determination of whether Respondents have established one or more of their affirmative defenses that rely on the Oregon and U. S. Constitution. *See Tanner v. OHSU,* 157 Or App 502, 513 (1998), *rev den* 329 Or 528, citing *Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Or 562, 564, 687 P2d 785 (1984); *Young v. Alongi,* 123 Or App 74, 77–78, 858 P2d 1339 (1993). *See also Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 138-39 (1995)(before considering constitutional issues, court must first consider pertinent subconstitutional issues).

"In its Charges, the Agency alleged that Respondents operated Sweetcakes, a place of public accommodation under ORS 659A.400, and violated ORS 659A.403, 659A.406, and 659A.409 by refusing to provide Complainants a wedding cake based on their sexual orientation, by aiding and abetting that refusal, and by communicating their intent to discriminate based on sexual orientation.

"Although Respondents' affirmative defenses apply to the forum's ultimate disposition of each alleged statutory violation, the forum is able to draw several legal conclusions from the undisputed material facts relevant to the Agency's allegations that are unaffected by those affirmative defenses.

"First, at all times material, A. Klein and M. Klein owned and operated Sweetcakes as a partnership. ORS 67.055 provides, in pertinent part:

> '(1) Except as otherwise provided in subsection (3) of this section, the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.
>
> '* * * * *
>
> '(d) It is a rebuttable presumption that a person who receives a share of the profits of a business is a partner in the business * * *.'

In affidavits dated October 23, 2014, signed by M. Klein and A. Klein and submitted in support of Respondent's motion for summary judgment, they both aver: 'Together we have operated Sweetcakes by Melissa as a business since we opened in 2007. * * * Until recent months, we both worked actively in the business, primarily derived our family income from the operation of the business, and jointly shared the profits of the business.' The Agency does not dispute the factual accuracy of these statements. Accordingly, the forum concludes that M. Klein and A. Klein were joint owners of Sweetcakes and operated it as a partnership and unregistered assumed business name in January 2013, and as a registered assumed business name since February 1, 2013. As such, they are jointly and severally liable for any violations of ORS chapter 659A related to Sweetcakes.

"Second, ORS 659A.403, 659A.406, and 659A.409 all require that discrimination must be made by a 'person' acting on behalf of a 'place of public accommodation.' 'Person' includes '[o]ne or more individuals.' ORS 659A.001(9)(a). The undisputed facts establish that A. Klein and M. Klein are 'individual[s]' and 'person[s].' A 'place of public accommodation' is defined in ORS 659A.400 as '(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.' The undisputed facts show that, at all material times, Sweetcakes was a place or service offering goods and services – wedding cakes and the design of those cakes – to the public. Accordingly, the forum concludes that Sweetcakes, at all material times, was a 'place of public accommodation.'

"Third, as germane to this case, ORS 659A.403 and 659A.406 prohibit any 'distinction, discrimination or restriction' based on Complainants' 'sexual

orientation.' This requires the forum to determine Complainants' actual or perceived sexual orientation. As used in ORS chapter 659A**, 'sexual orientation' is defined as '**an individual's actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's assigned sex at birth.' **OAR 839-005-0003(16).** The forum infers[32] that Complainants' sexual orientation is homosexual and that A. Klein perceived they were homosexual from four undisputed facts: (a) Complainants were planning to have a same-sex marriage; (b) A. Klein told Cryer and McPherson that Respondents do not make wedding cakes for same-sex ceremonies; (c) McPherson told A. Klein that she had 'two gay children'; and (d) In response to McPherson's statement, A. Klein quoted a reference from Leviticus related to male homosexual behavior.

"Fourth, A. Klein's verbal statements made in the CBN and Tony Perkins interviews that were publicly broadcast constitute a 'communication' that was 'published' under ORS 659A.409.

"**C. Failure to State Ultimate Facts Sufficient to Constitute a Claim**

"Before determining the merits of the Agency's ORS 659A.403(3) allegations, the forum first evaluates Respondents' pleading – 'fail[ure] to state ultimate facts sufficient to constitute a claim' -- that Respondents categorize as their first 'affirmative defense.' As a procedural matter, the forum views this defense as a straightforward denial of the allegations in the pleadings rather than as an affirmative defense.[33] As argued by Respondents in their motion for summary judgment, this defense goes to two issues. First, whether Bowman-Cryer's absence when A. Klein made his alleged discriminatory statement on January 13, 2013, deprives her of a cause of action under ORS 659A.403 and 659A.406. Second, whether Respondents' refusal to provide a wedding cake for Complainants was on account of their sexual orientation.

[32] Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. *See, e.g., In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).*

[33] In general, an affirmative defense is a defense setting up new matter that provides a defense against the Agency's case, assuming all the facts in the complaint to be true. *See, e.g. Pacificorp v. Union Pacific Railroad,* 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of affirmative defenses previously recognized by this forum include statute of limitations, claim and issue preclusion, bona fide occupational requirement, undue hardship, laches, and unclean hands. Some other affirmative defenses recognized by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds, unconstitutionality, and waiver. *ORCP 19B.* In contrast, a defense that admits or denies facts constituting elements of the Agency's prima facie case that are alleged in the Agency's charging document is not an affirmative defense.

"Bowman-Cryer's absence on January 13, 2013 does not deprive her of standing

"It is undisputed is the fact that Complainants sought a wedding cake from Sweetcakes based on Cryer's previous experience in purchasing a wedding cake from Sweetcakes for McPherson's wedding. It is also undisputed that Bowman-Cryer was not present at Sweetcakes on January 13, 2013, when A. Klein told Cryer and McPherson that Sweetcakes would not make a wedding cake for a same-sex wedding.

"Respondents argue as follows:

> 'Additionally, if as it appears on the face of the pleadings, one or more of the complainants were not actually potential customers requesting a wedding cake issue, and they were also not the ones denied services, and their claims must fail as a matter of law. In particular, the record is Laurel Bowman-Cryer was not present for the cake tasting and was never denied services. Therefore, either Rachel Cryer or Cheryl McPherson was the only person who was denied services according to Complainants['] own record. Claims made by anyone else must fail.'

The forum rejects this argument, as it relies on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In this case, the 'full and equal accommodation' sought by both Complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. The forum takes judicial notice that a wedding cake has long been considered a customary and important tradition in weddings in the United States. Respondents themselves acknowledge the special significance of wedding cakes in their affidavits, in which A. Klein and M. Klein each aver:

> 'The process of designing, creating and decorating a cake for a wedding goes far beyond the basics of baking a cake and putting frosting on it. Our customary practice involves meeting with customers to determine who they are, what their personalities are, how they are planning a wedding, finding out what their wishes and expectations concerning size, number of layers, colors, style and other decorative detail, which often includes looking at a variety of design alternatives before conceiving, sketching, and custom crafting a variety of decorating suggestions and ultimately finalizing the design. Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate so it is a special part of their holy union.'

Because the wedding cake was intended to equally benefit both Cryer and Bowman-Cryer, the forum finds that Bowman-Cryer has the same cause of

action against Respondents under ORS 659A.403 and .406 as Cryer. *Macedonia Church v. Lancaster Hotel Ltd.*, 498 F. Supp 2d 494 (2007), though not binding on this forum, illustrates this point. In *Macedonia*, a group of individuals associated with Macedonia Church, a predominantly African-American congregation, alleged that they were denied accommodations because of their race. Defendants moved to dismiss the complaint as to all but four plaintiffs on the grounds that the only plaintiffs who had standing to pursue the complaint were the four who actually visited defendants' facility. As stated by the court, 'the defendants' argument appears to assume that unless each plaintiff had a first-hand contact with the defendants, he or she could not [have] suffered any "personal and individual" injury.' The court denied defendants' motion, holding:

> 'Whether there was first-hand contact between the individual plaintiffs and the defendants is not material to the question of whether the individual plaintiffs suffered a personal and individual injury. Each of the Non-organizer Plaintiffs alleges that he or she was denied accommodations on the basis of race or color. The fact that the defendants informed the plaintiffs that their refusal to provide them with accommodations by communicating with the Organizers instead of with each of the Non-organizer plaintiffs does not alter the fact that those plaintiffs were denied accommodations. Nor is it material that the plaintiffs were unaware of the discrimination until sometime after it occurred.'

"Nexus between Complainants' sexual orientation and Respondents' refusal to provide a wedding cake for their same-sex wedding

"Respondents argue that there is no evidence of any connection between Complainants' sexual orientation and Respondents' alleged discriminatory action. Respondents' argument is two-pronged. First, Respondents argue that their prior sale of a wedding cake to Cryer for her mother's wedding proves Respondents' lack of animus towards Complainant's sexual orientation. Second, Respondents attempt to isolate Complainants' sexual orientation from their proposed[34] wedding, arguing that their decision was not on account of Complainants' sexual orientation, but on Respondents' objection to participation in the event for which the cake would be prepared.

"Respondents' first argument fails for the reason that there is no evidence in the record that A. Klein, the person who refused to make a cake for Complainants while acting on Sweetcakes' behalf, had any knowledge of Complainants' sexual orientation in November 2010 when Cryer purchased a cake for her mother's wedding. Even if A. Klein was aware of Cryer's sexual

[34] The forum uses the term "proposed" because there is no evidence in the record to show whether Complainants were actually ever married. [NOTE: At hearing, evidence was presented that Complainant's were legally married in 2014, a few days after Oregon's ban on same-sex marriage was struck down in federal court. *See* Proposed Finding of Fact #47 -- The Merits, *infra*.

orientation in November 2010, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion.

"Respondents rely on *Tanner v. OHSU* to support their second argument. In *Tanner,* OHSU, in accordance with State Employees' Benefits Board (SEBB) eligibility criteria, permitted employees to purchase insurance coverage for 'family members.' Under the SEBB criteria, unmarried domestic partners of employees were not 'family members' who were entitled to insurance coverage. Plaintiffs, three lesbian nursing professionals with domestic partners, applied for insurance coverage and were denied on the ground that the domestic partners did not meet the SEBB eligibility criteria. Plaintiffs sued, alleging disparate impact sex discrimination in violation of *then* ORS 659.030(1)(b) in that OHSU's policy had the effect of discriminating against homosexual couples because, unlike heterosexual couples, they could not marry and become eligible for insurance benefits. Significant to this case, the court stated that plaintiffs were a member of a protected class under ORS 659.030 and that they made out a disparate impact claim because 'OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners. That is because, under Oregon law, homosexual couples may not marry.' *Id.* at 516. The court then held that OHSU did not violate *then* ORS 659.030(1)(b) because plaintiffs did not prove that OHSU engaged 'in a subterfuge to evade the purposes of this chapter' under *then* ORS 659.028. *Id.* at 517-19. The language that Respondents quote to support their argument is not the holding of the case, but merely a bridge between the court's evaluation of plaintiffs' case based on different treatment and disparate impact theories. Accordingly, *Tanner* does not assist Respondents. Also significant to this case, plaintiffs alleged a violation of Article I, section 20, of the Oregon Constitution. The court found that plaintiffs, as homosexual couples, were members of a 'true class,' and also members of a 'suspect class' based on their sexual orientation. *Id.* at 524.

"Respondents' attempt to divorce their refusal to provide a cake for Complainants' same-sex wedding from Complainants' sexual orientation is neither novel nor supported by case law. As the Agency argues in support of its cross-motion, '[t]here is simply no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple. The conduct, a marriage ceremony, is inextricably linked to a person's sexual orientation.'

"The U. S. Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661, 130 S. Ct. 2971 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society ('CLS') and sought formal recognition from the school. The CLS required its

members to affirm their belief in the divinity of Jesus Christ and to refrain from 'unrepentant homosexual conduct.' *Id.* at 2980. Hastings refused to recognize the organization on the ground that it violated Hastings' nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. The CLS argued that 'it does not exclude individuals because of sexual orientation, but rather "on the basis of a conjunction of conduct and the belief that the conduct is not wrong."' *Id.* at 2990. The Court rejected this argument, stating:

> 'Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas,* 539 U.S. 558, 575, 123 S Ct 2472, 156 L.Ed.2d 508 (2003) ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination." (emphasis added)); *id.,* at 583, 123 S.Ct. 2472 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class."); cf. *Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) ("A tax on wearing yarmulkes is a tax on Jews.").'

In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. *See Elane Photography, LLC v. Willock,* 309 P3d 53, 62 (2013), *cert den* 134 S. Ct. 1787 (2014). Applied to this case, the forum finds that Respondents' refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants' sexual orientation.

"**D. Respondent A. Klein violated 659A.403**

With regard to its ORS 659A.403 claims, the Agency alleges the following in paragraph III.12 in both sets of Charges:

'12. Respondents discriminated against Complainant because of her sexual orientation.

a. Melissa Elaine Klein denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).

b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied full and equal accommodations, advantages, facilities and privileges of her [sic] **business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).**

c. **In the alternative,** Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS 659A.406.'

(emphasis bolded by Agency in its Amended Formal Charges to show amendments to original Formal Charges)

ORS 659A.403 provides, in pertinent part:

> '(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.
>
> '(2) Subsection (1) of this section does not prohibit:
>
> > "(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or
> >
> > "(b) The offering of special rates or services to persons 50 years of age or older.
>
> '(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.'

"The prima facie elements of the Agency's 659A.403 case are: 1) Complainants were a homosexual couple and were perceived as such by A. Klein and M. Klein; 2) Sweetcakes was a place of public accommodation; 3a) A. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; 3b) M. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; and 4) the denials were on account of Complainants' sexual orientation. Elements 1, 2, 3a are established by undisputed facts. Element 4 is established in the preceding section's discussion of 'Nexus.' Accordingly, the forum concludes that A. Klein violated ORS 659A.403 and that the Agency is entitled to summary judgment on the merits as to Cryer's and Bowman-Cryer's 659A.403 claims against A. Klein. Since there is no evidence that M. Klein took any action to deny the full and equal accommodations, advantages, facilities and privileges of Sweetcakes to Complainants, the forum concludes that M. Klein did not violate ORS 659A.403. However, M. Klein, as a joint owner of Sweetcakes with A. Klein, is jointly and severally liable for any damages awarded to Complainants stemming from A. Klein's violation.

"**E. ORS 659A.406 -- Aiding and Abetting a Violation of ORS 659A.403(3)**

"The Agency seeks to hold A. Klein liable as an aider and abettor under ORS 659A.406 for M. Klein's alleged violation of ORS 659A.403(3). Respondents assert that A. Klein cannot be held liable as an aider and abettor under ORS 659A.406 because he is a co-owner of Sweetcakes and, as a matter of law, cannot aid and abet himself. The Agency argues to the contrary, based on the 'plain text' of the statute.

"ORS 659A.406 provides, in pertinent part:

> "Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older."

In the previous section, the forum concluded that M. Klein did not violate ORS 659A.403(3) as alleged in paragraph III.12.a and that A. Klein, the joint owner of Sweetcakes, violated ORS 659A.403(3) as alleged in paragraph II.12.b. Since M. Klein did not violate ORS 659A.403, A. Klein cannot be held liable to have aided and abetted her violation.[35]

"**F. Notice that Discrimination will be made in Place of Public Accommodation – ORS 659A.409**

"In section IV of its Charges,[36] the Agency alleges: (a) Respondent M. Klein 'published, issued * * * a communication, notice * * * that its accommodation, advantages * * * would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409'; (b) Respondent A. Klein, 'dba Sweetcakes by Melissa, denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3)'; and (c) In the alternative, Respondent A. Klein 'aided or abetted M. Klein in violating ORS 659A.409, in violation of ORS 659A.406.'

[35] As pointed out in the previous section, there is a difference between committing a violation and being liable for the consequences of that violation. In this case, M. Klein's liability stems from her partnership status, not from any violation that she committed.

[36] Section IV is prefaced by the caption "UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION."

"In its Charges, the Agency alleges in paragraphs II.8 & 9 that A. Klein made statements that were broadcast on television on September 2, 2013, and on the radio on February 13, 2014, that communicate an intent to discriminate based on sexual orientation. The full text of the relevant part of those broadcasts is set out in Findings of Fact ##12 and 14, *supra*. The Agency's cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409.[37]

"ORS 659A.409 provides, in pertinent part:

> '* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.'

The alleged unlawful statements made by A. Klein were:

> 'I didn't want to be a part of her marriage, which I think is wrong.' (*September 2, 2013 CBN interview*)

> 'I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." * * * You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know."' (*February 13, 2014, Tony Perkins interview*)

In their motion for summary judgment, Respondents argue that 'ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance.' Respondents further argue that:

> 'A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants' ceremony. The same is true of the Perkins

[37] The Agency's cross-motion also discusses the sign on Sweetcakes' door after it closed for business, but since the Agency did not allege the existence or contents of the sign as a violation, the forum does not consider it.

> radio broadcast. * * * A statement of future intention in either media event is conspicuously absent.'

The Agency does not dispute the correctness of Respondents' argument that ORS 659A.409 is directed towards communications relating a prospective intent to discriminate, but argues that A. Klein's statements are a prospective communication:

> 'Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they "don't do same sex weddings," they "stand firm," are "still in business" and will "continue to stay strong."'

Whatever Respondents' post-January 2013 intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the forum finds that A. Klein's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In other words, these statements described what occurred on January 17, 2013, and thoughts and discussions the Kleins had before January 2013, not what the Kleins intended to do in the future.[38] To arrive at the conclusion sought by the Agency requires drawing an inference of future intent from the Kleins's statements of religious belief that the forum is not willing to draw. Accordingly, the forum concludes that A. Klein's communication did not violate ORS 659A.409.[39]

"In addition, the forum notes that M. Klein cannot be held to have violated ORS 659A.409 because she made no communication. Therefore, the forum finds that A. Klein did not aid or abet M. Klein to commit a violation of that statute and Respondents are entitled to summary judgment on this issue.

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[38] In contrast, had A. Klein told Perkins "I said 'I'm very sorry * * * You know we don't do same-sex marriage, same-sex wedding cakes' *and we take the same stand today*," the forum's ruling would be different, assuming the Agency had plead a violation of ORS 659A.409 by A. Klein.

[39] *Compare In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub*, 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and "Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

"**G. Respondents' Counterclaims**

"Before addressing Respondents' affirmative defenses, the forum addresses Respondents' counterclaims. First, Respondents allege that BOLI, through its actions in prosecuting this case, has 'knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights on the basis of religion' in violation of ORS 659A.403 and 'deprive[d] the Respondents of fundamental rights and protections guaranteed by the First and Fourteenth amendments to the United States Constitution,' thereby generating liability under 42 USC § 1983. Second, Respondents allege that the BOLI's Commissioner violated ORS 659A.409 by publishing, circulating, issuing, or displaying communications on Facebook and in print media 'to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or the discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.' Respondents seek damages in the amount of $100,000 for economic damages, $100,000 for non-economic damages, court costs, and reasonable attorney fees.

"The authority of state agencies is limited to that granted to them by the legislature. *See SAIF Corp. v. Shipley,* 326 Or 557, 561, 955 P2d 244 (1998) ('an agency has only those powers that the legislature grants and cannot exercise authority that it does not have'). ORS 659A.850(4) gives the Commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding. There is no corresponding statute that authorizes the Commissioner to award the damages sought by Respondents in their counterclaims. With regard to attorney fees or court costs, the legislature has only granted authority to the Commissioner to award these in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421.[40]

"In conclusion, the forum lacks jurisdiction to adjudicate Respondents' counterclaims and may neither grant nor deny them. The only relief available to Respondents through this forum is dismissal of any Charges not proven by the Agency under ORS 659A.850(3).[41]

[40] *See* ORS 659A.850(1)(b)(B).

[41] *See, e.g., Wallace v. PERB,* 245 Or App 16, 30, 263 P3d 1010 (2011) (when plaintiff sought compensatory damages in an APA contested case proceeding based on alleged financial loss after PERS placed a limit on how often he could transfer funds he had invested in the Oregon Savings Growth Plan, the court held that, since it had no authority under ORS 183.486(1)(b) to award compensatory damages to plaintiff, plaintiff was also unable to recover those damages in the contested case proceeding).

"H. Respondents' Affirmative Defenses

"Respondents' affirmative defenses include estoppel and the unconstitutionality of ORS 659A.403, .406, and .409, both facially and as applied. As an initial matter, the forum notes that the Oregon Court of Appeals has held that an Agency has the authority to decide the constitutionality of statutes. *See Eppler v. Board of Tax Service Examiners,* 189 Or App 216, 75 P3d 900 (2003), citing *Cooper v. Eugene Sch. Dist. No. 4J,* 301 Or. 358, 362-65, 723 P.2d 298 (1986) and *Nutbrown v. Munn,* 311 Or. 328, 346, 811 P.2d 131 (1991). In BOLI contested cases, the Commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision 'set forth in the Proposed Order' and subject to ratification by the Commissioner in the Final Order. OAR 839-050-0150(4). Accordingly, the ALJ has the initial authority to rule on the constitutional issues raised by Respondents in their motion for summary judgment.[42]

"Estoppel

"In their answers, Respondents phrase their estoppel defense as follows:

> "The state of Oregon, including the Bureau of Labor and Industries[,] is estopped from compelling Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."

Estoppel is a legal doctrine whereby one party is foreclosed from proceeding against another when one party has made 'a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.' *State ex rel. State Offices for Services to Children and Families v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing Keppinger v. Hanson Crushing, Inc.,* 161 Or App 424, 428, 983 P.2d 1084 (1999). In order to establish **estoppel** against a **state agency**, a party must have relied on the agency's representations and the party's reliance must have been reasonable. *Id., citing Dept. of Transportation v. Hewett Professional Group,* 321 Or 118, 126, 895 P2d 755 (1995).[43]

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[42] *Eppler, Cooper,* and *Nutbrown* impliedly overruled the forum's holding in the case of *In the Matter of Doyle's Shoes,* 1 BOLI 295 (1980), a Final Order issued before the *Eppler, Cooper,* and *Nutbrown* decisions in which the forum held that it was beyond the Commissioner's discretion to determine the constitutionality of legislative enactments. The forum now explicitly overrules that holding.

[43] *See also In the Matter of Sunnyside Inn,* 11 BOLI 151, 162 (1993) (Equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be relied upon by the other party; and (5) the other party is induced to act upon it to that party's detriment); *In the Matter of Portland Electric & Plumbing Company,* 4 BOLI 82, 98-99 (1983) (estoppel only protects those who materially change their position in reliance on another's acts or representations).

"Here, Respondents do not identify any false representation made by BOLI or any other state agency upon which Respondents relied in refusing to provide a wedding cake to Complainants. Although it is undisputed that the Oregon Constitution did not recognize same-sex marriages in January 2013, the affidavits of A. Klein and M. Klein establish that the refusal was because of Respondents' religious convictions stemming from Biblical authority, not on their reliance on Oregon's Constitutional provision rejecting same-sex marriage or their attempt to enforce that provision.[44]

"In conclusion, Respondents present no facts, articulate no legal theory, and cite no case law to support their argument that BOLI should be estopped from litigating this case based on the doctrine of estoppel. The Agency is entitled to summary judgment on this issue.

"Respondents' Constitutional Defenses – Introduction

"Due to the number and complexity of Respondents' constitutional defenses, the forum summarizes them, as plead in Respondents' answers, before analyzing them. They include the following:

- "The statutes underlying the Charges are unconstitutional as applied in that they violate Respondents' fundamental rights arising under the Oregon Constitution by: (a) unlawfully violating Respondents' freedom of worship and conscience under Article I, §2; (b) unlawfully violating Respondents' freedom of religious opinion under Article I, §3; (c) unlawfully violating Respondents' freedom of speech under Article I, §8; (d) unlawfully compelling Respondents to engage expression of a message they did not want to express; (e) unlawfully violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §5a.

- "The statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

- "The statutes underlying the Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and

[44] In A. Klein's affidavit, he states that, after Cryer told him "something to the effect 'Well, there are two brides, and their names are Rachel and Laurel,'" he "indicated we did not create wedding cakes for same-sex ceremonies because of our religious convictions, and they left the shop." In the same paragraph, he states "I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and prohibited recognition of any other type of union as marriage."

Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment, by: (a) unlawfully infringing on Respondents' right of conscience, right to free exercise of religion, and right to free speech; (b) unlawfully compelling Respondents to engage expression of a message they did not want to express; and (c) unlawfully denying Respondents' right to due process and equal protection of the laws.

- "The statutes underlying the Charges are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment.

When both state and federal constitutional claims are raised, Oregon courts first evaluate the state claim. *Sterling v. Cupp,* 290 Or 611, 614, 625 P2d 123 (1981). The forum does likewise. For continuity's sake, the forum follows the analysis of each state claim with an analysis of the parallel federal claim. The forum only addresses the constitutionality of ORS 659A.403, since the forum has already concluded, on a subconstitutional level, that Respondents did not violate ORS 659A.406 and 659A.409.

"Oregon Constitution

"Article I, Sections 2 and 3: Freedom of worship and conscience; Freedom of religious opinion

"The forum addresses these interrelated defenses together. Article I, Sections 2 and 3 of the Oregon Constitution provide:

'**Section 2. Freedom of worship**. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.'

'**Section 3. Freedom of religious opinion.** No law shall in any case whatever control the free exercise, and enjoyment of religeous [sic] opinions, or interfere with the rights of conscience.'

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

"The forum first analyzes a series of Oregon Supreme Court cases interpreting Article I, sections 2 and 3, then applies them to ORS 659A.403. Beginning with *City of Portland v. Thornton,* 174 Or 508, 149 P2d 972 (1944), the Oregon Supreme Court applied U.S. Supreme Court precedents under the First Amendment to the U.S. Constitution when interpreting Article I, Sections 2 and 3 of the Oregon Constitution. In *Salem College & Academy, Inc. v. Emp. Div.,* 298 Or 471, 486-87, 695 P2d 25 (1985), an inter-denominational Christian school argued that the state's requirement that it pay unemployment tax violated Article I, sections 2 and 3. The court held that 'the state had not infringed upon the school's right to religious freedom when all similarly situated employers in the state were subject to [unemployment tax].' Significant to this case, the *Salem* court interpreted Article I, sections 2 and 3 in light of the text and historical context in which they arose, without reference to U.S. Supreme Court decisions and without reference to its own prior decisions that had relied on federal First Amendment precedent. *Id.* at 484.

"In 1986, in the next case involving the application of Article I, sections 2-7, the Oregon Supreme Court made explicit what was implicit in *Salem* College. In *Cooper* v. *Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369-70, 723 P2d 298, 306-07 (1986), the court stated:

> 'This court sometimes has treated these guarantees and the First Amendment's ban on laws prohibiting the free exercise of religion (footnote omitted) as "identical in meaning," *City of Portland v. Thornton,* 174 Or. 508, 512, 149 P.2d 972 (1942); but identity of 'meaning' or even of text does not imply that the state's laws will not be tested against the state's own constitutional guarantees before reaching the federal constraints imposed by the Fourtenth [sic] Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state's comparable clauses.' (footnote omitted).

Since *Cooper*, the Oregon Supreme Court has decided a trio of cases interpreting Article I, sections 2 and 3 that are relevant to the present case.

"In *Smith v. Employment Div., Dept. of Human Resources,* 301 Or 209, 721 P2d 445 (1986), *vacated on other grounds sub nom., Employment Div. v. Smith,* 485 US 660 (1988), a drug counselor was fired for misconduct based on his ingestion of peyote, a sacrament in the Native American Church, during a Native American Church service and denied unemployment benefits. Smith claimed that the denial of unemployment benefits placed 'a burden on his freedom to worship according to the dictates of his conscience' under the Oregon Constitution, Article I, sections 2 and 3. Citing *Salem College*, the court held that there was no violation of Article I, sections 2 and 3 because the statute and rule defining misconduct were 'completely neutral toward religious motivations for

misconduct' and '[claimant] was denied benefits through the operation of a statute that is neutral both on its face and as applied.' *Id.* at 215-16.

"In *Employment Div., Department of Human Resources v. Rogue Valley Youth for Christ,* 307 Or 490, 498-99, 770 P2d 588 (1989), the court rejected a religious organization's claim that payment of unemployment tax would violate its rights under Article I, sections 2 and 3. Relying on *United States v. Lee,* 455 U.S. 252, 256–57, 102 S.Ct. 1051, 1054–55, 71 L.Ed.2d 127, 132 (1982), the court stated:

> 'When governmental action is challenged as a violation of the Free Exercise Clause of the First Amendment it must first be shown that the governmental action imposes a burden on the party's religion. Assuming that imposing unemployment payroll taxes on all religious organizations will burden at least some of those groups, (although not necessarily their freedom of belief or worship), that assumption "is only the beginning, however, and not the end of the inquiry. Not all burdens on religious liberty are unconstitutional. * * * The state may justify a limitation on religion by showing that it is essential to accomplish an overriding governmental interest." In the present case the State of Oregon has two governmental interests which, when taken together, are sufficiently important to support the burden on religion represented by unemployment payroll taxes.
>
> 'There are few governmental tasks as important as providing for the economic security of its citizens. A strong unemployment compensation system plays a significant role in providing this security. * * * [A]ny state's unemployment tax must, as a practical matter, comply with FUTA's (Federal Unemployment Tax Act) requirements or the state's employers would face a double tax. Such a double tax would, in turn, create a very undesirable business climate in the state. This, combined with Oregon's constitutional interest in treating all religious organizations equally, creates an overriding state interest in applying the unemployment payroll taxes to all religious organizations. Our construction of the coverage of Oregon's unemployment compensation taxation scheme does not offend the First Amendment's Free Exercise Clause or Article I, section 3 of the Oregon Constitution.' (internal citations and footnotes omitted)

Rogue Valley, at 498-99.

"In *Meltebeke v. Bureau of Labor and Industries,* 322 Or 132, 903 P2d 351 (1995), the court considered a constitutional challenge to BOLI's rule that 'verbal or physical conduct of a religious nature' in the workplace was unlawful if it had 'the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment.' *Id.* at 139. As Respondents note, the court introduced its discussion of Article I, sections 2 and 3, with this sweeping statement:

> 'These provisions are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference.'

Id. at 146. The court then launched into a brief history of governmental intolerance towards religion enforced by criminal laws in England before summarizing its *Salem College* decision and concluding:

> 'A general scheme prohibiting religious discrimination in employment, including religious harassment, does not conflict with any of the underpinnings of the Oregon constitutional guarantees of religious freedom identified in *Salem College:* It does not infringe on the right of an employer independently to develop or to practice his or her own religious opinions or exercise his or her rights of conscience, short of the employer's imposing them on employees holding other forms of belief or nonbelief; it does not discourage the multiplicity of religious sects; and it applies equally to all employers and thereby does not choose among religions or beliefs.
>
> 'The law prohibiting religious discrimination, including religious harassment, honors the constitutional commitment to religious pluralism by ensuring that employees can earn a living regardless of *their* religious beliefs. The statutory prohibition against religious discrimination in employment and, in particular, the BOLI rule at issue, when properly applied, will promote the '[n]atural right' of employees to 'be secure in' their 'worship [of] Almighty God according to the dictates of their own consciences,' Or. Const. Art. I, § 2, and will not be a law controlling religious rights of conscience or their free exercise.'

Meltebeke at 148-49. The court then moved on to a review of *Smith*, stating that *Smith* stood for the principle that '[a] law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3.' *Meltebeke* at 149. The court held as follows:

> 'We conclude that, under established principles of state constitutional law concerning freedom of religion, discussed above, BOLI's rule is constitutional on its face. The law prohibiting employment discrimination, including the regulatory prohibition against religious harassment, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Indeed, its purpose is to

> support the values protected by Article I, sections 2 and 3, not to impede them.'

Id. at 150-51.

"Next, the *Meltebeke* court analyzed whether the BOLI rule, *as applied*, violated Article I, sections 2 and 3. Following *Smith*, the court stated:

> 'Because sections 2 and 3 of Article I are expressly designed to prevent government-created homogeneity of religion, the government may not constitutionally impose sanctions on an employer for engaging in a **religious practice** without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer's enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control.' (emphasis added)

Id. at 153. Based on facts set out in BOLI's Final Order, the court found that the employer's complained-of conduct constituted a 'religious practice,' that the employer did not know his conduct created an intimidating, hostile, or offensive working environment,[45] and that the employer had established an affirmative defense under Article I, sections 2 and 3 because BOLI's rule did not require that the employer 'knew in fact that his actions in exercise of his religious practice had an effect forbidden by the rule.'[46] *Id.* In contrast, here Respondents' affidavits establish that their refusal to make a wedding cake for Complainants was not a religious practice, but *conduct* motivated by their religious beliefs.[47] Accordingly, *Meltebeke* does not aid Respondents.

"The general principle that emerges from these cases is that a law that is part of a general regulatory scheme, expressly neutral and neutral among

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[45] *See In the Matter of James Meltebeke,* 10 BOLI 102, 105-07 (1992) (BOLI Commissioner's Findings of Fact included detailed findings that employer believed he was commanded to preach his beliefs to others under "any and all circumstances" or "he would be lost").

[46] In a footnote, the court distinguished "a religious practice" from "conduct that may be motivated by one's religious beliefs" in stating: "Conduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice. The knowledge standard is considered here only in relation to the latter category. In this case, no distinction between those categories is called into play, because a fair reading of BOLI's revised final order is that BOLI found that all of Employer's religious activity respecting Complainant is part of Employer's religious practice." *Meltebeke* at 153, fn. 19.

[47] *Cf. State v. Beagley,* 257 Or App 220, 226, 305 P3d 147 (2013) ("First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs.")

religions, is constitutional under Article I, sections 2 and 3. ORS 659A.403 is such a law. Additionally, there is also "an overriding governmental interest" present, explicitly expressed by Oregon's legislature in ORS 659A.003 in the following words:

> 'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on * * * sexual orientation * * *.'

"Respondents further contend that 'the statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.' There is no requirement under the Oregon Constitution for such an exemption.[48] The exclusions and prohibitions in ORS 659A.400(2) and 659A.403(2) do not lead to the conclusion that the law is not neutral. Respondents' reliance on *Hobby Lobby*[49] fails because *Hobby Lobby* was not decided on constitutional grounds, but decided under the Religious Freedom Restoration Act ("RFRA") of 1993 and because the RFRA does not apply to the states. *City of Boerne v. Flores,* 521 US 507 (1997).

"Based on the above, the forum finds ORS 659A.403 to be constitutional with respect to Article I, sections 2 and 3 of the Oregon Constitution. With respect to whether ORS 659A.403 is constitutional 'as applied,' *Meltebeke* does not aid Respondents for the reason that Respondents' refusal to make a wedding cake for Complainants was not a 'religious practice,' but conduct motivated by their 'religious beliefs.' *Meltebeke* at 153.

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[48] The legislature did choose to enact certain exemptions to civil rights laws. Actions by bona fide churches or other religious institutions regarding housing and use of facilities are not unlawful practices if based on a bona fide religious belief about sexual orientation. Actions by bona fide churches or other religious institutions regarding employment are not unlawful practices if based on a bona fide religious belief about sexual orientation if the actions fall under one of three specific circumstances. Preference for employment applicants of a particular religion is not an unlawful practice by a bona fide church or other religious institution if it passes a three part test. The housing, use of facilities and employment exemptions do not apply to commercial or business activities of the church or institution. *See* ORS 659A.006. The existence of this statute, last amended in 2007, does not support Respondents' argument that the public accommodation statutes are unconstitutional because they do not contain such exemptions. Rather, it supports the Agency. If the legislature intended such exemptions be applied to the public accommodation statutes it would have enacted them.

[49] *Burwell v. Hobby Lobby,* 573 US ___, 134 SCt 2751 (June 30, 2014).

34 BOLI ORDERS

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right of conscience** and **right to free exercise of religion

"Respondents contend that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute, on its face and as applied, unlawfully infringes on Respondents' right of conscience and right to free exercise of religion. In pertinent part, the First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *.'

"Respondents argue that the forum should apply the 'strict scrutiny' test set out by the U.S. Supreme Court in *Sherbert v. Verneer,* 374 US 398 (1963), claiming that *Sherbert* and the U.S. Supreme Court's subsequent decisions in *Wisconsin v. Yoder,* 406 US 205 (1972), *Thomas v. Review Board,* 450 US 707 (1981), *Pacific Gas and Elec. Co. v. Public Utilities Commissioner.,* 475 US 1 (1986), *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 US 520 (1993), *Hosanna-Tabor Ev. Lutheran Church & School v. EEOC,* 132 SCt 694 (2012), *Gonzalez v. O Centro,* 546 US 418 (2006), *Brown v. Entertainment Merchants Assn.,* 131 SCt 2729 (2011), and *Wooley v. Maynard,* 430 US 705 (1977) compel the application of that test.

"The forum begins its analysis by noting that *Wooley, Pacific Gas, Hosanna-Tabor, Gonzalez,* and *Brown* are inapplicable to Respondents' free exercise claim for the following reasons:

- *"Wooley* and *Pacific Gas* involved religion but were decided exclusively upon free speech grounds.
- *"Hosanna-Tabor* was an employment discrimination suit brought by the EEOC on behalf of a minister challenging the church's decision to fire her as an ADA violation in which the court held only that 'the ministerial exception bars such a suit.' *Hosanna-Tabor* at 710.
- *"Gonzalez,* like *Hobby Lobby*, is inapplicable to this case because it was decided under the RFRA and because the RFRA does not apply to the states.
- *"Brown* was a free speech case that did not involve a free exercise claim.

"In *Sherbert*, a Seventh Day Adventist ('appellant') was denied unemployment benefits because she refused to work on Saturdays based on her religious beliefs. She appealed on the grounds that South Carolina's law violated the free exercise clause of the First Amendment. The court held that the law was constitutionally invalid because it imposed a burden on appellant's free exercise

of her religion and there was no 'compelling state interest enforced in the eligibility provisions of the South Carolina statute [that] justifies the substantial infringement of appellant's First Amendment rights.' *Id.* at 404, 406-07.

"In *Wisconsin,* the Supreme Court held that the state of Wisconsin could not compel Amish students to attend school beyond the eighth grade when that requirement conflicted with Amish religious beliefs, stating:

> "[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

"Relying on *Sherbert* and *Wisconsin*, the *Thomas* court reversed the denial of unemployment benefits to a Jehovah's Witnesses who quit his job because his job duties changed from working with sheet metal to manufacturing turrets for tanks, a war-related task that he opposed based on his religious beliefs. In upholding appellant's claim, the court stated:

> 'The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.'

Thomas, at 718.

"In 1990, the *Smith* case, upon which both the Agency and Respondents rely, came before the court on appeal from the Oregon Supreme Court. The Oregon Supreme Court held that the state's denial of unemployment benefits based on the prohibition of sacramental peyote use was valid under the Oregon Constitution but invalid under the free exercise clause in the First Amendment of the U. S. Constitution based on *Sherbert* and *Thomas*. The U.S. Supreme Court characterized the issue before it as follows:

> "This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use."

Smith at 874. Smith argued that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or

requires).' *Id.* at 878. The court rejected Smith's argument, holding that the State of Oregon, 'consistent with the free exercise clause,' could deny Smith unemployment benefits when Smith's dismissal resulted from the use of peyote, a use that was constitutionally prohibited under Oregon law. *Id.* at 890. The court specifically declined to apply *Sherbert's* 'compelling interest' test, stating:

> 'Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to * * * laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling - permitting him, by virtue of his beliefs, "to become a law unto himself," - contradicts both constitutional tradition and common sense.' (internal citations omitted)

Id. at 884-85. The court concluded that the 'right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."' *Id.* at 879, citing *United States v. Lee*, 455 U.S. 252, at 263, n. 3. Related to one of Respondents' arguments here, the court also discussed the concept of 'hybrid' cases and concluded that *Smith* was not a 'hybrid' case.[50]

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[50] With respect to "hybrid claims," the *Smith* court stated: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut,* 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick,* 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. *Cf. Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State

"In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993), the Church of the Lukumi Babalu Aye, Inc. ('church') and its congregants practiced the Santeria religion, a religion that employed animal sacrifice as one of its principal forms of devotion. During that devotion, animals are killed by cutting their carotid arteries, then cooked and eaten following Santeria rituals. After the church leased land in Hialeah and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed a resolution which noted city residents' 'concern' over religious practices inconsistent with public morals, peace, or safety, and adopted three substantive ordinances addressing the issue of religious animal sacrifice.

Using the *Smith* test, the Supreme Court found that the ordinances were neither neutral[51] nor of general applicability[52] and held that 'a law burdening religious practice that is not neutral or not of general application' can only survive if there is a 'compelling' governmental interest and the law is 'narrowly tailored in pursuit of those interests.' *Id.* at 546-47.

"Respondents argue that the *Smith* 'neutrality' test should not be applied here for two reasons. First, this is a 'hybrid' case in which the law 'substantially burden[s] multiple rights combining religion and speech' that the *Smith* court distinguished from cases that only involve free exercise claims. This argument fails because neither Respondents' free exercise nor free speech claims are independently viable[53] and the two claims together are not greater than the sum

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[if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (footnotes omitted)

[51] The court examined the history behind the ordinances before concluding:

> "In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion." *Lukumi* at 542.

[52] In concluding that Hialeah's ordinances were not of "general applicability," the court found that the ordinances "were drafted with care to forbid few killings but those occasioned by religious sacrifice," that they did not prohibit and approved many kinds of "animal deaths or kills for nonreligious reason," that the city's purported concern for public health resulting from improper disposal of animal carcasses only addressed religious sacrifice and not disposal by restaurants or hunters, that more rigorous standards of inspection were imposed on animals killed for religious sacrifice and eaten than animals killed by hunters or fishermen, and that small commercial slaughterhouses were not subject to similar requirements related to the city's "professed desire to prevent cruelty to animals and preserve the public health." *Id.* at 543-45.

[53] *See* discussion in "free speech" section, *infra*.

of their parts.[54] Second, Respondents argue that ORS 659A.403 is neither 'neutral' nor of 'general applicability.' Applying the *Smith* test, the forum finds that ORS 659A.403 is a 'valid and neutral law of general applicability.' As such, it is constitutional under the First Amendment's free exercise clause, both facially and as applied.

"Oregon Constitution

"Article I, Section 8: freedom of speech

"Article I, Section 8 of the Oregon Constitution provides:

> '**Section 8. Freedom of speech and press.** No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.'

ORS 659A.403 provides, in pertinent part:

> '(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation * * *.
>
> '* * * * *
>
> '(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.'

The issues considered by the forum are:

> (1) Is ORS 659A.403 facially unconstitutional?
>
> (2) If ORS 659A.403 is facially constitutional, is it unconstitutional by requiring Respondents to participate in 'compelled speech' by making and providing a wedding cake for Complainants?

"State v. Robertson, 293 Or 402, 649 P.2d 569 (1982), is the seminal Oregon case in this area. *Robertson* involved an Article I, Section 8 challenge to ORS 163.275, a statute defining the crime of coercion, in which 'speech [was] a statutory element in the definition of the offense.' *Id.* at 415. In *Robertson*, the

[54] *See Elane Photography, LLC v. Willock,* 309 P3d 53 (2013), *cert. den.* ___ US ___ , 134 SCt 1787 (2014).

Oregon Supreme Court established a basic framework, comprised of three categories, for determining whether a law violates Article I, section 8. That framework was most recently described in *State v. Babson*, 355 Or 383, 391, 326 P3d 559, 566 (2014).

> 'Under the first category, the court begins by determining whether a law is "written in terms directed to the substance of any 'opinion' or any 'subject' of communication." If it is, then the law is unconstitutional, unless the scope of the restraint is "wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach." If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and "the proscribed means [of causing those effects] include speech or writing," or whether it is "directed only against causing the forbidden effects." If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second *Robertson* category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. If, on the other hand, the law focuses only on forbidden effects, then the law is in the third *Robertson* category, and an individual can challenge the law as applied to that individual's circumstances.' (internal citations omitted)

*"**Robertson Category One***

"In analyzing a law under *Robertson's* first category, Oregon courts have looked to the text of the law to see whether it expressly regulates expression. *Babson* at 395. In *Babson*, the issue was the constitutionality of a guideline adopted by the Legislation Administration Committee ('LAC') that prohibited all overnight use of the capitol steps, including protests like defendants' vigil. Defendants and the LAC agreed that a person could violate the guideline without engaging in expressive activities, if, for example, a person used the steps as a shortcut while crossing the capitol grounds after 11:00 p.m. when there were no hearings or floor sessions taking place. *Id.* at 396-97. The court held that the guideline was not unconstitutional under *Robertson's* first category because it was not 'written in terms directed to the substance of any "opinion" or any "subject'' of communication.' *Id*. ORS 659A.403, like the LAC guideline in *Babson*, is not "written in terms directed to the substance of any 'opinion' or any "subject" of communication." Rather, it is a law focused on proscribing the pursuit or accomplishment of a forbidden result – in this case, discrimination by places of public accommodations against individuals belonging to specifically enumerated protected classes. As such, it is not susceptible to a *Robertson* category one facial challenge.

"Respondents argue that ORS 659A.403 expressly regulates expression because the word 'deny' in section (3) shows that, when properly interpreted, 'the

statute prohibits *communication* that services are being denied for a prohibited reason, which implicates both speech and opinion.' (emphasis in original). Under Respondents' expansive interpretation, all laws implicating any form of communication whatsoever would be facially unconstitutional under Article I, Section 8. This is not what the court held in *Robertson* and *Babson*.[55]

"Based on the above, the forum concludes that ORS 659A.403 is not subject to a *Robertson* category one Article I, Section 8 facial challenge.

*"**Robertson Category Two***

"A law falls under the second category of *Robertson* if it is 'directed in terms against the pursuit of a forbidden effect' and 'the proscribed means [of causing that effect] include speech or writing.' *Babson* at 397, quoting *Robertson* at 417-18. Oregon courts examine a statute in the second category for 'overbreadth' to determine if 'the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth.' *Id.* at 397-98, quoting *Robertson* at 410, 412.

"In *State v. Illig Renn,* 341 Or 228 (2006), the defendant challenged as overbroad a statute that made it a crime to '[r]efuse[ ] to obey a lawful order by [a] peace officer' if the person knew that the person giving the order was a peace officer. In addressing the state's argument that the statute was not subject to an overbreadth challenge because it did not 'expressly' restrict expression, the court stated that a statute is subject to a facial challenge under the first or second category of *Robertson* if it 'expressly or obviously proscribes expression,' leaving

[55] *See State v. Robertson,* 293 Or 402, 416-417, 649 P.2d 569 (1982) ("As stated above, article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.") *See also State v. Garcias*, 296 Or 688, 697, 679 P.2d 1354, 1359 (1984) (menacing statute held constitutional under *Robertson* category one analysis even though it prohibited threatening words because "[t]he fact that the harm may be brought about by use of words, even by words unaccompanied by a physical act, does not alter the focus of the statute, which remains directed against attempts to cause an identified harm, rather than prohibiting the use of words as such"); *State v. Moyle,* 299 Or 691, 701, 705 P2d 740 (1985)(statute criminalizing telephonic or written threats held constitutional under *Robertson* category one analysis because "the effect that it proscribes, causing fear of injury to persons or property, merely mirrors a prohibition of words themselves"); *City of Eugene v. Miller,* 318 Or 480, 489, 871 P2d 454 (1994)(defendant, who sold joke books on the city sidewalk, was convicted of violating an ordinance prohibiting vendors from selling merchandise on city sidewalks; ordinance held valid under first category of *Robertson* because it banned the sale of all expressive material on the sidewalk and therefore was content neutral); *State v. Illig-Renn,* 341 Or 228, 237, 142 P3d 62 (2006)("[t]he fact that persons seek to convey a message by their conduct, that words accompany their conduct, or that the very reason for their conduct is expressive, does not transform prohibited conduct into protected expression or assembly").

statutes with '[m]arginal and unforeseen applications to speech and expression' to as-applied challenges under the third category.[56] *Illig–Renn,* at 234. The court went on to state that facial challenges generally would not be permitted 'if the statute's application to protected speech [was] not traceable to the statute's express terms.' *Id.* at 236. Based on that interpretation of Article I, section 8, the court concluded that the defendant could challenge the statute that prohibited interfering with a peace officer only as applied, under the third category of *Robertson,* and not on its face, under the other two categories. *Id.* at 237.

"Respondents' argument resembles defendants' argument in *Babson*, which the court characterized in the following words:

> 'Defendants instead argue that, even if the [law] targets some harm—rather than targeting expression—the [law] has an "obvious and foreseeable" application to speech, and it is overbroad. That is, defendants argue that the text of the statute does not have to refer to expression or include expression as an element to fall under category two, as long as it has an obvious application to expression.'

Babson at 398. The *Babson* court rejected this argument, stating:

> 'We agree with the state that the statement in *Robertson* on which defendants rely does not extend Article I, section 8, overbreadth analysis to every law that the legislature enacts. When expression is a proscribed means of causing the harm prohibited in a statute, it is apparent that the law will restrict expression in some way because expression is an element of the law. For that type of law, the legislature must narrow the law to eliminate apparent applications to *protected* expression. *See Robertson,* 293 Or. at 417–18, 649 P2d 569 (noting that when a law focused on harmful effects includes expression as a proscribed means of causing those effects, the court must determine whether the law "appears to reach *privileged* communication" (emphasis added)). However, if expression is not a proscribed means of causing harm, and is not described in the terms of the statute, the possible or plausible application of the statute to protected expression is less apparent. That is, in the former situation, every time the statute is enforced, expression will be implicated, leading to the possibility that the law will be considered overbroad; in the latter situation, the statute may never be enforced in a way that implicates expression, even if it is possible, or even apparent, that it *could* be applied to reach protected expression. When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them. The court's statement in *Robertson,* on which

[56] The court referred to this type of statute as a "speech-neutral" statute, one that "doe[s] not by its terms forbid particular forms of expression." *Illig-Renn* at 233-34.

> defendants rely, does not extend the second category overbreadth analysis to statutes that do not, by their terms, expressly or obviously refer to protected expression.'

Id. at 400. The *Babson* court went on to explain that 'obviously,' as used in the last sentence of the above-quoted statement, did not 'extend Article I, section 8, scrutiny [under the first two *Robertson* categories] to any statute that could have an apparent application to speech; rather, the [*Robertson*] court used the word 'obviously' to make it clear that creative wording that does not refer directly to expression, but which could *only* be applied to expression, would be scrutinized under the first two categories of *Robertson*.' *Id.* at 403. The *Babson* court concluded its *Robertson* category two analysis by stating:

> 'Similarly, here, although the guideline does not directly refer to speech, the guideline does have apparent applications to speech, as defendants contend. A restriction on use of the capitol steps will prevent people like defendants from protesting or otherwise engaging in expressive activities on the capitol steps overnight. That fact alone, however, does not subject the guideline to Article I, section 8, scrutiny under the second category of *Robertson.* The guideline is not simply a mirror of a prohibition on words. The guideline also bars skateboarding, sitting, sleeping, walking, storing equipment, and all other possible uses of the capitol steps during certain hours. Thus, because the guideline does not expressly refer to expression as a means of causing some harm, and it does not "obviously" prohibit expression within the meaning of *Moyle,* it is not subject to an overbreadth challenge under the second category of *Robertson.'*

Babson at 403-04. This case, like *Babson* and *Illig-Renn*, does not involve a statute that 'obviously' prohibits expression. Rather, it is a 'speech-neutral' statute as described in *Illig-Renn*.[57] Furthermore, the legislature's use of the challenged word 'deny' in ORS 659A.403 is contextually similar to the challenged word 'refuse' in *Illig-Renn*, as both terms prohibit specific actions that may involve expression without specifying a particular form of expression. In conclusion, the forum finds that ORS 659A.403 is not subject to Article I, section 8 overbreadth scrutiny as set out in *Robertson, category two.*

"Robertson Category Three Does Not Apply to Respondents' claim of 'compelled speech.'

"Respondents contend that their Article I, section 8, rights were violated by the Agency's application of ORS 659A.403 because that application, in requiring

[57] *Cf. State v. Babson*, 355 Or 383, 405, 326 P3d 559, 566 (2014), quoting *Miller* at 489-90 (*Robertson* category two analysis did not apply because contested ordinance "was directed at a harm – street and sidewalk congestion – that the city legitimately could seek to prevent, and did not, 'by [its] terms, purport to proscribe speech or writing as a means to avoid a forbidden effect.'")

them to provide a wedding cake to Complainants, 'unlawfully compel[s] Respondents to engage in expression of a message they did not want to express.' The *Robertson* framework was developed in a series of cases involving prohibited speech, and there are no Oregon cases that have come to the forum's attention in which compelled speech was the issue. However, the U.S. Supreme Court has addressed that issue in a line of cases involving the First Amendment and compelled speech. In the absence of Oregon case law, the forum turns to those decisions for guidance.

"As a preliminary matter, the forum addresses Respondents' argument, made in their response to the Agency's cross-motions for summary judgment, that the 'forbidden effect' involved in a *Robertson* category three analysis of the constitutionality of ORS 659A.403 is 'Respondents' choice not to be involved in Complainants' same-sex ceremony, which is alleged to be a denial of services based on sexual orientation.' Respondents argue that their 'choice not to be involved' cannot be a 'forbidden effect' because Article XV, section 5a of the Oregon Constitution expressly prohibited legal recognition of same-sex marriages in January 2013,[58] making it 'clear [that] opposition to same-sex marriage is not a 'forbidden effect.'" Respondents misread *Babson*, *Robertson*, and the statute. The 'forbidden effect' under ORS 659A.403 is not its impact on Respondents, but Respondents' denial of services to Complainants based on their sexual orientation. Respondents were not asked to issue a marriage license, perform a wedding ceremony, or in any way legally recognize Complainants' planned same-sex wedding in contravention of Article XV, Section 5a. Furthermore, there is no evidence in the record, as submitted for summary judgment, that they communicated to Respondents where they intended to be married, that they intended to be married in the state of Oregon, or, for that matter, that Complainants were ever married.[59]

"The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943), in which the U. S. Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require 'affirmation of a belief and an attitude of mind,' noting that 'the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.' *Id.* at 633-34.

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[58] In January 2013, Article XV, section 5a, of the Oregon Constitution provided: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

[59] The forum takes judicial notice that a law granting full marriage rights for same-sex couples in the state of Washington, which is immediately adjacent to the State of Oregon and only separated from the City of Portland by the Columbia River, took effect on December 6, 2012. *See* Revised Code of Washington 26.04.010. A. Klein was aware of that on January 17, 2013, as shown by his statement during the Perkins interview, quoted in Finding of Fact #14.

"In *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), the Court considered whether a Florida statute that required newspapers that 'assailed' the 'personal character or official record' of any political candidate to give that candidate the 'right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper's charges,' and to print the reply 'in as conspicuous a place and in the same kind of type as the charges which prompted the reply.' *Id.* at 243. The Court found the statute was unconstitutional because it deprived the newspaper and its editors of the fundamental right to decide what to print or omit. *Id. at 258.*

"In 1977, the Court was asked to decide whether the State of New Hampshire could constitutionally enforce criminal sanctions against persons who covered the motto 'Live Free or Die' on their passenger vehicle license plates because that motto was repugnant to their moral and religious beliefs. *Wooley v. Maynard,* 430 U.S. 705 (1977). In its discussion of the nature of compelled speech, the Court noted that New Hampshire's statute 'in effect requires that appellees used their private property as a "mobile billboard" for the State's ideological message or suffer a penalty' and that driving an automobile was a 'virtual necessity for most Americans.' *Id.* at 715. The Court found New Hampshire's statute unconstitutional, holding as follows:

> 'We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.'

Id. at 713.

"In 1986, the Court was asked to decide whether a regulated public utility company that had traditionally distributed a company newsletter in its quarterly billing statements was required to enclose newsletters published by TURN, a group expressing views opposite to the utility, in the same billing statements. *Pacific Gas & Electric Co. v. Public Utilities Commission of California* ("PUC"), 475 U.S. 1 (1986). The Court held that the PUC's requirement unconstitutionally compelled Pacific Gas to accommodate TURN's speech by requiring it to disseminate messages hostile to Pacific's own interests. *Id.* at 20-21.

"*Hurley v. Irish-American GLIB,* 515 U.S. 557 (1995), presented the question of whether private citizens in Massachusetts who organized a St. Patrick's Day parade were required to include GLIB, a group 'celebrat[ing] its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants,' thereby imparting a message that the organizers did not wish to convey among the marchers. *Id.* at 570. The requirement was based on a provision of Massachusetts' public accommodation law that included a prohibition

on discrimination on the basis of sexual orientation. The Court found that a parade is a form of expression, stating that a 'parade' indicates 'marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade's dependence on watchers is so extreme that nowadays, as with Bishop Berkeley's celebrated tree, "if a parade or demonstration receives no media coverage, it may as well not have happened."' *Id.* at 568. The Court also determined that:

> '[GLIB]'s participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members' identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. The organization distributed a fact sheet describing the members' intentions, and the record otherwise corroborates the expressive nature of GLIB's participation. In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription "Irish American Gay, Lesbian and Bisexual Group of Boston." GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.' (internal citations omitted)

Id. at 570. The Court further determined that '[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade'[60] and held the state's application of the statute unconstitutional because 'this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.' *Id.* at 573.

"In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ('FAIR'), 547 U.S. 47 (2006), a group of law school associations objected to the application of the Solomon Amendment, which required campuses receiving federal funds to provide equal access to military recruiters. The Court held that there was no First Amendment violation, distinguishing *Hurley*, *Tornillo*, and *Pacific Gas* because in those cases 'the complaining speaker's own message was affected by the speech it was forced to accommodate' or 'interfere[d] with a speaker's desired message.' *Id.* at 63-64. The Court noted that '[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.' *Id.* at 62. Of additional significance to this case, the Court stated:

[60] *Hurley v. Irish-American GLIB,* 515 U.S. 557, 572-73 (1995).

> 'Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.'

Id. at 65.

"*Wooley* and *Barnette* do not support Respondents because Respondents are under no compulsion to publicly 'speak the government's message'[61] in an affirmative manner that demonstrates their support for same-sex marriage. Unlike the laws at issue in *Wooley* and *Barnette*, ORS 659A.403 does not require Respondents to recite or display any message. It only mandates that if Respondents operate a business as a place of public accommodation, they cannot discriminate against potential clients based on their sexual orientation. *Elane Photography* at 64.

"*Tornillo* and *Pacific Gas* are distinctly different from this case. In both cases, the government commandeered a speaker's means of reaching its audience and required the speaker to disseminate an opposing point of view. Here, the state has not compelled Respondents to publish or distribute anything expressing a view.

"*Hurley* is distinguishable because Respondents' provision of a wedding cake for Complainants was not for a public event, but for a private event. Whatever message the cake conveyed was expressed only to Complainants and the persons they invited to their wedding ceremony, not to the public at large. In addition, the forum notes that, whether or not making a wedding cake may be expressive, the operation of Respondents' bakery, including Respondents' decision not to offer services to a protected class of persons, is not. *Elane Photography* at 68.

"Finally, *Rumsfeld* does not aid Respondents because it rejected the law schools' arguments that they were forced to speak the government's message and that they were required to host the recruiters' speech in a way that violated compelled speech principles. *Rumsfeld* at 64-65.

"For the reasons stated above, the forum concludes that the application of ORS 659A.403 to Respondents so as to require them to provide a wedding cake for Complainants does not constitute compelled speech that violates Article I, section 8 of the Oregon Constitution.

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[61] *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right to free speech.

"Respondents contend that the First Amendment to the U. S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute unlawfully infringes on Respondents' free speech rights. In pertinent part, the First Amendment provides: 'Congress shall make no law * * * abridging the freedom of speech * * *.'

"Based on the discussion in the previous section, the forum concludes that the requirement in ORS 659A.403 that Respondents bake a wedding cake for Complainants is not 'compelled speech' that violates the free speech clause of the First Amendment to the U. S. Constitution.

"**CONCLUSION**

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent M. Klein violated ORS 659A.403 by denying full and equal accommodations, advantages, facilities and privileges to Complainants Rachel Cryer and Laurel Bowman-Cryer.

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.406.

"Respondents' motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondents violated ORS 659A.409.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.403 by denying the full and equal accommodations, advantages, facilities and privileges of a place of public accommodation to Complainants Rachel Cryer and Laurel Bowman-Cryer based on their sexual orientation.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to the Agency's allegations in the Formal Charges that Respondents A. Klein and M. Klein are jointly and severally liable for A. Klein's violation of ORS 659A.403.

"The Agency's cross-motion for summary judgment is **GRANTED** with respect to Respondents' affirmative defenses.

"The Forum has **NO JURISDICTION** to adjudicate the counterclaims raised by Respondents in paragraphs ##31-42 in Respondents' Amended Answers.

"**Case Status**

"The hearing will convene as currently scheduled. The scope of the evidentiary portion of the hearing will be limited to the damages, if any, suffered by Complainants as a result of A. Klein's ORS 659A.403 violation.

IT IS SO ORDERED"

The ALJ's rulings on Respondents' motion for summary judgment and the Agency's cross-motion for summary judgment are **AFFIRMED**, except for the ruling on Respondents' violation of ORS 659A.409, which is **REVERSED** for reasons set out in the Opinion section of this Final Order and as noted in the Conclusions of Law in this Final Order. (Ex. X65)

29) On February 4, 2015, the ALJ granted the Agency's second motion for a protective order. (Ex. X65)

30) On February 5, 2015, the ALJ granted Respondents' renewed motion to depose Complainants. The ALJ's interim order read as follows:

"**Introduction**

"On January 15, 2015, Respondents filed a renewed motion to depose Complainants. On January 22, 2015, the Agency timely filed objections. Respondents' motion is based on part on their assertion that (1) the 25 additional interrogatories they were allowed to serve on the Agency pursuant to my September 29, 2014, interim order that allowed Respondents to serve additional interrogatories as a potential means of eliminating the need for a deposition, (2) coupled with the Agency's responses to Respondents' prior interrogatories and the Agency's answers to the 25 additional interrogatories, (3) are inadequate to address Complainants' damages, leaving Respondents substantially prejudiced as a result.

"On January 22, 2015, the Agency filed objections, arguing that Respondents' have not clearly articulated how they will be substantially prejudiced in the absence of depositions, that Complainants should not be subjected to depositions 'due to Respondents' inability to adequately craft their interrogatories,' and that Respondents' 'discovery tactics are an abuse of process.'

"**Discussion**

"On October 14, 2014, the Agency complied with the forum's September 25, 2014, discovery order requiring the Agency to answer Respondents' August 5, 2014, interrogatory seeking a detailed explanation of Complainants' emotional, physical and mental suffering caused by Respondents' actions. The Agency's interrogatory response listed a total of 88 discrete types of harm suffered by Complainant Cryer and 90 discrete types of harm suffered by Complainant Bowman-Cryer. In support of their motion, Respondents argue that:

> '[The listed symptoms], some of which are inconsistent with each other, raise more questions than they answer. Respondents attempted to address some of these nearly 200 symptoms in their 25 interrogatories, but were unable to even begin to address the questions raised by this exhaustive list of symptoms, much less get clear answers from Complainants.'

Among its objections to Respondents' motion for depositions, the Agency asserts that 'many of the listed symptoms are interrelated to one another and would hardly require Respondents to explore them individually.' The Agency further notes that Respondents will have an adequate opportunity to 'cross-examine Complainants on all symptoms at hearing.'

"To more clearly illustrate the points raised by Respondents and the Agency, the types of harm alleged by each Complainant are reprinted below in their entirety. As will be seen, they permeate all aspects of Complainants' lives.

Complainant Rachel Cryer

> '[88 symptoms listed]

Complainant Laurel Bowman-Cryer

> '[90 symptoms listed]

OAR 839-050-0200(3) governs depositions in this forum. It provides:

> 'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'

"Since OAR 839-050-0200(3) was adopted, the forum has been extremely reluctant to grant depositions, and has uniformly denied respondents' requests for depositions when respondents have not first sought informal discovery through interrogatories. *See, e.g., In the Matter of Oak Harbor Freight Lines,*

Inc., 33 BOLI 1 (2014), *In the Matter of Columbia Components, Inc.,* 32 BOLI 257 (2013), *In the Matter of Blachana, LLC,* 32 BOLI 220 (2013), *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227 (2009). The only occasion when the forum has allowed a deposition to take place was in the *Columbia Components* case, under the following circumstances:

> 'During the hearing it became clear that Complainant possessed documents either requested by Respondent and/or set out in the [ALJ's] discovery order that Complainant did not provide until Respondent was able to ascertain existence of those documents during Complainant's testimony * * * [and] that Complainant had been less than forthcoming with regard to the existence of those documents.'

"In this case, Respondents have satisfied the forum's requirement of seeking discovery by means of informal request before requesting a deposition. Before initially requesting a deposition, Respondents made informal document discovery requests, requested admissions, and served 25 interrogatories on the Agency, all before Respondents received the Agency's interrogatory answer setting out the alleged 178 types of harm suffered by Complainants as a result of Respondents' actions.

"On September 25, 2014, the forum granted Respondents' motion to depose Complainants, with the scope of the depositions limited to 'Complainants' claim for damages.' That ruling was predicated on my conclusion that Respondents '[had] sought informal discovery on the issue of damages through other methods and do not have adequate information on damages.'

"At a prehearing conference held on September 29, 2014, discovery was discussed at length. As noted earlier, it was agreed that Respondents would be allowed to serve 25 additional interrogatories on the Agency as a potential means of eliminating the need for a deposition. On October 14, 2014, the Agency sent Respondents its interrogatory response listing the 178 types of alleged harm. In the absence of depositions, that left 25 interrogatories for Respondents to explore those 178 listed harms. On December 31, 2014, Respondents served the interrogatories that were allowed in my September 29, 2014, ruling. The Agency timely responded on January 13, 2015.

"Since Respondents filed their motion on January 15, 2015, the Agency was granted summary judgment as to Respondents' alleged ORS 659A.403 violation. In the interim order granting summary judgment, I ruled that the only evidentiary issue at hearing will be the amount of damages, if any, to which Complainants are entitled. The amount of damages sought on Complainants' behalf is 'at least $75,000' for each Complainant. In addition, it appears from the Agency's February 3, 2015, filing in response to the forum's inquiry regarding a Protective Order sought by the Agency that the Agency may intend to present evidence at hearing that Complainants are entitled to damages for mental and

emotional suffering up to the present day, more than two years after the date of discrimination.

"I have reviewed prior BOLI Final Orders in which damages were awarded for emotional and mental suffering and find that this case stands well apart from all its predecessors in the exhaustive list of harms alleged by Complainants for which the Agency seeks damages. No other case comes even remotely close. In defending themselves, Respondents have a right to inquire into each type of harm alleged by Complainants to determine the extent of the harm and whether Complainants' physical, mental, and emotional suffering was caused, at least in part, if not in whole, by events and circumstances that were unrelated to Aaron Klein's ORS 659A.403 violation. Based on the sheer number and variety of types of alleged harm, there is no practical way Respondents can accomplish an effective inquiry using interrogatories. I find that Respondents will be substantially prejudiced if they are not allowed to depose Complainants.

"Based on the above, Respondents' motion to depose Complainants is **GRANTED,** with the following limitations:

'1. Respondents are allowed a maximum of three hours, not counting breaks, to question each Complainant.

'2. The Agency may choose where the depositions are to be conducted and is instructed to cooperate in making Complainants available for deposition as soon as practical, given that the hearing is scheduled to begin next month. If the Agency and Respondents cannot agree on a date, they are instructed to contact me and I will choose a date. I do not intend to postpone this hearing again because of a discovery issue.

'3. Respondents are responsible for any costs associated with conducting the deposition. Respondents and Agency must each pay for their own copy of the transcript if a transcript is prepared.

'4. Respondents and the Agency are ordered to notify me at least seven days in advance of the date and time for the depositions so that I can be available if necessary. As of today, the only dates I will be unavailable between now and March 1 are the afternoon of February 11 and all day February 16.

5. The scope of Respondents' questioning is limited to damages. Respondents may not engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of physical, emotional, and mental suffering.'"

(Ex. X72)

31) On February 11, 2015, “in view of the national attention and attendant publicity these cases have already received and the likelihood that Complainants will be questioned about the protected health information in the records produced under the protective order," the ALJ issued a protective order regarding Complainants' depositions. The order prohibited the deposition transcripts or notes made of the deposition testimony from being made available to “non-qualified” persons or from being used “for any other purpose than the preparation for litigation of [the] proceeding." (Ex. X74)

32) On February 17, 2015, Respondents filed a motion for reconsideration of the ALJ's ruling on summary judgment. The ALJ denied Respondents' motion. (Exs. X73, X75, X79)

33) On February 23, 2015, the Agency issued Second Amended Formal Charges in both cases. Respondents filed answers on February 27, 2015. (Exs. X78, X82)

34) Respondents and Agency timely submitted case summaries. (Exs. X76, 77)

35) On February 26, 2015, Respondents filed a motion for discovery sanctions that was opposed by the Agency. On March 5, 2015, the ALJ ruled on Respondents' motion as follows:

> “On February 26, 2015, Respondents filed a motion requesting discovery sanctions related to the Agency’s failure to provide discovery subject to my Discovery Order dated September 25, 2014, until February 24, 2015. The Agency filed a response on February 27, 2015, and Respondents supplemented their motion on March 3, 2015.
>
> “The discovery in question relates to my September 25, 2014, Order requiring that the Agency provide Respondents with:
>
> > ‘all posting by Complainants to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages.’
>
> “Specifically, Respondents allege that on February 24, 2015, less than three hours before the Agency filed its case summary, the Agency turned over 109 pages of documents (‘subject documents’) to Respondents that were subject to my discovery order. Respondents further allege that the 109 pages were included in the Agency’s case summary. The Agency does not dispute these allegations, acknowledges it received the subject documents from Complainants in August 2014, and attempts to explain the reason for its late disclosure in its

response. After reviewing the subject documents, I conclude that they contain Complainants' social media conversations that fall within the scope of my September 25, 2014, Discovery Order.

"Respondents allege that the Agency's untimely disclosure of these documents establishes bad faith on the part of the Agency and/or Complainants, particularly since the disclosure occurred after Respondents completed their depositions of Complainants, and that Respondents are irreparably prejudiced as a result. Respondents ask that the forum sanction the Agency in a number of different ways.

"In my September 25, 2014, Discovery Order, I ruled as follows:

> 'After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating the Agency's deadline for complying with the terms of this order. The Agency has a continuing obligation, through the close of the hearing, to provide Respondents' counsel with any newly discovered material that responds to the responses and production ordered in this interim order. The Agency's failure to comply with this order may result in the sanction described in OAR 839-050-0200(11).'

In the interim order I issued on September 30, 2014, that summarized the September 29, 2014, prehearing conference, I ordered that "[t]he Discovery ordered in my rulings on * * * Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014." That was not done.

"As a prelude to my ruling, I note that the forum has no authority to impose the vast majority of sanctions sought by Respondents. The forum's authority in this matter is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General's Administrative Rules (OAR 137-003-0000 to -0092), and the forum's own rules, OAR 839-050-000 *et seq*. The ALJ's authority to impose sanctions for violations of discovery orders is set out in OAR 839-050-0020(11):**^**

> 'The administrative law judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)[62]. If the administrative law judge admits evidence that was not disclosed as ordered or subpoenaed, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond."

[62] This statutory reference in the current rule is in error. The APA was amended in 2007 and the "full and fair inquiry" requirement was moved to ORS 183.417(8).

In brief, the Agency frankly admits that it 'cannot determine why the [subject records] were not produced [earlier] in discovery, but they were in a location unlikely to be accessed' and characterizes its 'oversight' as an 'inadvertent error.' The Agency also notes, in a supporting declaration by * * * the Agency's Chief Prosecutor, that '[i]t appears that on or about October 3, 2014, in anticipation of discovery, the subject documents were partially redacted. I have no other recollection as to why they were not provided in discovery.'

> "OAR 839-050-0020(16) provides:
>
> '"Good cause" means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.'

For the reasons stated below, the forum concludes that the Agency's failure to provide the subject records by October 14, 2014, as ordered by the forum, does not meet the 'good cause' standard. Participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order. In this case, the subject records were accessed by BOLI's Administrative Prosecutions Unit on October 3, 2014, eight days after a discovery order was issued requiring the production of those records, and only 11 days before their production was due pursuant to the forum's September 30, 2014, order. The Agency's 'oversight' or storage of the documents in a place where they were 'unlikely to be accessed' does not constitute 'an excusable mistake or a circumstance over which the [Agency] had no control.'

"Ordinarily, the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence.**^** However, Respondents assert that some of the subject records will potentially assist Respondents' defense and explain why in their motion. Based on Respondents' assertion, it appears that a blanket prohibition on the introduction of the subject records may prejudice Respondents and prevent a 'full and fair inquiry' by the forum. The forum's order is crafted with this in mind.

"ORDER

"**1. Sanctions:** (a) The Agency may not offer or otherwise utilize any of the subject documents as evidence until such time as Respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) Respondents, should they elect to do so, may offer or utilize the subject documents in support of their case.

"**2. Discovery Order**

"To the extent these records have not already been provided, the forum hereby issues a discovery order requiring the Agency to provide responsive documents to items ##1, 5-6, 8, 13-15, and 21 listed on pages 9 and 10 of Respondents' Motion for Discovery Sanctions, with the caveat that the Agency is not required to produce statements made to Ms. Gaddis or Ms. Casey, the Agency's administrative prosecutors in this case, in any response to item #5. The Agency's responsibility to produce any such records begins as soon as this order is issued and continues until the hearing is concluded. The forum will apply OAR 839-050-0020(11) if an issue arises regarding an alleged failure by the Agency to produce such records in a timely manner.

"**3.** Respondents' request that the forum dismiss the Agency's Second Amended Formal Charges is **DENIED**.

"**4.** Respondents may amend their Case Summary witness list and exhibit list. * * *"

"**5.** Respondents' request to 'reopen discovery to allow for depositions of Complainants and other BOLI witnesses with knowledge of these matters' is **DENIED**.

"**6.** Respondents' request that the cases be dismissed or that the Agency's claim for damages of Complainants' behalf be dismissed is **DENIED**.

"**7.** Respondents' request for costs is **DENIED**.

"**8.** Respondents' request for any other sanctions not specifically discussed in this interim order is **DENIED**."

(Exs. X81, X83, X86, X87)

36) The general public was allowed to attend the hearing. Because of this and potential security issues, the ALJ issued guidelines prior to the hearing that, among other things: prohibited the public from bringing backpacks, briefcases, satchels, carrying cases any type, or handbags into the building in which the hearing was held; prohibited the use of audio recorders and cameras, including cell phone cameras and recorders; and required cell phones to be turned off during the hearing. (Ex. X85; Statement of ALJ)

37) 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)

38) During the hearing, the Agency offered Exhibits A24 and A26. Respondents objected to their admission and the ALJ reserved ruling on their

admissibility for the Proposed Order. Respondents objected on the basis of relevancy. Exhibits A24 and A26 are received because they are relevant to show the impact that the media exposure spawned by this case had on Complainants. (Exs. A24, A26)

39) During the hearing, the ALJ stated he would consider LBC's testimony about the "handfasting cord" used in LBC's and RBC's commitment[63] ceremony as an offer of proof and rule on its admissibility in the Proposed Order. That testimony is admitted because it is not evidence that was required to be disclosed by the ALJ's discovery orders and it is relevant to show the extent of Complainants' commitment to their relationship. (Testimony of LBC; Statement of ALJ)

40) On March 16, after the Agency had concluded its case-in-chief, Respondents filed a motion for an order to Dismiss or Reopen Discovery and Keep Record Open. Respondents argued that this was necessary in order:

> "to allow Respondents a full and fair opportunity to reopen discovery concerning possible undisclosed collusion among Complainants, Basic Rights Oregon and/or the Agency in light of the testimony of Agency witness Aaron Cryer elicited at the hearing on Friday, March 13, 2015."

The ALJ allowed Respondents and the Agency to present oral argument on Respondents' motion when the hearing re-convened on March 17, 2015, then denied Respondents' motion. (Ex. X94; Statement of ALJ)

41) Respondents called AK, MK, and RBC as witnesses in support of their case in chief. At the conclusion of RBC's testimony on March 17, 2015, Respondents' counsel Grey made the following statement:

> "That's all of the witnesses that we have to present at this time. However, for purposes of the record I'd like to make it clear that Respondents did not intend to rest their case in chief for the reasons we discussed in connection with the motion that we presented this morning, which the forum denied. So simply for purposes of the record, we are not planning on closing our case in chief."

(Statement of Grey)

42) On May 28, 2015, Respondents filed a motion to Reopen the Contested Case Record. The Agency filed a response on June 2, then supplemented its response on June 5, 2015. On June 22, 2015, the ALJ issued an interim order that denied Respondents' motion. The ALJ's ruling is reprinted in its entirety below:

> "Pursuant to OAR 839-050-0410, Respondents filed a motion to reopen the contested case record on May 29, 2015.

[63] The forum uses the term "commitment" because the handfasting cord was used in Complainants' June 27, 2013, ceremony at the West End Ballroom, when same-sex marriage was not yet permitted in the state of Oregon.

"OAR 839-050-0410 provides:

> 'On the administrative law judge's own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.'

"Good cause" means:

> '[U]nless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.' OAR 839-050-0020(16).

Respondents' motion, like their earlier motion to Disqualify BOLI Commissioner Brad Avakian, is predicated on their argument that Commissioner Avakian's alleged bias 'has effectively precluded Respondents from receiving due process in this case.'

"In support of their motion, Respondents attached documentation of the following: (1) emails beginning April 11, 2014, and ending January 31, 2015, primarily containing conversations between Charlie Burr, BOLI's Communications Director and Strategy Works NW, LLC, Basic Rights of Oregon ('BRO'), and Senator Jeff Merkley's office, that were forwarded to Respondents' counsel by email by on May 20, 2015, by Kelsey Harkness, a reporter for the Daily Signal, pursuant to a public records request made by Harkness (the 'Harkness records'); (2) testimony of both Rachel and Laurel Bowman-Cryer from their February 17, 2015, depositions; and (3) selected hearing testimony of Aaron Cryer, brother of Complainant Rachel Bowman-Cryer. Respondents contend that the above shows 'hitherto undisclosed collusion between complainants, BOLI and Basic Rights Oregon * * * sufficient to taint the integrity of the proceedings and deny Respondents fundamental due process or a fair hearing" and 'unfairly prejudice Respondents['] rights herein.

"Specifically, Respondents ask that the record be reopened so that they can:

> "(1) Depose Aaron Cryer;
>
> "(2) Request, obtain and review additional documents from BOLI, BRO, and others and to issue interrogatories through *subpoena duces tecum* upon non-participants including but not limited to Commissioner Brad Avakian, the Commissioner's assistant Jesse Bontecou, Charlie Burr,

> Jeanna Frazzini, Amy Ruiz, Diane Goodwin, Emily McLain, Joe LeBlanc and Maura Roche, all of whom are identified in the emails provided to Respondents by Harkness;
>
> "(3) Depose Avakian, Bontecou, Burr, Frazzini, Ruiz, Goodwin, McLain, LeBlanc and Roche; and
>
> "(4) Depending on the information obtained, renew their motion to disqualify the Commissioner "and other BOLI personnel shown to have been involved in this political agenda from any role in deciding the case."

On June 2, 2015, the Agency timely filed a response to Respondents' motion, then supplemented it with an amended response on June 5, 2015.

"Discussion

"Under OAR 839-050-0410, Respondents have the burden of showing 'good cause' within the meaning of OAR 839-050-0020(16) for reopening the contested case record. To show good cause, Respondents must demonstrate an excusable mistake or a circumstance over which Respondents had no control. The excusable mistake or circumstances over Respondents had no control means 'there must be a superseding or intervening event which prevents timely compliance.' *In the Matter of Ashlanders Senior Foster Care, Inc.,* 14 BOLI 54, 61-62 (1996), *citing In the Matter of City of Umatilla,* 9 BOLI 91 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries,* 110 151, 821 P2d 1134 (1991). The mistaken act or failure to act is excusable if a party mistakenly acts or fails to act due to being misled by facts or circumstances that would mislead a reasonable person under similar circumstances. *Ashlanders, citing In the Matter of 60 Minute Tune,* 9 BOLI 191 (1991), *affirmed without opinion, Nida v. Bureau of Labor and Industries,* 119 Or App 174, 822 P2d 974 (1993). The forum examines the three different types of supporting documentation provided by Respondents against these standards.

A. The Harkness Records

"The emails provided to Respondents by Harkness are dated April 11, 2014, to January 31, 2015, well before the hearing began. Respondents do not assert that BOLI did not cooperate promptly in providing these documents to Harkness when she made her public records request. Respondents' June 18, 2014, motion to disqualify Commissioner Avakian due to bias makes it apparent that Respondents considered the Commissioner's alleged bias to be a relevant issue at least nine months before the hearing began. Despite this, there is no evidence in the record that Respondents made a discovery request or public records request for the records that were provided to Harkness. This is a circumstance that was under Respondents' control, and Respondents provide no explanation for their own failure to make a pre-hearing request for these records that they

now claim are relevant and probative of the Commissioner's bias. In addition, Respondents have failed to show a superseding or intervening event that prevented them obtaining the Harkness Records before the hearing or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, the forum concludes that Respondents have not shown good cause for their failure to pursue the Harkness records before the hearing and offer them as evidence at hearing.[64]

[64] There are no Commissioner's Final Orders interpreting "good cause" in the context of a motion to reopen a contested case proceeding. Besides *Ashlanders, City of Umatilla,* and *60 Minute Tune*, there have been numerous Final Orders interpreting the definition of "good cause" in OAR 839-050-0020(16) in other contexts. None of them support Respondents' claim that their supporting documentation shows "good cause." ***Cf.*** *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 240 (2009)(when respondents sought a postponement so they could complete discovery and respondents' previous motion for a postponement had been granted to give respondents' newly retained attorney time to prepare for the hearing, respondents delayed three months after the forum granted the first postponement before seeking discovery, the agency was not responsible for respondent's delay, and respondents' need for an another postponement could have been obviated if respondents had timely sought discovery, the forum denied respondents' motion, finding that respondents had not shown "good cause"); *In the Matter of Logan International, Ltd.,* 26 BOLI 254, 257-58 (2005)(the ALJ denied respondent's motion to reset the hearing based on the agency's alleged failure to provide complete discovery, stating that respondent had not established "good cause" because it had not shown that the agency had withheld discoverable information nor that respondent was entitled to a deposition of the complainant); *In the Matter of Orion Driftboat and Watercraft Company, LLC,* 26 BOLI 137, 139 (2005)(when respondents moved for a postponement 12 days before the hearing date based on respondents' need to be represented by an attorney and current inability to afford an attorney, because the agency had refused to accept respondents' settlement offers, and because respondents needed more time to file a discovery order, the agency objected on the basis that it had lined up its witnesses and was prepared to proceed, and because respondents had agreed three months earlier to the date set for hearing and the forum denied respondents' motion because respondents had not shown good cause); *In the Matter of Adesina Adeniji,* 25 BOLI 162, 164-65 (2004)(respondent's failure to comply with discovery order because he believed the case would settle and because he had provided some of the documents subject to discovery order exhibits with his answer was not "good cause" and the ALJ sustained the agency's objection to respondent's attempted reliance at hearing on exhibits subject to discovery order that were not provided before hearing); *In the Matter of Barbara Coleman,* 19 BOLI 230, 238-39 (2000)(respondent's attorney's assertion that respondent's medical condition of depression made it difficult for her to gather information did not present good cause for postponement of the hearing when "nothing filed with this forum * * * comes close to establishing that respondent is legally incompetent, and respondent has made no such claim. As the forum stated in [an earlier] order, respondent spoke lucidly and logically during the * * * teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago"); *In the Matter of Sabas Gonzalez,* 19 BOLI 1, 5-6 (1999)(respondent's motion for postponement, based in part on a scheduling conflict of respondent's counsel, was denied based on respondent's failure to show good cause when there was no evidence that the matter on respondent's counsel's schedule that conflicted with the hearing had been set before the notice of hearing issued in this case and respondent's counsel knew of the possible conflict for weeks before filing the motion and did not respond to the attempts the agency made at that time to resolve the conflict); *In the Matter of Troy R. Johnson*, 17 BOLI 285, 287-88 (1999)(respondent's motion to postpone the hearing was denied based on respondent's failure to show good cause when respondent based his motion on assertions that he had not received the notice of hearing until one week before a scheduled hearing date and did not have time to prepare for the hearing, but his delay in receiving the notice of hearing was due to his failure to notify the forum of his change of address; he was out of town on a hunting trip; and he was amazed the case had been set for hearing); *In the Matter of Jewel Schmidt,* 15 BOLI 236, 237 (1997)(when respondent requested a postponement of the hearing because she had an adult care home and could not find a relief person for the date of hearing or successive days, and the agency opposed the request because it was ready to proceed and had subpoenaed witnesses, the ALJ denied the request because respondent had not shown good cause for a postponement, noting that there were over 30 days between the date the notice of hearing was issued and the date of the scheduled hearing, and this should have been ample time to find a relief person for the expected one-day hearing). ***Compare*** *In the Matter of Computer Products Unlimited, Inc.,* 31 BOLI 209, 212-13 (2011) *(*respondent's motion for postponement granted based on emergency medical treatment required by the wife of respondent's authorized representative that could not be put off); *In the Matter of Spud Cellar Deli, Inc.,* 31 BOLI 106, 111 (2010)(forum granted the agency's motion for a hearing postponement based on the fact that respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing); *In the Matter of Northwestern Title Loans LLC,* 30 BOLI 1, 3, (2008)(forum granted respondent's motion for postponement based on unavailability of respondent's key

B. Complainants' Deposition Testimony

"Respondents allege that Aaron Cryer's testimony and the Harkness records show that Complainants' deposition testimony is not credible regarding their alleged 'collusion' with BOLI 'in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants.' This is merely a repeat of Respondents' March 16, 2015, argument made in their *Motion to Dismiss or Reopen Discovery and Keep Record Open* that the ALJ denied at hearing. The deposition testimony given by Complainants that Respondents now argue justifies reopening the case was given on February 17, 2015, almost a month before the hearing commenced. In their depositions, Complainants were asked questions and gave answers regarding Jeanna Frazzini, Amy Ruiz, BRO, and their involvement with Frazzini, Ruiz, and BRO, as reflected in the attachments to Exhibit X94. Despite that deposition testimony, there is no evidence that Respondents attempted to follow up on the collusion that Respondents now alleges existed between these individuals, Complainants, BRO, and BOLI. Further, Respondents could have questioned Complainants about Cryer's testimony in their case-in-chief, but did not do so. These opportunities were both circumstances that were under Respondents' control. Likewise, Respondents have not shown a superseding or intervening event that prevented them from pursuing further discovery before the hearing based on Complainants' deposition testimony or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, Respondents have not established good cause to support their argument that Complainants' deposition testimony, coupled with Aaron Cryer's hearing testimony and the Harkness records, constitute grounds for reopening the contested case record to pursue the additional discovery that Respondents seek in this motion.

C. Aaron Cryer's Testimony

"Respondents' proffered characterization of Cryer's quoted testimony as '*directly* implicat[ing] BOLI and Complainants in using this case against

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witness on the date set for hearing); *In the Matter of Captain Hooks, LLP,* 27 BOLI 211, 213 (2006)(respondent's motion for postponement granted based on respondent's documented emergency medical condition); *In the Matter of SQDL Co.,* 22 BOLI 223, 227-28 (2001)(when respondent retained substitute counsel after its original counsel was suspended from the practice of law and substitute counsel filed a motion for postponement five days before the hearing based on the complexity of the case and his corresponding need for more time to prepare for the hearing, the ALJ concluded that respondent had shown good cause and granted the motion); *In the Matter of Ann L. Swanger,* 19 BOLI 42, 44 (1999)(respondent's motion for postponement, based on the fact that respondent would be having major dental surgery the day before the hearing was set to commence, making it extremely difficult for her to attend or communicate at the hearing, was granted).

Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants' is simply inaccurate. As noted above, Respondents were aware of communications between Complainants, BRO, BOLI, Frazzini, and Ruiz before the hearing, but elected not to pursue the defense they now assert by requesting additional discovery or by calling Complainants as witnesses in their case in chief to explore the alleged political agenda. This was a choice made by Respondents' legal team, not a circumstance beyond Respondents' control, and Respondents have not shown any superseding or intervening event that prevented them seeking additional discovery or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, Cryer's testimony that Respondents rely on is not good cause within the meaning of OAR 839-050-0410 and OAR 839-050-0020(16).

D. The Additional Evidence Sought by Respondents is Unnecessary to Fully and Fairly Adjudicate This Case

"Notwithstanding the lack of 'good cause,' the forum also concludes that additional evidence on the issues raised in Respondent's motion is unnecessary to fully and fairly adjudicate this case, as the forum has fully and carefully considered and ruled on these matters, which are incorporated herein and made a part hereof by this reference. *See* Ex. X12 (ALJ's July 2, 2014, Interim Order entitled *Ruling on Respondents' Election to Remove Cases to Circuit Court and Alternative Motion to Disqualify BOLI Commissioner Brad Avakian*).[65]

"Furthermore, since these prior rulings the Oregon Court of Appeals issued an opinion in *Columbia Riverkeeper* v. Clatsop County, 267 Or App 578, 341 P3d 790 (2014) that supports those rulings. Respondents' earlier motions sought to disqualify Commissioner Avakian due to 'actual bias.' In *Columbia,* Huhtala, a Clatsop County Commissioner, ran for election on the platform of not allowing a LNG business to be established in Astoria, then voted to deny in a land use decision that denied a pipeline company's application to build an LNG pipeline originating in Astoria. Prior to his election, Huhtala had made many public statements opposing construction of an LNG pipeline. In reversing the Land Use Board of Appeals' (LUBA) decision that Huhtala's bias had deprived the pipeline company of an impartial tribunal, the court stated:

[65] *Cf. In the Matter of Mountain Forestry, Inc.,* 29 BOLI 11, 48-50 (2007), *affirmed without opinion, Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009)(when respondents moved to reopen the record to admit a federal audit that purportedly showed the prevalence of records discrepancies throughout the firefighting industry and that the Oregon Department of Forestry did not have specific training requirements prior to 2003, and that purportedly negated certain inferences drawn from witness testimony, the forum found that, notwithstanding respondents' failure to submit an affidavit showing they had no knowledge of the audit prior to its release in March 2006, the audit did not contain any information relevant to the issues in the case or that mitigated respondents' violations and therefore the additional evidence was not necessary to fully and fairly adjudicate the case).

> 'All told, no single case in Oregon establishes what is necessary for a party to prove actual bias by an elected official in quasi-judicial land-use proceedings such as this one. Generally, we can glean the following. The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.
>
> 'In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First,* the scope of the "matter" and "question at issue" is narrowly limited to the specific decision that is before the tribunal. *Second,* because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And *third,* the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.'

Columbia Riverkeeper at 602-03.

"Under this standard, none of the "evidence" that Respondents have proffered previously or in support of their Motion to Reopen the Contested Case Record is probative to show "actual bias" on Commissioner Avakian's part. Therefore, notwithstanding the lack of "good cause" shown for not providing the proffered "evidence" before the record closed, the Motion is denied on the merits.

E. Conclusion

"Respondents' motion to Reopen the Contested Case Record is **DENIED**."

43) On April 24, 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. The Agency and Respondents both timely filed exceptions.

44) Respondents' exceptions are **DENIED** in their entirety as lacking merit. The Agency's exceptions as to the alleged violations of ORS 659A.409 are **GRANTED**. Otherwise, the Agency's exceptions are **DENIED**.

In the Matter of

PORTLAND FLAGGING, LLC dba A D Traffic Control

Case No. 55-15
Final Order of Commissioner Brad Avakian
Issued September 10, 2015

SYNOPSIS

Respondent Portland Flagging, LLC ("Portland Flagging") failed to pay the prevailing wage rate to two workers on a public works project when it did not make timely payments to the workers' fringe benefit accounts. The Commissioner assessed $2000 in civil penalties against Portland Flagging for its failure to pay the prevailing wage rate.

The above-entitled case was assigned to Kari Furnanz, 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. Portland Flagging was represented by its President, Evan Williams.

After the Agency issued a Notice of Intent ("NOI"), the Agency moved for and was granted summary judgment against Portland Flagging in this case.[1]

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.

[1] As explained in greater detail below, the allegations against the remainder of the Respondents were bifurcated from the liability issues against Portland Flagging and then consolidated with other BOLI cases involving similar joint liability issues against the same Respondents.

[2] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

FINDINGS OF FACT – PROCEDURAL

1) On February 20, 2015, the Agency issued a Notice of Intent to Assess Civil Penalties ("NOI") in the amount of $2000 against Respondents. Summarized, the NOI alleged:

- Respondents failed to timely pay the fringe benefits portion of wage claimant Eric Penn's prevailing wages in the amount of $2,607.65 on several public works projects.

- Respondents failed to timely pay the fringe benefits portion of wage claimant Starley Martell's prevailing wages in the amount of $2,813.25 on a public works project.

- OAR 839-025-0043(1) requires that contributions made to a fringe benefit program must be made on a regular basis but not less often than quarterly.

- Respondents are liable for $2000 ($1000 per violation) in civil penalties.

(Ex. X1a)

2) Respondents timely filed an answer and request for hearing on February 27, 2015. In their answer, Respondents denied violating ORS 279C.840 because the fringe benefit payments were ultimately paid, but admit "PORTLAND FLAGGING, LLC dba A D TRAFFIC CONTROL" was "not timely" in submitting fringe benefit payments for Penn and Martell. (Ex. X1b, ¶¶ 3, 5)

3) On March 2, BOLI's Contested Case Coordinator issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9:00 a.m. on April 21, 2015, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the Notice of Intent, a multi-language warning notice, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a–X2e)

4) A letter filed with the forum dated March 13, 2015, signed by "Evan Williams, Managing Member," stated that Evan Williams was the authorized representative for all of the Respondent companies and that he was "acting as President" for the companies. (Ex. X10)

5) On March 17, 2015, the Agency filed a motion for summary judgment, contending it was entitled to judgment as a matter of law. On March 19, 2015, the ALJ issued an interim order setting a deadline of March 24, 2015, for a written response by Respondents. Respondent timely filed a response on March 24, 2015. (Exs. X7, X8, X12)

6) On March 20, 2015, the ALJ granted the Agency's unopposed motion to consolidate Case Nos. 28-15 and 55-15.[3] (Ex. X9)

7) On April 3, 2015, the ALJ issued an interim order GRANTING the Agency's motion for summary judgment. The ALJ's interim order is reprinted[4] below:

"Introduction

"On February 20, 2015, the Agency issued a Notice of Intent to Assess Civil Penalties (NOI) against Respondents. Respondents timely filed an answer and request for hearing on February 27, 2015. The violations alleged in the NOI for 55-15 were: (1) Respondents failed to timely pay fringe benefits to wage claimants Eric Penn and Starley Martell for work on prevailing wage projects in violation of ORS 279C.840(1), OAR 839-025-0043 and OAR 839-025-0040; and (2) Respondents are liable for civil penalties pursuant to ORS 279C.865; OAR 839-025-0520; *former and current* OAR 839-025-0530(3)(a); and OAR 839-025-0540.

"The NOI for 55-15 requested civil penalties in the amount of $1000 per wage claimant based on the alleged violations.

"The Agency filed a motion for summary judgment in Case No. 55-15 on March 17, 2015, asserting that there is no genuine issue of material fact regarding Respondents' failure to pay unpaid wages. Respondents timely filed a response to the motion on March 24, 2015.

"On March 20, 2015, I granted the Agency's unopposed motion to consolidate Case Nos. 28-15 and 55-15. The hearing in Case No. 28-15 began on March 3, 2015, recessed on March 5, 2015, and will resume on April 8, 2015. Each party has requested that I consider the evidence submitted with the summary judgment filings and at hearing in Case No. 28-15 when ruling on the motion for summary judgment in Case No. 55-15.

"Summary Judgment Standard

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

[3] The two cases were consolidated so that the common facts could be presented in one hearing. For the sake of clarity and to assist the parties in understanding the forum's rulings, final orders will be issued separately in Case Nos. 28-15 and 55-15.

[4] Minor editorial changes for clarification were made in two places, as reflected by brackets.

> ' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].'
>
> "ORCP 47C.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's NOI, the Agency's argument made in support of its motion, and the exhibits submitted with the Agency's motion (including exhibits incorporated by reference from the summary judgment and hearing record in Case No. 28-15); and (2) Respondents' Answer, Respondents' argument opposing the Agency's motion, and the exhibits submitted in Respondents' response to the Agency's motion (including exhibits incorporated by reference from the summary judgment and hearing record in Case No. 28-15).

"ANALYSIS

"In its motion, the Agency argues that Respondents violated ORS 279C.840 by withholding fringe benefit amounts from the paychecks of two wage claimants and then failing to deposit the withdrawn amounts into a fringe benefit plan as required by ORS 279C.800(1)(a).

"1. Violations of ORS 279C.840

"It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013). Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1).

"*a. Summary of the Parties' Positions*

"The Agency points to Respondents' Exhibit R-7 and R-8, page 2, when asserting that Penn's and Martell's fringe benefits earned in 2012 were not posted to their accounts until November 18, 2013.

"Respondents argue that they are not in violation of ORS 279C.840 because 'the fringe benefit portion of these employee wages was in some cases paid late but they were paid.' Response, p. 1. Respondents further do not dispute the Agency's contention that Exhibits R-7 and R-8 demonstrate that

fringe benefit payments for wages earned in 2012 were not posted until September 30, 2013, and November 18, 2013. *Id.*

"At the hearing in Case No. 28-15, Agency Investigator Monique Soria-Pons testified that the Agency does not consider late fringe benefit payments in its calculations of unpaid prevailing wages, relying on the interpretation of the United States Department of Labor ('DOL') in determining valid fringe benefit contributions. In particular, Ms. Soria-Pons discussed Exhibit A-23 which states that it will not credit payments made retroactively into a benefit plan because those will not be credited by DOL.

"*b. Analysis*

"'Prevailing wage payments must be made to employees 'in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a).' ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the 'rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program.' It is clear that any timely (i.e. 'not less often than quarterly') contributions made to The Contractors' Plan would be valid. OAR 839-025-0043(1).

"However, to make late contributions, employers must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. *See, e.g.,* 29 CFR § 2510.3-102(d); 67 Fed. Reg. 15,051, 15,062 (March 28, 2002). There is no evidence in this case that the late contributions made to the accounts of Penn and Martell followed an appropriate delinquent contribution payback method. Rather, it appears that only the amounts deducted from the wage claimants' paychecks in 2012 were deposited into The Contractor's Plan in 2013 – much 'less often than quarterly.' Accordingly, I find that the contributions which Respondents made on September 30 and November 18, 2013, do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a).

"2. <u>Amount of Civil Penalties</u>

"Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ORS 279C.865; OAR 839-025-0530(3)(a). The Agency may assess a civil penalty in the amount of the unpaid wages or $1000, whichever is lesser. OAR 839-025-0540. In this case, the Agency seeks civil penalties of $1000 for each wage claimant. Given that the amount of fringe benefit payments owed to each wage claimant exceeds $1000, I hereby assess civil penalties in the amount of $1000 each [for the violations against] Penn and Martell [for a total of $2000].

"3. Analysis of Liability of the Multiple Respondents

Respondents admit that Portland Flagging LLC dba AD Traffic Control was not timely in submitting the fringe benefit payments of Penn and Martell. Answer, ¶ 3[,¶ 5]. Respondents deny the liability of the remaining Respondents. *Id.* Since the record at this time does not demonstrate the liability of the remaining Respondents, I find that only Portland Flagging LLC dba AD Traffic Control is liable for civil penalties. Liability as to the remaining Respondents will be addressed in the Proposed Order at the conclusion of the hearing in these matters.

"CONCLUSION

"The Agency's motion in Case No. 55-15 is **GRANTED** in part as to the civil penalties requested against Portland Flagging LLC dba AD Traffic Control, and is **DENIED** as to the remainder of the Respondents. The hearing will resume as scheduled at **9:00 a.m. on April 8, 2015**."

(Ex. X15)

8) The ALJ's ruling on the Agency's motion for summary judgment against Portland Flagging is hereby **AFFIRMED**.[5] Because the parties requested that the ALJ consider evidence in Case No. 28-15, the ALJ marked the following documents referenced in the ALJ's summary judgment ruling as exhibits in this case:

- A copy of the digital recording of the hearing for Case No. 28-15 has been marked as Ex. X20.
- A copy of Ex. A-23 from Case No. 28-15 has been marked as Ex. X21.
- A copy of Ex. R-7 from Case No. 28-15 has been marked as Ex. X22.
- A copy of Ex. R-8 from Case No. 28-15 has been marked as Ex. X23.

9) On April 10, 2015, the issue of the liability of the remainder of the Respondents was bifurcated from the claims against Portland Flagging, and then consolidated with Case Nos. 28-15, 37-13 and 14-14. The hearing for those consolidated matters has been postponed until pending default issues are fully resolved in related cases involving all Respondents. In the event the liability of the remaining Respondents proceeds to hearing, a separate Final Order will be issued addressing the joint liability allegations in all of those consolidated cases. (Ex. X22)

[5] The liability of the remaining Respondents has been separated from this case, as explained in Finding of Fact - Procedural No. 9 below.

10) The ALJ issued a proposed order on August 18, 2015, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondents filed any exceptions.

FINDINGS OF FACT – THE MERITS

1) Portland Flagging employed wage claimants Penn and Martell on various public works projects. (Exs. X1a, X-1b)

2) Portland Flagging used the assumed business name "A D Traffic Control." (Ex. X1b, ¶2)

3) In the year 2012, Portland Flagging withheld fringe benefit payments from the wages paid to Penn and Martell in excess of $1000 per worker. (Ex. X1a, X1b, ¶¶ 3, 5)

4) The funds Portland Flagging withheld from the paychecks of Penn and Martell in 2012 were not deposited into a fringe benefit plan until September 30, 2013, and November 18, 2013. (Ex. X22, X23)

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has the authority to assess civil penalties for violation of ORS 279C.840(1) and ORS 279C.800(1)(a). ORS 279C.865.

2) Prevailing wage benefit payments must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1).

3) Portland Flagging LLC employed wage claimants Eric Penn and Starley Martell, and violated ORS 279C.840(1) and ORS 279C.800(1)(a) by failing to make timely deposits to the fringe benefit accounts of Penn and Martell.

4) The imposition of $2000 in civil penalties for Portland Flagging's violations of these statutes is an appropriate exercise of the Commissioner's authority. ORS 279C.865; OAR 839-025-0530(3)(a).

OPINION

All allegations in the Agency's NOI against Portland Flagging were resolved in the ALJ's interim order granting the Agency's motion for summary judgment, which has been affirmed in this Final Order. The issue of the liability of the remaining Respondents has been bifurcated and that portion of the case was consolidated with Case Nos. 28-15, 37-13 and 14-14 into a separate proceeding. No further discussion is required as to the merits.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.540, ORS 279C.840(1), ORS 279C.845, OAR 839-025-0010(1), OAR 839-025-0035, and OAR 839-025-0050, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Portland Flagging LLC dba AD Traffic Control 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, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of **TWO THOUSAND DOLLARS ($2000.00)**, plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent Portland Flagging LLC dba AD Traffic Control complies with the Final Order.

_____

In the Matter of

BLUE GRYPHON, LLC and FLORA TURNBULL, individually as aider and abettor

Case No. 20-15
Final Order of Commissioner Brad Avakian
Issued November 24, 2015

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; and 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

[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.

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)

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)

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

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

[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.

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 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)

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)

[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.

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

34 BOLI ORDERS

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?"
>
> **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 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)

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

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."

34 BOLI ORDERS

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.

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

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

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

[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).

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.

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).

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).

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.[10] 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.[11] 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 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

[10] 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[.]"

[11] 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.

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"*[12] *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.

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

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.

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.[13] The forum's inclusion of such a

[13] 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

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.[14] The ALJ's computation follows the forum's precedent. Respondents' exception is overruled.

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

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elected governing body of a political subdivision in the state or any elected auditor of a city, county or metropolitan service district."

[14] *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).

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 Turnbul**l to cease and desist from violating the provisions of ORS 659A.199, OAR 839-010-0100, and ORS 659A.030(1)(g) relating to unlawful employment discrimination against whistleblowers.

In the Matter of

PORTLAND FLAGGING, LLC; A D TRAFFIC CONTROL SERVICES, LLC; TRI-STAR FLAGGING, LLC; PORTLAND SAFETY EQUIPMENT, LLC; PHOENIX CONSTRUCTION GROUP, INC.; SBG CONSTRUCTION SERVICES LLC; GNC CONSTRUCTION SERVICES LLC; and EVAN WILLIAMS

Case No. 28-15
Final Order of Commissioner Brad Avakian
Issued February 1, 2016

SYNOPSIS

Respondent Portland Flagging, LLC ("Portland Flagging"), A D Traffic Control Services, LLC ("A D Traffic"), and Tri-Star Flagging, LLC ("Tri-Star") failed to pay the prevailing wage rate to two workers on public works projects when they did not make timely payments to the workers' fringe benefit accounts. On behalf of one worker, the Commissioner ordered Portland Flagging and A D Traffic to pay remaining unpaid wages and liquidated damages in the amount of $2,069.00 plus interest. On behalf of a second worker, the Commissioner ordered Portland Flagging and A D Traffic to pay remaining unpaid wages and liquidated damages in the amount of $3,357.74 plus interest, and ordered Tri-Star to pay $404.78 plus interest.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Suite 1045, Portland, Oregon on the following dates: March 3, 5 and April 8, 9, 2015.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Evan Williams was the authorized representative for Portland Flagging, A D Traffic, Tri-Star, LLC; Portland Safety Equipment, LLC; Phoenix Construction Group, Inc.; SBG Construction Services LLC; GNC Construction Services LLC, and presented the case on behalf of those Respondents and himself. Respondent Kenya Smith was also present at the hearing.

The Agency called Compliance Specialist Monique Soria-Pons and Starley Martell (by telephone) as witnesses. Respondents called Alene Watkins and Kenya Smith as witnesses.

The forum received into evidence:

a) Administrative exhibits X1 through X29;
b) Agency exhibits A1 through A23, and A26 through A28.[1]
c) Respondents' exhibits R1, R2, R4, R10 and R11. Respondents' exhibits R7 and R8 were received for demonstrative purposes only, except that pages 2 and 49 of Exhibit R7 and pages 2, 4 and 6 of Exhibit R8 were not admitted for any purpose.

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 August 1, 2013, the Agency issued an Order of Determination (OOD) for Files 13-1378 and 13-1126 to A D Traffic. The OOD alleged that A D Traffic failed to pay wage claimants all prevailing wage rate wages owed, and requested an award of unpaid wages and liquidated damages on behalf of the wage claimants. (Ex. X1a)

2) An answer and request for hearing from A D Traffic was received by BOLI's Wage and Hour Division on September 13, 2013. In the answer, A D Traffic denied the Agency's allegations. (Ex. X1b)

3) On November 11, 2014, BOLI's Contested Case Coordinator issued a Notice of Hearing to Respondents A D Traffic, Tri-Star and Portland Flagging, the Agency, and Claimants setting the time and place of hearing for 9:00 a.m. on February 10, 2015, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a multi-language warning notice, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a–X2e)

[1] Exhibits A26 and A27 (spreadsheets prepared by the Compliance Specialist with calculations of remaining wages owed to Penn and Martell) were not officially offered or received into evidence during the hearing. However, the Compliance Specialist testified in detail as to how she arrived at the calculations in those spreadsheets by referring to Exhibits A5, A6 and A14 (timesheets and flagging job receipts provided to the Agency by Respondents). Given that A26 and A27 were referred to extensively throughout the testimony of the Compliance Specialist, it is helpful to have those exhibits as part of the case record. Therefore, the forum takes official notice of A26 and A27 for demonstrative or illustrative purposes only. The final computation of wages owed to Penn and Martell is based on the testimony at hearing and other exhibits admitted into evidence which support the contents of A26 and A27.

[2] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

4) On December 1, 2014, the ALJ issued an Interim Order seeking clarification as to the identity of Respondents, noting that the OOD listed A D Traffic as the sole employer, but the Notice of Hearing also listed Tri-Star and Portland Flagging in the case caption. The Agency filed a response on December 9, 2014, stating that the exclusion of Tri-Star and Portland Flagging from the OOD was an oversight, and that it would be filing an Amended OOD to include Tri-Star and Portland Flagging as Respondents. (Ex. X3, X7)

5) On January 7, 2015, a letter was submitted to the ALJ from Evan Williams which stated that he was the authorized representative and "acting as President" for A D Traffic, Tri-Star, Portland Flagging and Portland Safety Equipment. (Ex. 29)[3]

6) The Agency filed a motion for summary judgment on January 16, 2015, asserting that there is no genuine issue of material fact regarding Respondents' failure to pay unpaid wages. On January 21, 2015, the ALJ issued an Interim Order extending the deadline for filing the response to the summary judgment motion until January 26, 2015. Respondents' authorized representative Evan Williams timely filed a response to the motion on January 26, 2015. (Exs. X8 - X10)

7) The Agency issued an Amended Order OOD on January 28, 2015, which added Portland Flagging, Tri-Star, and Portland Safety Equipment as Employers. (Ex. X12)

8) On February 2, 2015, the ALJ issued an Interim Order postponing the hearing, and set a new hearing date of March 3, 2015. (Ex. X15)

9) The ALJ issued an interim order on February 4, 2015, granting the Agency's motion to compel documents relating to Respondents' corporate structures and relationships, including the names of Respondents' employees. After the Agency filed a supplemental motion to compel, on February 9, 2015, the ALJ issued an interim order requiring Respondents to provide the dates of employment for the employees of Tri-Star, A D Traffic and Portland Flagging. (Ex. X17, X19)

10) A telephone prehearing conference was held on February 12, 2015, to discuss concerns Respondents raised by email about complying with the Interim Order of February 9, 2015. On February 13, 2015, the ALJ issued an interim order requiring Respondents to provide copies of W-4 forms for the employees of Tri-Star, A D Traffic and Portland Flagging. (Ex. X20)

11) On February 20, 2015, the ALJ issued an interim order denying the Agency's motion for summary judgment. The ALJ's interim order is reprinted below:

[3] The original letter is in the file for Contested Case No. 37-13. The ALJ placed a copy of the letter, marked as Ex. X29, in the file for Contested Case No. 28-15.

"Introduction

"On August 1, 2013, the Agency issued an Order of Determination (OOD) for Files 13-1378 and 13-1126 to Respondent A D Traffic Control Services, LLC. On January 28, 2015, the Agency issued an Amended OOD which named the following additional Respondents in the caption: Portland Flagging LLC dba A D Traffic Control Services; Tri-Star Flagging LLC; and Portland Safety Equipment LLC.[4] The violations alleged in the OOD were: (1) Respondent A D Traffic Control Services, LLC was the employer of wage claimants Eric Penn and Starley Martell; (2) the employer failed to fully compensate wage claimants at the prevailing wage rates pursuant to ORS 279C.840; and (3) the employer failed to fully compensate wage claimants at daily overtime rates pursuant to ORS 279C.540.

"The OOD asserted that the employer owed the wage claimants $5,694.99, together with interest thereon. The OOD also asked that $5,694.99 in liquidated damages, along with interest, be assessed based on the employer's violations.

"The Agency filed a motion for summary judgment on January 16, 2015, asserting that there is no genuine issue of material fact regarding Respondents' failure to pay unpaid wages. On January 21, 2015, I issued an Interim Order extending the deadline for filing the response to the summary judgment motion until January 26, 2015. Respondents' authorized representative Evan Williams timely filed a response to the motion on January 26, 2015.

"Summary Judgment Standard

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> ' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].'

[4] Aside from adding the three additional Respondents to the caption, there were no other differences between the amended and the original OOD. Therefore, except when necessary, this ruling will refer to the operative charging document as simply the "OOD" without reference to the amendments in the caption of the amended pleading.

"ORCP 47C.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's OOD and Amended OOD, the Agency's argument made in support of its motion, and the exhibits submitted with the Agency's motion; and (2) Respondents' Answer, Respondents' argument opposing the Agency's motion, and the exhibits submitted in Respondents' response to the Agency's motion.

"ANALYSIS

"In its motion, the Agency argues that Respondents violated ORS 279C.840 by withholding fringe benefit amounts from the paychecks of two wage claimants and then failing to deposit the withdrawn amounts into a fringe benefit plan as required by ORS 279C.800(1)(a). It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013).

"1. Liability of Respondents Portland Flagging LLC dba A D Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC

"The Agency's motion asserts that 'Respondents' violated ORS 279C.800(1)(a). However, I note that the motion was submitted prior to the filing of the Amended OOD which added Portland Flagging LLC dba A D Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC as Respondents. At the time the motion was filed, A D Traffic Control Services LLC was the only named Respondent. Even if I were to consider the allegations against the three new Respondents, the Amended OOD contains no information about these newly added Respondents, and the text in the body of the Amended OOD only identifies A D Traffic Control Services, LLC as the 'employer.' There is no reference to the other three Respondents and no explanation of their role in this matter. Finally, while the Agency's exhibits contain information suggesting a relationship between the newly added Respondents and A D Traffic, the documents fail explain the role of those three Respondents in relation to the wage claimants this matter and there is no sworn testimony from an affidavit or declaration which explains the significance of the documents. Therefore, to the extent the Agency is requesting summary judgment on behalf of Respondents Portland Flagging LLC dba A D Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC, the Agency's motion is **DENIED** as to those Respondents.

"2. Liability of Respondent A D Traffic Control Services LLC for Unpaid Wages

"As previously stated, the Agency asserts that A D Traffic Control Services LLC was the employer of two wage claimants, and that it withdrew fringe benefit funds from the claimants' paychecks without depositing those amounts into a fringe benefit plan or otherwise paying the amounts to them. The Agency asserts that the alleged violations occurred between May 4, 2011 – April 12, 2013, for Eric Penn, and from August 13, 2012 – October 14, 2012, for Starley Martell. Respondents do not dispute that A D Traffic Control Services, LLC employed the wage claimants or that fringe benefit funds were withdrawn from the wage claimants' paychecks. However, Respondents argue that all of the deducted fringe benefit payments have been deposited into The Contractors Plan. Accordingly, Respondents contend that they do not owe any unpaid wages to the wage claimants.

"a. Summary of the Agency's Evidence

"In support of its motion the Agency submitted copies of the following documents for each wage claimant:

- Completed wage claim form and assignment of wages. (Exs. 1, 10)
- BOLI's Notices of Claim to Respondents. (Exs. 3, 12)
- Computer print-outs from the Oregon Secretary of State's website regarding Respondents. (Ex. 2)
- Correspondence from the Agency to Respondents during the investigation, including the Agency's calculations as to wages determined to be owed to claimants. (Ex. 4, 7, 9, 15)
- Payroll records Respondents provided to the Agency. (Exs. 5, 6, 13, 14)
- The Agency's original OOD. (Ex. 16)
- Return of Service documents from a Clackamas County Sheriff's Deputy, reflecting service on the registered agent for A D Traffic Control Services LLC, on August 2, 2013. (Ex. 17)
- A Notice of Intent to Issue Final Order by Default to Respondents issued by the Agency on August 19, 2013. (Ex. 18)
- Letters that Respondents submitted to the Agency dated September 10, 2013 and September 13, 2013. (Exs. 19 and 20)

"Additionally, the Agency submitted the following on behalf of Claimant Penn:

- A document that purports to be an account statement from Claimant Penn's retirement plan for January 1, 2013 to March 31, 2013. The statement reflected a vested balance of $1542.24 and indicated that no contributions were made during that time period. (Ex. 8)

"The following was also submitted on behalf of Claimant Martell:

- A BOLI Notice of Notice of Public Works which stated that construction on the French Creek Road (Detroit) was a public works project. (Ex. 11)

"The Agency argues that, based on its calculations, Claimant Penn was owed $2,607.65 and Claimant Martell was owed $3,087.34 in unpaid wages. The Agency further asserts that Respondents are liable for liquidated damage in an additional amount equal to the unpaid wages, pursuant to ORS 279C.855.

"b. Summary of Respondents' Opposition

"In their Opposition, Respondents submitted the following evidence and arguments:

- Claimant Penn's first timesheet and payroll. (Ex. R-1[5])
- Claimant Penn's letter of resignation dated May 29, 2014 and marked 'received' on June 3, 2014. (Ex. R-2)
- Two pages of a 'Transaction History' computer print-out and a one page 'CITT Monthly Hours and Contribution Report' that Respondents have identified as Claimant Penn's 'fringe statement and NWCC contribution.' (Ex. R-3)
- Claimant Martell's first timesheet and payroll. (Ex. R-4)
- Claimant Martell's letter of resignation. (Ex. R-5)
- A one page 'Transaction History' computer print-out and three pages of 'CITT Monthly Hours and Contribution Report' that Respondents have identified as Claimant Martell's 'fringe statement and NWCC contribution.' (Ex. R-6)

"Respondents argue that all fringe benefit payments for both claimants were made for the 2011 and 2013 years, but that the fringe benefit plan payments for the 2012 year 'were paid late but were in fact paid to [each] claimant while still employed.' They further argue that no liquidated damages are due since there were no unpaid wages.

"c. *Admissibility of Exhibits*

"Neither the Agency nor Respondents submitted any affidavit, declaration or sworn testimony to authenticate their respective exhibits in conformance with ORCP 47D. *Demaray v. Dept. of Envtl. Quality*, 127 Or App 494, 497, 873 P2d 403, rev den, 319 Or 625 (1994). However, unless a party objects to the authenticity of an exhibit, all documents submitted by each side can be

[5] Respondents' individual exhibits were not labeled with numbers, but were attached to a Case Summary Form which listed the exhibits and identified them by number.

considered as part of the record for purposes of this motion. *See Drey v. KPFF, Inc.*, 205 Or App 31, 36, 132 P3d 663, 665 (2006), citing *Splinters, Inc. v. Andersen/Weitz,* 192 Or App 632, 638, 87 P3d 689 (2004). Since no party objected to the authenticity of the opposing party's exhibits, I will consider all of the exhibits when ruling on this motion.[6]

"In Respondents' Opposition, they argue that they did not receive various documents from BOLI, specifically:

- Agency Exhibit 2 (the Notice of Claim referenced in paragraph b),
- Agency Exhibits 7 and 9 (Agency letters to Respondents referenced in paragraphs f and h), and
- Agency Exhibit 15 (Agency letter and spreadsheet referenced in paragraph l).

"Respondents' Opposition, p. 1.

"Respondents further assert that Agency Exhibits 13 and 14 were provided to the Agency on June 26, 2013, not July 3, 2013, as stated in the Agency's motion. Accordingly, in the absence of sworn testimony, an affidavit or declaration which establishes the date these documents were sent to and/or received from Respondents, I find that Respondents have raised an issue as to the dates Agency Exhibits 2, 7, 9 and 15, and the date Exhibits 13 and 14 were received by BOLI. *See Sisters of St. Joseph of Peace, Health, & Hosp. Servs. v. Wyllie*, 120 Or App 474, 477, 852 P2d 941, 942 (1993) (noting there was a genuine dispute concerning a material issue of fact when the evidence consisted of an unauthenticated consent form signed by an unknown person, and the defendant said that the signature was not his). Therefore, when ruling on this motion, I will not consider the dates Exhibits 2, 7, 9, 13, 14 and 15 were allegedly sent to or received from Respondents.

"c. *Analysis of the Admissible Evidence*

"i. Claimant Penn

"The Agency's Prevailing Wage Specialist calculated the unpaid wages owed to Claimant Penn as follows:

	$12,158.93	(Total Earned)
(minus)	$7,998.26	(Wages Paid)
(minus)	$1,553.02	(Contributions to The Contractors Plan)

[6] At the upcoming hearing, the parties are encouraged to enter stipulations as to the authenticity of documents where there is agreement or, if not in agreement, the parties should be prepared to present testimony to explain what each document is, who prepared or wrote on the document, where the document came from and when it was sent and/or received.

Total Wages Due: $2,607.65

"(Agency Ex. 9, p. 2) The alleged underpayments occurred between the July 16, 2011, and April 6, 2013, pay periods. The 'Total Wages Due' amount of $2,607.65 included $2,305.38 in fringe benefit payments that were allegedly not made into Claimant Penn's retirement account on his behalf.[7] The Agency also submitted a statement from The Contractors Plan for the time period January 1 – March 31, 2015, that showed an ending balance in the account of $1,542.24, and no contributions made during that time period. (Agency Ex. 8)

"The remainder of the alleged unpaid wages owing to Claimant Penn appear to be attributable to unpaid overtime for the weeks ending September 1, 2012 and September 15, 2012, and underpayment for hours worked in the week ending September 22, 2012. *Id.* An explanation as to how this additional amount was calculated was not provided. When viewing the evidence in the light most favorable to Respondents for summary judgment purposes, I am unable to determine how the additional $302.27 in alleged unpaid wages was calculated and find that the Agency has not satisfied its burden as to this amount of alleged unpaid wages.

"Next, I evaluate the response in Respondents' Opposition to the allegations of $2,305.38 in unpaid wages due to nonpayment of fringe benefit plan contributions.

"Respondents assert that all fringe benefit contributions for Claimant Penn were paid on time in 2011 and 2013, but that 'payments for the year 2012 were paid late but were in fact paid to the claimant while still employed.' (Respondents' Opposition, p. 1) Respondents submitted exhibits that they claim demonstrate that they made the following contributions to The Contractors Plan on Claimant Penn's behalf:

Date	Contribution
9/30/2011	$178.40
9/30/2011	$1,318.90
8/31/2012	$1,050.95
9/30/2012	$811.73
3/31/2013	$128.50
4/30/2013	$67.46
4/30/2013	$276.28
Total	**$3,832.22**

[7] To arrive at the figure of $2,305.38, I subtracted the amount of $1,553.02 at the bottom of the "Fringes Paid" column of the Compliance Specialist's spreadsheet from the amount of $3,858.40 in the "Fringes Due" column.

"(Respondents' Ex. R-3, pp. 1-2) Respondents also submitted a 'CITT Month Hours and Contribution Report' that appears to reflect payments made on October 19, 2012, on behalf of Claimant Penn for the September 2012 time period. (Respondents' Ex. R-3, p. 3) However, it is unclear from the CITT report whether this payment is the same as the $811.73 payment reflected in the table above. Respondents' exhibits appear to directly contradict the spreadsheet submitted by the Agency, as well as Claimant Penn's statement from The Contractors Plan. (Compare Agency Exs. 8 and 9, p. 2 with R-3, pp. 1-3) The forum has previously recognized that factors such as fluctuating market conditions can account for differences between retirement account statement balances and the amounts contributed by an employer. *See, e.g. Green Thumb*, 32 BOLI at 198. Without sworn testimony from witnesses knowledgeable about the contributions to the plan, the evidence is unclear as to the amounts contributed and the dates on which contributions were made. Accordingly, viewing the evidence submitted by both sides in the light most favorable to Respondents, I find that there is a question of fact as to whether there are any unpaid wages owed to Claimant Penn. Therefore, the Agency's motion for summary judgment is **DENIED** as to Claimant Penn.[8]

"ii. Claimant Martell

"The Agency's Prevailing Wage Specialist calculated the unpaid wages owed to Claimant Martell as follows:

	$8,728.38	(Total Earned)
(minus)	$5,601.04	(Wages Paid)
(minus)	$0	(Contributions to The Contractors Plan)
Total Wages Due:	$3,087.34	

"(Agency Ex. 15, p. 2) The alleged underpayments occurred between the August 18, [2012], and October 6, 2012, pay periods.

"Respondents assert that all fringe benefit contributions for Claimant Martell were paid on time in 2013, but that 'payments for the year 2012 were paid late but were in fact paid to the claimant while still employed.' (Respondents' Opposition, p. 1) Respondents submitted an exhibit that they claim demonstrates that they made the following contribution to The Contractors Plan on Claimant Martell's behalf:

[8] Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1). It is unclear from the evidence in this case what affect any late payments may have on the Agency's claims. However, since the OOD alleges claims for *unpaid* wages and there is no claim for *late* retirement plan contributions, there is no need for me to examine that issue at this time.

"Date	Contribution
11/30/2012	$2,534.60

"(Respondents' Ex. R-6, p. 1) Respondents also submitted three 'CITT Monthly Hours and Contribution Reports' that appear to reflect payments made on behalf of Claimant Martell on September 21, 2012, and November 15, 2012, for the September – October 2012 time period. (Respondents' Ex. R-3, p. 3) However, it is unclear from the CITT reports whether these payments are the same as that $2,534.60 payment referenced above. Respondents' exhibits appear to directly contradict the spreadsheet submitted by the Agency outlining the alleged unpaid fringe benefit payments. Without sworn testimony from witnesses knowledgeable about the contributions to the plan, the evidence is unclear as to the amounts contributed and the dates on which contributions were made. Accordingly, viewing the evidence submitted by both sides in the light most favorable to Respondents, I find that there is a question of fact as to whether there are any unpaid wages owed to Claimant Martell. Therefore, the Agency's motion for summary judgment is also **DENIED** as to Claimant Martell.[9]

"3. Liability of Respondents for Liquidated Damages

"Because the Agency has not yet established whether any of the Respondents violated ORS 279C.840, there is a question of fact as to whether Respondents are responsible for liquidated damages pursuant to ORS 279C.855(1). Therefore, the Agency's motion for summary judgment requesting liquidated damages is **DENIED.**

"CONCLUSION

"The Agency's motion is **DENIED** in its entirety. The hearing for Case No. 28-15 will begin as scheduled at **9:00 a.m. on March 3, 2015**, as stated in my Interim Order of February 2, 2015."

(Ex. X21)

The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

12) A telephone prehearing conference was held on February 26, 2015, to discuss concerns raised by the Agency concerning the upcoming hearing date. The Agency indicated it would be filing another amended OOD and would be moving to consolidate this matter with Case No. 55-15 because it arises out of the same facts. The ALJ issued an interim order which stated, in part:

[9] As referenced above with respect to Claimant Penn, the OOD has asserted claims for *unpaid* wages and there is no claim for *late* retirement plan contributions. Therefore, there is also no need for me to examine that issue with respect to Claimant Martell at this time.

> "After a discussion of the above-referenced issues during the conference and the fact that Respondents were entitled to the allotted time to respond to the amended allegations, I proposed that the hearing proceed on March 3, 2015, to determine only the issues of whether the wage claimants were entitled to unpaid wages and liquidated damages. The remaining issues would be addressed at a hearing on a later date. Both Ms. Ortega and Mr. Williams indicated their agreement with this proposal.
>
> "Therefore, I hereby rule that the hearing date of March 3, 2015, remains intact and will only address the topics of whether the wage claimants are entitled to unpaid wages and liquidated damages. The record will remain open as to the remainder of the issues to be addressed. At the conclusion of the March 3 hearing, I will hold a conference with Ms. Ortega and Mr. Williams to schedule a date for a hearing on the remaining issues in the case."

(Ex. X23)

13) On February 27, 2015, the Agency issued a Second Amended OOD which added Phoenix Construction Group, SBG Construction Services LLC, GNC Construction Services, LLC and Evan Williams as Employers. Summarized, the Second Amended OOD alleged:

- Respondents failed to timely pay the fringe benefits portion of wage claimant Eric Penn's prevailing wages in the amount of $2,607.65 on public works projects.
- Respondents failed to timely pay the fringe benefits portion of wage claimant Starley Martell's prevailing wages in the amount of $3,087.34 on a public works project.
- Respondents were required to compensate the wage claimants at not less than the prevailing wage states pursuant to ORS 279C.840 and daily overtime rates pursuant to ORS 279C.540 when work was performed on public works projects.
- Pursuant to ORS 279C.855 and OAR 839-025-0080, Respondents are liable for $5,694.99 in unpaid prevailing wages due and $5,694.99 in liquidated damages.

(Ex. X24)

14) The contested case hearing in this matter began on March 3, 2015, and went into recess that afternoon at Respondents' request due to a possible medical emergency. (Hearing Record)

15) On March 4, 2015, the ALJ issued an interim order summarizing rulings made during the hearing which stated:

> "The purpose of this order is to summarize the ruling I made on the record at yesterday's hearing as to information Respondents sought to introduce into

evidence regarding contributions made to The Contractor's Plan, specifically Exhibits R-7 at pages 2 and 49 and R-8 at pages 2, 4-6.[10] Those pages are not admitted into evidence, but the issue will be handled as follows:

- Respondents may submit The Contractors Plan documents that were referenced by Kenya Smith yesterday which she said were received in an email from Nancy Caldwell. These documents must be submitted to BOLI's Contested Case Coordinator, with copies to Ms. Ortega and me, no later than 5:00 pm today. Please submit both these by both hard copy and email.

- Respondents may call Ms. Caldwell as a telephone witness when the hearing re-convenes tomorrow. Respondents must "reply all" to the email sent to the participants this morning as soon as possible to let me know when Ms. Caldwell will be available to testify by telephone tomorrow.

- Respondents may submit signed copies of the CITT contribution reports which were on pages 4-6 of Exhibit 8. These documents must be submitted to BOLI's Contested Case Coordinator, with copies to Ms. Ortega and me, no later than 5:00 pm today. Please submit both these by both hard copy and email.

- The Agency has the right to object to any of the new evidence that is offered at hearing tomorrow.

- If the Agency determines that additional witnesses or exhibits need to be offered into evidence to address any new information provided by Respondents, Ms. Ortega can notify me of that tomorrow and we will discuss a procedure to allow the Agency to submit additional witnesses and exhibits, if necessary.

- Kenya Smith must be present when the hearing re-convenes tomorrow so that Ms. Ortega can continue her cross examination of the witness.

"I have not yet ruled that any of the above-referenced testimony or documents is admissible. At this time the hearing is scheduled to re-convene at **9:00 a.m. tomorrow, Thursday, March 5, 2015**."

(Ex. X24a)

16) The hearing reconvened on March 5, 2015, and went into recess. On March 9, 2015, the ALJ issued an interim order stating:

[10] This information was also summarized in an email sent to the participants.

"This Interim Order will summarize the rulings made on the record when the hearing adjourned Thursday, March 5, 2015:

- At the Agency's request, I am allowing the Agency to submit revised spreadsheets with corrections to the amount of wages owed to both wage claimants. The revised spreadsheets must be filed and served no later than **March 13, 2015**. I have not yet ruled that the revised spreadsheets are admissible, and Respondents retain the right to object to any revised spreadsheets when the documents are offered into evidence by the Agency.

- Respondents are permitted to file an addendum to their case summary for the sole purpose of introducing additional exhibits and/or testimony in response to any revisions made to the spreadsheets by Ms. Soria-Pons. Any addendum to Respondents' case summary must be filed by **March 31, 2015**.

- The hearing will re-convene at **9:00 a.m. on April 7, 2015**, at which time the Agency may call Compliance Specialist Monique Soria-Pons to testify about any revisions made to the spreadsheets.

- At the conclusion of the proceedings on April 7, 2015, the record will remain open with respect to the revised allegations in the Second Amended Order of Determination and we will discuss a date for concluding the hearing to address those issues.

* * *"

(Ex. X25)

17) A letter filed with the forum dated March 13, 2015, signed by "Evan Williams, Managing Member," stated that Evan Williams was the authorized representative for all of the Respondent companies and that he was "acting as President" for the companies named in that action. (*In the Matter of Portland Flagging, LLC*, 34 BOLI Orders 208, __ (2015))

18) On March 20, 2015, the ALJ granted the Agency's unopposed motion to consolidate Case Nos. 28-15 and 55-15.[11] (Ex. X26)

19) On April 6, 2015, the Agency filed a letter with notice that it was arranging for security to be present when the hearing resumed due to safety concerns. Respondents objected to the need for security, and the parties were permitted to state their positions regarding the need for security when the hearing reconvened on April 8, 2015. The Agency referenced comments made by Evan Williams and presented documentation of his criminal history. Respondents disagreed that the criminal history

[11] The two cases were consolidated so that the common facts could be presented in one hearing without duplication of evidence. For the sake of clarity and to assist the parties in understanding the forum's rulings, proposed and final orders will be issued separately in Case Nos. 28-15 and 55-15.

was relevant. The ALJ overruled Respondents' objections. An Oregon State Police Trooper was present for all remaining proceedings. (Ex. X28, Hearing Record)

20) The hearing reconvened on April 8, 2015, and recessed after closing arguments on April 9, 2015. (Hearing Record)

21) On April 10, 2015, the issue of the liability of the remainder of the Respondents was bifurcated from the claims against Portland Flagging, and then consolidated with Case Nos. 28-15, 37-13 and 14-14. The hearing for those consolidated matters was postponed until pending default issues were fully resolved in related cases involving all Respondents, and those will be addressed in a separate Final Order. (*In the Matter of Portland Flagging, LLC*, 34 BOLI 208, __ (2015))

22) The ALJ marked a copy of a printout of the following website as Ex. X27: http://www.oregon.gov/BOLI/WHD/PWR/docs/PWR_FAQ_04-2014.pdf. The document was attached as an appendix to the Proposed Order. (Ex. X27)

23) The ALJ issued a proposed order on January 12, 2016, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondents filed any exceptions.

FINDINGS OF FACT – THE MERITS

1) Portland Flagging LLC dba A D Traffic Control employed wage claimants Penn and Martell on various public works projects in 2011 and 2012. (*In the Matter of Portland Flagging, LLC*, 34 BOLI 208, __ (2015))

2) With respect to Martell, the Notice of Public Works for the French Creek project Martell reflected that Portland Flagging was the flagging subcontractor. Portland Flagging operated under the assumed business name of "A D Traffic." Time sheets, payroll records and retirement plan contribution statements for Martell and Penn during 2011 and 2013 all use some form of the name "A D Traffic." The statement for Martell's account with The Contractors Plan is addressed to "A D Traffic Control Services, LLC." Throughout the contested case process, Portland Flagging and A D Traffic shared the same business address. (Exs. A5, A6, A11, p. 2, A13, A14; *In the Matter of Portland Flagging, LLC*, 34 BOLI 208, __ (2015); Hearing Record)

3) Martell did not receive timely prevailing wage rate wages earned in the amount of $2,326.88, which represents $233.16 in unpaid wages and overtime wages and $2,093.72 in late prevailing wage fringe benefit payments. (Testimony of Martell & Soria-Pons; Exs. A13, A14, A27)

4) When calculating whether prevailing wage fringe benefits payments that are owed to wage claimants, the Wage and Hour Division has a practice of crediting amounts an employer made into a claimant's fringe benefit account when the Division receives reliable documentation verifying that contributions were made. (Testimony of Soria-Pons)

5) Some funds were deposited into Martell's fringe benefit account on November 18, 2013. (Ex. R11)

6) The amount owing to Martell should be reduced by amounts in her fringe benefit account totaling $2,583.95. (Stipulation of the Parties)

7) A total of $3,358.86 was deducted from Penn's paychecks in 2011 and 2012 as fringe benefits. (Testimony of Soria-Pons; Exs. A5, A6, A26, R10)

8) Deposits were made into Penn's fringe benefit account for A D Traffic as follows:

$1,318.90 on November 7, 2011
$178.40 on November 8, 2011
$1,050.95 on November 18, 2013
$811.73 on September 13, 2013
Total: $3,359.98

(Ex. R10, p. 4)

9) The funds Portland Flagging and A D Traffic withheld from the paychecks of Penn and Martell in 2011 and 2012 were not deposited within the calendar quarter in which they earned those wages. (Testimony of Soria-Pons; Stipulation of the Parties; Ex. R10)

10) Tri-Star Flagging, LLC employed Penn on the Rose City project during March and April of 2013. (Exs. A5, A6)

11) Fringe benefit payments were withheld from Penn's paycheck while he worked for Tri-Star and were deposited into his Tri-Star fringe benefit account on the following dates:

Payroll Week Ending Date	Fringe amount withheld	Fringe Account Deposits
3/30/2013	$128.50	$128.50 on June 27, 2013
4/6/2013	$276.28	$276.28 on October 31, 2013
Total	$404.78	

(Testimony of Soria-Pons; Exs. A5, A26, R10)

12) All witnesses were credible, with the exception that on some occasions the testimony of Watkins and Smith about specific work hours, payroll records and deposits conflicted with what was in evidence in the exhibits. The forum has only credited their testimony on those issues when it was consistent with the documents in evidence. (Hearing Record)

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay the wage claimants any unpaid wages and liquidated damages, plus interest, for violations of ORS 279C.840(1) and ORS 279C.540. ORS 279C.855(1); ORS 652.332; OAR 839-025-0080.

2) Prevailing wage benefit payments must be made on a regular basis and not less often than quarterly. To make a timely quarterly prevailing wage rate fringe benefits contribution, an employer must contribute to an employee's fringe benefit plan on or before the 15th day of the month following the close of the calendar quarter. For employers who use the standard calendar year, a calendar quarter means the period of three consecutive months ending on March 31, June 30, September 30 or December 31.

3) Portland Flagging and A D Traffic, jointly employed wage claimant Starley Martell, and violated ORS 279C.840(1) and ORS 279C.800(1)(a) by failing to timely pay $2,326.88 in unpaid wages.

4) Since a violation of ORS 279C.840 was established, Portland Flagging and A D Traffic are also responsible for $2,326.88 in liquidated damages to Martell. ORS 279C.855(1).

5) After subtracting late payments made to Martell's fringe benefit account, Portland Flagging and A D Traffic owe Martell $2,069.81 plus interest.

6) Portland Flagging and A D Traffic jointly employed wage claimant Eric Penn from July 2011 to September 2012, and violated ORS 279C.840(1) and ORS 279C.800(1)(a) by failing to timely pay $3,358.86 in unpaid wages. ORS 279C.855(1).

7) Since a violation of ORS 279C.840 was established, Penn is also owed $2,326.88 in liquidated damages from Portland Flagging. ORS 279C.855(1).

8) After subtracting late payments made to Penn's fringe benefit account, Portland Flagging and A D Traffic owe Penn $3,359.98 plus interest.

9) Tri-Star employed wage claimant Eric Penn in March and April 2013, and violated ORS 279C.840(1) and ORS 279C.800(1)(a) by failing to timely pay $404.78 in unpaid wages.

10) Since a violation of ORS 279C.840 was established, Penn is also owed $404.78 in liquidated damages from Tri-Star. ORS 279C.855(1).

11) After subtracting late payments made to Penn's fringe benefit account, Tri-Star owes Penn $404.78 plus interest.

12) The prejudgment interest owing to Penn and Martell accrued on the date their fringe benefit plan deposits were due until the date those amounts were either paid to them as wages or deposited into their fringe benefit accounts on their behalf.

OPINION

In the Second Amended OOD, the Agency asserts that Martell is owed $3,087.34 and Penn is owed $2,607.65 in prevailing wage rate wages. During a recess of the hearing, the Agency's Compliance Specialist revised the Agency's calculations to take into account the evidence offered by Respondents to dispute the calculations in her initial spreadsheets. When the hearing resumed, she testified in detail about her revised calculations of wages owing to Martell in the amount of $2,326.88, which represented $233.16 in unpaid wages and overtime wages and $2,093.72 in prevailing wage fringe benefit payments. She also testified in detail to explain her revised calculations of wages owing to Penn in the amount of $2,416.64, which represented $154.28 in unpaid wages and overtime wages and $2,262.35 in unpaid prevailing wage fringe benefit payments. During her testimony, she cross-referenced the timesheets for each worker to support the calculations in her testimony. Respondents admitted that the fringe benefit payments owed to Martell and Penn were not timely deposited.

The Agency and Respondents stipulated that $2,583.95 amount of fringe benefit payments were paid into an account with The Contractor's Plan in Martell's name. Respondents contend that while some fringe benefit contributions were paid late, the funds were ultimately deposited into the account of Penn. The Agency disputes that contention.

A. Failure to Pay the Prevailing Wage Rate

It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013). Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1). Prevailing wage payments must be made to employees "in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a)." ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the "rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program." In a companion case involving civil penalties for this same conduct, the forum ruled that the late contributions to the accounts of Penn and Martell do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a). *In the Matter of Portland Flagging, LLC*, 34 BOLI Orders 208, __ (2015).

The prevailing wage rate regulations do not provide a definition of the term "quarterly," but the Agency has provided the following guidance on BOLI's website:

"'Not less often than quarterly' means that the fringe benefit portion of wages must be contributed to a bona fide plan, fund or program at least once every three months within an established consecutive twelve month period. The contribution must represent payment to the plan, fund or program for amounts earned in the three month period immediately prior to the contribution date.

"An established twelve month period may be a calendar year, fiscal year, plan year, or other consecutive twelve month period as determined by the employer. The beginning of the twelve month period may be changed only if the change is intended to be permanent, and is not designed to evade the timely payment of contributions into a bona fide plan, fund or program. *If an employer does not determine a consecutive twelve month period the default period shall be a calendar year; that is, from 12:00 midnight on January 1 to 11:59 p.m. December 31, each year.*

"*As an example, using the calendar year as the established consecutive twelve month period, a contractor or subcontractor establishes a contribution date of April 15 for the payment of fringe benefits earned between January 1 and March 31 into the plan, fund or program; consequently, amounts earned between April 1 and June 30 must be contributed into the plan, fund or program on or before July 15; amounts earned between July 1 and September 30 must be contributed into the plan, fund or program on or before October 15; and amounts earned between October 1 and December 31 must be contributed into the plan, fund or program on or before January 15*."

(X27, *Prevailing Wage Rate: FAQ's*, p. 6 (emphasis added)). Using the formula set forth in the Agency's example, the quarterly contribution schedule for employers who either use the standard calendar year or who have not determined their own consecutive 12-month period is as follows:

Payroll Dates	Fringe Benefit Account Contribution Deadline
January 1-March 31	April 15
April 1-June 30	July 15
July 1-September 30	October 15
October 1- December 31	January 15

An Agency's interpretation of its own rule is entitled to deference "if that interpretation is plausible and is not inconsistent with the rule in its context or with some other source of law." *AT & T Corp. v. Dept. of Rev.*, 357 Or 691, 702, 358 P3d 973, 978 (2015). The Agency's interpretation, as articulated above, is consistent with other Oregon laws which define a "calendar quarter" as "the period of three consecutive months ending on March 31, June 30, September 30 or December 31." *See, e.g.* ORS 657.010(4)(unemployment tax contribution); ORS 314.515(1)(outlining installment

schedule for payment of a corporation's estimated tax to the Department of Revenue).[12] Therefore, the above-referenced quarterly payment schedule should be applied to the facts of this case, because the Agency's interpretation of the regulation is "plausible and . . . not inconsistent with the rule in its context or with some other source of law." *AT & T Corp.*, 357 Or at 702.

The Compliance Specialist's calculations also included some unpaid overtime wages. Subcontractors required by ORS 279C.540 to pay overtime wages must pay overtime wages for all hours worked on Saturdays. Those wages must be paid on the subcontractor's "regular payday." The Agency sustained its burden in proving that those wages were not paid.

Thus, the Agency sustained its burden of proof in demonstrating that the untimely deposit of funds into the fringe benefit accounts of Penn and Martell violated the requirement to pay the prevailing wage rate.[13]

B. Liquidated Damages

A "subcontractor . . . that violates the provisions of ORS 279C.840 is liable to the workers affected . . . in an additional amount equal to the unpaid wages as liquidated damages." ORS 279C.855(1). Since violations of ORS 279C.840 were established, Martell and Penn are entitled to an award of liquidated damages equal to the amount of unpaid wages.

C. Identity of Employers and Calculation of Amounts Owed

Subcontractors who fail to pay prevailing wages are liable to the workers affected for the unpaid wages and liquidated damages. ORS 279C.855(1). The evidence established that at various times Martell and Penn worked as flaggers for either Portland Flagging, A D Traffic and/or Tri-Star. Therefore, it is necessary to examine

[12] With respect to retirement plan contributions, the Agency's deadlines appear to offer a more generous timeframe to employers than the current federal standards which require contributions to pension accounts to be made on a more frequent basis. *See, e. g.* 29 CFR 2510.3-102(b)(1). *C.f.* 29 CFR 2510.3-102(c) (allowing up to 90 days for contributions to welfare benefit plans, which are also included in the definition of a fringe benefit account for purposes of prevailing wage law).

[13] The exact amounts to be paid to each claimant are explained in detail in Section C, *infra*. The funds that must be paid to Penn exceed what was requested by the Agency in the OOD and at hearing, and the amounts to be paid to Martell are lower than the Agency sought. This is primarily due to the fact that there was evidence introduced by Respondents at hearing that was not available to the Compliance Specialist when she prepared and updated her spreadsheet calculations. "[D]amages flowing from statutory wage violations are awarded based on the actual evidence at the hearing, regardless of the allegations in the OOD." *In the Matter of Charlene Marie Anderson dba Domestic Rescue*, 33 BOLI 253, 261 (2014), *citing In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *aff'd without opinion, Cisneros v. Bureau of Labor and Industries*, 187 Or App 114, 66 P3d 1030 (2003). *See also In the Matter of C.S.R.T., LLC, and Robert P. Sabo,* 33 BOLI 263, 271 (2014) (noting that the commissioner has the authority to award penalty wages exceeding those sought in the OOD).

which employers are responsible for unpaid wages and liquidated damages, and the exact amounts owing to each claimant.

1. Martell

Time sheets labeled as "job receipts" show that Martell worked on the Oregon 22 – French Creek Road US20 project ("French Creek"). (Ex. A14) Portland Flagging previously admitted that it employed Martell. (Finding of Fact – Merits, No. 1) Thus, Portland Flagging is a subcontractor liable for all of the unpaid wages and liquidated damages owing to Martell. The evidence at hearing also established that A D Traffic Control was a joint employer of Martell for her work on that subcontract for the reasons set forth below.

In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Laura M. Jaap*, 30 BOLI 110, 126 (2009). To determine whether there is a joint employment relationship, the forum has previously relied on the federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2 and prior final orders applying the regulation. A joint employment relationship is established under the FLSA when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. 29 C.F.R. § 791.2.

The forum previously found that an individual respondent and a corporate respondent jointly employed a claimant when they: (1) shared an interest in the property being developed on a construction site; (2) the individual respondent controlled and directed the work performed by claimant and other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name; (3) the corporate respondent maintained an office where claimant and other laborers submitted their timesheets and controlled, to some extent, how, when, and whether claimant would be paid; and (4) the facts supported an inference that the claimant was under the simultaneous control of Respondents and simultaneously performed services for both. *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 299-301 (2007), *aff'd* 243 Or App 389, 256 P.3d 1099 (2011). The forum has also found an individual and two corporate respondents to be liable as joint employers when they shared work crews and equipment, the claimant performed work that benefited all three respondents, and the claimant was issued separate paychecks drawn on the accounts of each respondent. *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258, 271 (1995).

With respect to Martell, the Notice of Public Works for the French Creek project reflected that Portland Flagging was the flagging subcontractor. (Ex. A11, p. 2) Portland Flagging previously admitted that it operated under the assumed business name of "A D Traffic." Time sheets, payroll records and retirement plan contribution

statements for Martell all use some form of the name "A D Traffic." The statement for Martell's account with The Contractors Plan is addressed to "A D Traffic Control Services, LLC." Throughout the contested case process, Portland Flagging and A D Traffic shared the same business address. Considering all of these factors together, the Agency has sustained its burden in establishing that Martell was jointly employed by both Portland Flagging and A D Traffic Control. Therefore, both corporate entities are responsible for the amounts owing to her.

At the hearing, the parties stipulated that Respondents should be given credit for the $2,583.95 which was paid into an account with The Contractor's Plan in Martell's name. OAR 839-050-0280(1). Accordingly, the wages and liquidated damages owing to Martell are calculated[14] as follows:

	$2,326.88	Gross earned, unpaid, due and payable wages
+	$2,326.88	Liquidated damages
	$4,653.76	(Subtotal)
-	$2,583.95	Credit based on Stipulation of Parties
	$2,069.81	Total Wages & Liquidated Damages Owed to Martell by Portland Flagging & A D Traffic (Plus Interest)

2. Penn

Portland Flagging and A D Traffic

Penn was also jointly employed by both Portland Flagging and A D Traffic Control during 2011 and 2012 for the same reasons that these employers jointly employed Martell. The Compliance Specialist testified that the following fringe benefit payments were withheld from Penn's paycheck while he worked for joint employers Portland Flagging and A D Traffic:

[14] Martell is also entitled to receive prejudgment interest as requested in the Second Amended OOD. Prejudgment interest accrues on obligations the date they become due. *In the Matter of Charlene Marie Anderson dba Domestic Rescue*, 33 BOLI at 261, *citing* ORS 82.010(1)(a). Because of the late fringe benefit payments which the parties stipulated should be credited to the amounts owed to Martell, the calculation of interest is not straightforward and simple. Thus, a more detailed explanation follows. Martell's last day of work was October 3, 2012. Accordingly, deposits into her fringe benefit account should have been made by the quarterly due date of January 15, 2013. Interest on the sum of the unpaid wages and liquidated damages ($4,653.76 in total) accrued from January 15, 2013 until a portion of the amount owing was deposited into The Contractor's Plan on November 18, 2013. She is entitled to interest on the remaining amount owed of $2,069.81 from January 15, 2013 until paid.

Week Ending Date	Fringe amount	Date Fringe Deposit Due
7/16/2011	$178.40	10/15/2011
7/23/2011	$94.80	10/15/2011
7/30/2011	$325.88	10/15/2011
8/6/2011	$367.35	10/15/2011
8/13/2011	$225.15	10/15/2011
8/20/2011	$112.58	10/15/2011
8/27/2011	$77.03	10/15/2011
9/3/2011	$0.00	10/15/2011
9/10/2011	$77.03	10/15/2011
8/18/2012-1	$197.60	10/15/2012
8/18/2012-2	$114.95	10/15/2012
8/25/2012-1	$78.65	10/15/2012
8/25/2012-2	$339.63	10/15/2012
8/25/2012-3	$172.90	10/15/2012
8/25/2012-4	$26.13	10/15/2012
9/1/2012-1	$290.23	10/15/2012
9/1/2012-2	$61.75	10/15/2012
9/8/2012	$222.30	10/15/2012
9/15/2012	$160.55	10/15/2012
9/22/2012	$108.90	10/15/2012
9/29/2012	$127.05	10/15/2012
Total Due from Portland Flagging & A D Traffic	$3,358.86	

No deposits were made into a fringe benefit account for Penn until after the due dates reflected above. Thus, Portland Flagging & A D Traffic are responsible for payment of $3,358.86 in unpaid wages plus an equal amount in liquidated damages, resulting in a total of $6,717.72, plus interest.[15]

When calculating the amount of remaining prevailing wage payments owed to workers, the Agency has a practice of subtracting the amounts deposited into fringe benefit accounts when the Agency receives reliable documentation verifying the amounts of the deposits. Like the late fringe benefit deposits into Martell's account,

[15] The calculation of the interest reflected in the instructions at the end of this document was made using the same methodology that was used when calculating the interest owing to Martell.

Portland Flagging and A D Traffic should also be credited for the late benefit plan contributions[16] it made into Penn's account which were as follows:

Fringe Plan Deposits (Ex. R10, p. 4)
$1,318.90 on 11/7/2011
$178.40 on 11/8/2011
$1,050.95 on 11/18/2013
$811.73 on 9/13/2013
Total late deposits: $3,359.98

Thus, Portland Flagging and A D Traffic are responsible for payment of the $3,357.74 balance remaining ($6,717.72 minus late deposits of $3,359.98), plus interest.

Tri-Star

In March and April of 2013, Penn worked on the Kodiak 2 project. It is undisputed that Penn worked for Tri-Star at the time of this project. Thus, Tri-Star is responsible for payment of unpaid fringe benefits during this time period. The Compliance Specialist testified that the following fringe benefit payments were withheld from Penn's paycheck while he worked for Tri-Star:

Week Ending Date	**Fringe amount**	**Date Fringe Deposit Due**	**Fringe Plan Deposits (Ex. R10, p. 1)**
3/30/2013	$128.50	4/15/2013	$128.50 on 6/27/2013 - late
4/6/2013	$276.28	7/15/2013	$276.28 on 10/31/2013 - late
Total Due from Tri-Star	$**404.78**		

Thus, Tri-Star is responsible for payment of the sum of $404.78 in unpaid wages plus an equal amount in liquidated damages, resulting in a total of $809.56. However, Tri-Star should be credited for the late benefit plan contributions it remitted totaling $404.78. (Ex. R10) Thus, Tri-Star is responsible for payment of the $404.78 balance remaining, plus interest.

D. Additional Named Respondents

The issue of the liability of the remaining Respondents has been bifurcated and that portion of the case was consolidated with Case Nos. 55-15, 37-13 and 14-14 into a separate proceeding. *In the Matter of Portland Flagging, LLC*, 34 BOLI at __. No further discussion is required as to the merits.

[16] The Compliance Specialist did not have access to the documentation of the amounts deposited into Penn's accounts when she prepared her calculations. However, this information was received into evidence at the hearing. (Ex. R10)

ORDER[17]

A. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Portland Flagging, LLC** and **A D Traffic Control Services, LLC**, 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, the following:

1) A certified check payable to the Bureau of Labor and Industries in trust for **Starley Martell** in the amount of **$2,069.81** representing the remaining amount owed for unpaid wages and liquidated damages, less appropriate lawful deductions, plus

- Interest at the legal rate on the sum of $2,583.95 from January 15, 2013, until November 18, 2013; plus
- Interest at the legal rate on the sum of $2,069.81 from January 15, 2013, until paid.

2) A certified check payable to the Bureau of Labor and Industries in trust for **Eric Penn** in the amount of **$3,357.74** representing the total owed for unpaid wages and liquidated damages, less appropriate lawful deductions, plus

- Interest at the legal rate on the sum of $1,318.90 from October 15, 2011, until November 7, 2011; plus
- Interest at the legal rate on the sum of $178.40 from October 15, 2011, until November 8, 2011; plus
- Interest at the legal rate on the sum of $1,050.95 from October 15, 2012, until November 18, 2013; plus
- Interest at the legal rate on the sum of $811.73 from October 15, 2012, until November 18, 2013; plus
- Interest at the legal rate on the sum of $3,357.74 from October 15, 2013, until paid.

B. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Tri-Star Flagging, LLC,** 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, the following:

[17] A detailed explanation regarding the methodology for calculating the prejudgment interest in this case is set forth in footnote 15, *supra*.

34 BOLI ORDERS

A certified check payable to the Bureau of Labor and Industries in trust for **Eric Penn** in the amount of **$404.78** representing the remaining amount owed for unpaid wages and liquidated damages, less appropriate lawful deductions, plus

- Interest at the legal rate on the sum of $128.50 from April 15, 2013, until June 27, 2013; plus
- Interest at the legal rate on the sum of $276.28 from June 15, 2013, until October 21, 2013; plus
- Interest at the legal rate on the sum of $404.78 from June 1, 2013, until paid.

In the Matter of

PORTLAND FLAGGING, LLC; A D TRAFFIC CONTROL SERVICES, LLC; TRI-STAR FLAGGING, LLC; PORTLAND SAFETY EQUIPMENT, LLC; PHOENIX CONSTRUCTION GROUP, INC.; SBG CONSTRUCTION SERVICES LLC; GNC CONSTRUCTION SERVICES LLC; EVAN WILLIAMS and KENYA SMITH aka KENYA SMITH-WILLIAMS,

Case No. 37-13
Final Order of Deputy Commissioner Christie Hammond
Issued February 29, 2016

SYNOPSIS

Respondents Portland Flagging, LLC ("Portland Flagging") and A D Traffic Control Services, LLC ("A D Traffic") failed to pay the prevailing wage rate to 13 workers on public works projects when they did not make timely deposits to the workers' fringe benefit accounts. Civil penalties of $9,491.34 are imposed on Portland Flagging and A D Traffic for failing to pay the prevailing wage rate. Additionally, civil penalties of $16,000 are assessed against Portland Flagging and A D Traffic for filing 16 inaccurate certified payroll reports. Portland Flagging and A D Traffic are placed on the list of ineligibles to receive public contracts for a period of three years because they intentionally falsified information in the certified payroll statements. As the corporate officer responsible for the intentional falsification, Respondent Evan Williams is placed on the list of ineligibles to receive public contracts for a three year period.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Suite 1045, Portland, Oregon on April 22, 2015.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Evan Williams was the authorized representative for Portland Flagging, A D Traffic, Tri-Star, LLC, Portland Safety Equipment, LLC, Phoenix Construction Group, Inc., SBG Construction Services LLC, and GNC Construction Services LLC, and presented the case on behalf of those Respondents and himself. Respondent Kenya Smith was also present at the hearing.

The Agency called Prevailing Wage Rate Compliance Specialist Hannah Wood as a witness. Respondents submitted an offer of proof as to the testimony of Alene Watkins and Kenya Smith as witnesses.

The forum received into evidence:

a) Administrative exhibits X1 through X34;

b) Agency exhibits A2 through A10, and A15 through A29.

c) No exhibits were offered or received on behalf of Respondents.

Having fully considered the entire record in this matter, I Christine N. Hammond, Deputy Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.[1]

FINDINGS OF FACT – PROCEDURAL

1) On November 5, 2014, the Agency issued a Notice of Intent (NOI) to Portland Flagging, LLC, A D Traffic, Tri-Star Flagging, LLC and Portland Safety Equipment, LLC. The NOI alleged that A D Traffic failed to timely pay all prevailing wage rate wages owed to its employees, and requested civil penalties of $13,000 for those alleged violations. The NOI also alleged that Respondents submitted inaccurate certified payroll statements, and sought civil penalties in the amount of $16,000 for those violations. Finally, the NOI asserted that Respondents should be placed on the list of those ineligible to receive public works contracts for intentionally falsifying information on certified payroll statements. (Ex. X1a)

2) An answer and request for hearing from the attorney representing Portland Flagging, LLC, A D Traffic, Tri-Star Flagging, LLC and Portland Safety Equipment, LLC was received by BOLI's Wage and Hour Division on November 25, 2014. In the answer, the Agency's allegations were denied. (Ex. X1b)

3) On November 26, 2014, the forum issued a Notice of Hearing to Respondents A D Traffic, Tri-Star and Portland Flagging, and the Agency setting the time and place of hearing for 9:00 a.m. on February 10, 2015, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the Notice of Intent, a multi-language warning notice, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a–X2e)

4) On December 23, 2014, the ALJ issued an Interim Order seeking clarification as to whether Respondents were represented by the attorney who filed its answer and instructed the attorney to file a notice of withdrawal, if he intended to resign, so that the record was clear on this matter. The Interim Order further stated:

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

> "Furthermore, assuming [Respondents' attorney] does withdraw as counsel, other counsel or an authorized representative must appear on behalf of each Respondent as they are all limited liability companies. Limited liability companies are unincorporated associations. ORS 63.001(17). OAR 839-050-0110(1) requires that unincorporated associations must be represented at all stages of the proceeding either by counsel or by an authorized representative. An authorized representative includes an "authorized officer or regular employee" of the limited liability company. OAR 839-050-0110(2). **Before a person may appear as an authorized representative, the limited liability corporation that is a party to the contested case proceeding must file a letter specifically authorizing the person to appear on behalf of the party.** OAR 839-050-0110(3)."

(Ex. X3)

5) On December 24, 2014, Respondents' attorney filed a motion to withdraw as counsel. The motion was granted in an Interim Order issued by the ALJ on January 9, 2015. (Exs. X4, X6)

6) On January 7, 2015, a letter was submitted to the ALJ from Evan Williams, stating that he was the authorized representative and "acting as President" for A D Traffic, Tri-Star, Portland Flagging and Portland Safety Equipment. (Ex. X5)

7) On January 12, 2015, the ALJ issued an Interim Order explaining the requirements for filing motions and other documents, which notified the parties that all documents needed to be submitted in writing to BOLI's Contested Case Coordinator. The ALJ also issued an Interim Order requiring the parties to file case summaries which identified witnesses and exhibits two weeks in advance of the date set for hearing. (Exs. X7, X8)

8) A prehearing conference was held on January 16, 2015, to discuss this case and two other cases involving Respondents which were set for hearing February 10, 2015. The primary topic of discussion concerned whether the three cases should be consolidated for hearing. Neither the Agency nor Respondents had submitted a motion to consolidate the cases. The ALJ issued an Interim Order stating that there was insufficient information to conclude that the cases involve common questions of law or fact pursuant to OAR 839-050-0190 and determined that there would be a separate hearing for each of the three cases. The ALJ further ruled that, at the conclusion of the hearing in Case No. 28-15, a prehearing conference would be held in Case Nos. 37-13 and 14-14 to discuss the timeline for ruling on the motions for summary judgment and hearing dates. The deadline for filing case summaries and exhibits was postponed and was to be rescheduled at a later date. (Ex. X10)

9) The Agency filed a motion for partial summary judgment on January 20, 2015, asserting that there is no genuine issue of material fact regarding the claims

alleged in the NOI. On January 21, 2015, the ALJ issued an Interim Order requiring Respondents to file a written response to the motion. Respondents' authorized representative Evan Williams filed a response to the motion on January 27, 2015. (Exs. X9, X10 - X11)

10) Respondents submitted a case summary on January 27, 2015, which identified three exhibits, but did not list the names of any witnesses who would testify at hearing. (Ex. X13)

11) On February 2, 2015, the ALJ issued an Interim Order granting the Agency's unopposed motion to postpone the hearing so that the Agency could have additional time to review documents recently produced by Respondents. The ALJ set a new hearing date of April 7, 2015. (Ex. X34)

12) The ALJ issued interim orders regarding the Agency's motions to compel discovery, which are summarized in the Findings of Fact - Procedural in the Final Order for Case No. 28-15. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 246 (2016)

13) The Agency filed a second motion for summary judgment on February 19, 2015, asserting that there is no genuine issue of material fact regarding Respondents' intentional filing of falsified certified statements. On February 23, 2015, the ALJ issued an Interim Order requiring Respondents to file a written response to the motion. Respondents' authorized representative Evan Williams filed a response to the motion on February 27, 2015. (Exs. X14, X15, X17)

14) On February 25, 2015, the ALJ issued an interim order reminding the Agency that during the Prehearing Conference held on January 16, 2015, the Agency stated that it intended to amend the Notice of Intent in this matter to include the missing "Exhibit A" and that the potential amendment was also referenced in the ALJ's interim order of January 21, 2015. As of February 25, 2015, an "Exhibit A" was not attached to the NOI and the NOI did not include the names of the employees whom Respondents allegedly failed to pay the prevailing wage rate.

The interim order of February 25, 2015, also stated that if the Agency did not file an amended NOI which included the missing information by February 27, 2015, the ALJ would rule on the pending summary judgment motions based on the allegations in the NOI dated November 5, 2014. The Agency did not file an amended NOI by February 27, 2015. On March 2, 2015, the Agency filed a motion for extension of time to amend the NOI, asserting that the Agency just noticed the deadline that day and was unable to amend the document by February 27, 2015. The Agency further stated that "several amendments will need to be made to the" NOI. (Ex. X16, X18)

15) On March 2, 2015, the ALJ issued an interim order denying the Agency's motions for summary judgment. The pertinent portion of the ALJ's interim order is reprinted below:

"In its motions, the Agency argues that Respondents violated ORS 279C.800, 279C.840(1), OAR 839-025-0043(1) and OAR 839-025-0040 by withholding fringe benefit amounts from the paychecks of 36 workers and then failing to deposit the withdrawn amounts into a fringe benefit plan. The Agency also asserts that Respondents violated ORS 279C.845(3) and OAR 839-025-0010(1) by inaccurately certifying that the all workers were paid full wages and benefits. The Agency further requests that Respondents be placed on the list of ineligibles for falsifying information in certified statements, in violation of ORS 279C860(1)(d) and OAR 839-025-0010(1)(d). It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance*, Inc., 32 BOLI 185, 198 (2013).

"All of the arguments in the Agency's motions are based on the allegation that Respondents withdrew fringe benefit amounts from the paychecks of 'workers,' but failed to deposit those amounts into a fringe benefit plan. However, the NOI does not identify the names of the 'workers' or the amounts that were allegedly withheld and not deposited into a fringe benefit plan. The forum has previously dismissed allegations when the Agency failed to correctly identify the issues in its NOI. *See Green Thumb*, 32 BOLI at 197 (dismissing allegations of unpaid overtime when the Agency failed to identify the violations correctly or move to amend the NOI at hearing to conform to the evidence). Similarly in this matter, even if some violations could be inferred from the Agency's evidence submitted in support of its motions for summary judgment, the Agency cannot prevail at this time because the violations are not identified in the NOI. *Id.* Accordingly, the Agency has failed to sustain its burden in proving a violation and the motion for summary judgment is **DENIED**.

"The Agency has indicated that 'several amendments will need to be made to the' NOI. In light of that fact, the requirements set forth in my Interim Order of February 25, 2015, are rescinded and the Agency's Motion for Extension filed today is, therefore, moot. This case remains set for hearing on **April 7, 2015**. "

(Ex. X19)

16) On March 9, 2015, an interim order was issued resetting the hearing date to April 9, 2015, and setting a new case summary deadline of March 26, 2015. (Ex. X20)

17) On March 11, 2015, the Agency filed an Amended NOI which added Phoenix Construction Group, Inc., SBG Construction Services, LLC, GNC Construction Services LLC, Evan Williams and Kenya Smith aka Kenya Smith-Williams as Respondents. The Amended NOI also asserted joint and several liability allegations against all Respondents and contended that Williams was directly liable because the corporate veil was pierced. (Ex. X21)

18) The Agency filed a third motion for summary judgment on March 19, 2015, asserting that there is no genuine issue of material fact regarding Respondents' liability for the allegations in this matter. On April 1, 2015, after conferring with the parties by e-mail, the ALJ issued Interim Orders requiring Respondents to file a written response to the motion by April 6, 2015, and postponing the hearing until April 21, 2015, to allow sufficient time for the ALJ to rule on the motion. Respondents' response deadline was later extended until April 14, 2015. Respondents' authorized representative Evan Williams filed a response to the motion on April 14, 2015. (Exs. X22, X24, X27, X28)

19) The Agency filed a case summary on March 25, 2015, and an Amended Case Summary on April 17, 2015. (Exs. X23, X29)

20) On April 6, 2015, the Agency filed a letter with notice that it was arranging for security to be present at the hearing due to safety concerns in Case No. 28-15. An Oregon State Police Trooper was present during the hearing for this case (No. 37-13) because it involved the same Respondents as in Case No. 28-15. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 258 (2016);[2] Hearing Record)

21) On April 7, 2015, Respondents filed a motion requesting additional time to submit their case summary, and for a postponement of the hearing for one week to provide Respondents with sufficient time to prepare for the hearing. After a discussion on the record following the hearing in a companion case, the ALJ issued an interim order on April 10, 2015, setting a new hearing date of April 21, 2015, and extending the case summary deadline until April 14, 2015. The interim order of April 10, 2015, also noted that Respondents filed a document titled Motion to Remove Entities on April 7, 2015 and that the ALJ was considering Respondents' motion as a motion for summary judgment pursuant to OAR 839-050-0150(4). The motion was denied because it was untimely filed, pursuant to OAR 839-050-0150(4)(c). (Exs. X26, X27) The ALJ's ruling on Respondents' motion is hereby CONFIRMED.

22) On April 10, 2015, the issue of the liability of the remainder of the Respondents was bifurcated from the claims against Portland Flagging, and then consolidated with Case Nos. 28-15, 37-13 and 14-14. The hearing for those consolidated matters was postponed until pending default issues were fully resolved in related cases involving all Respondents, and those will be addressed in a separate Final Order. (*In the Matter of Portland Flagging, LLC*, 34 BOLI 208, 213 (2015))

23) On April 21, 2015, the ALJ issued an interim order ruling on the Agency's motion for summary judgment that was filed on March 19, 2015. The ALJ's interim order is reprinted below in its entirety:

> "On March 11, 2015, the Agency issued an Amended Notice of Intent ("ANOI") to Place on List of Ineligibles and Notice of Intent to Assess Civil

[2] The Commissioner previously issued two Final Orders involving Portland Flagging in 2015 and 2016. The citation for the second Final Order issued in 2016 includes Case No. 28-15 to assist in differentiating between the two Final Orders.

Penalties in this matter against the above-referenced Respondents. The allegations in the ANOI are based upon the alleged failure to timely pay prevailing wages.

"The Agency filed a motion for summary judgment on March 19, 2015, asserting that there is no genuine issue of material fact regarding Respondents' failure to pay unpaid wages, assessment of civil penalties and placement on the list of ineligibles. Respondents timely filed a response to the motion on April 14, 2015, after receiving an extension of time to file their response.

"Summary Judgment Standard

"A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists and the evidentiary burden on the participants is as follows:

> "' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].'

"ORCP 47C.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's ANOI, the Agency's argument made in support of its motions, and the exhibits submitted with the Agency's motions; and (2) Respondents' Answer, Respondents' argument opposing the Agency's motions, and the exhibits submitted in Respondents' response to the Agency's motions.

"ANALYSIS

"In its motion, the Agency argues that Respondents violated ORS 279C.840 by withholding fringe benefit amounts from the paychecks of the wage claimants listed in Exhibit A to the ANOI and then failing to deposit the withdrawn amounts into a fringe benefit plan as required by ORS 279C.800(1)(a). It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013).

1. Liability of Respondent A D Traffic Control Services LLC for Unpaid Wages

"The Agency asserts that Respondents withdrew fringe benefit funds from the wage claimants' paychecks without depositing those amounts into a fringe benefit plan in the time required by law. Respondents do not dispute that A D Traffic Control Services, LLC employed the wage claimants or that fringe benefit funds were withdrawn from the wage claimants' paychecks. Respondents further do not dispute that the deposits into the fringe benefit accounts of twelve workers listed in Exhibit A to the ANOI for the second quarter of 2012 (April, May and June) were not made until October 1, 2012.

"Prevailing wage payments must be made to employees 'in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a).' ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the 'rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program.' It is clear that any timely (i.e. 'not less often than quarterly') contributions made to The Contractors' Plan would be valid. OAR 839-025-0043(1).

"However, to make late contributions, employers must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. *See, e.g.,* 29 CFR § 2510.3-102(d); 67 Fed. Reg. 15,051, 15,062 (March 28, 2002). There is no evidence in this case that the late contributions made to the accounts of the twelve workers listed in Exhibit A for the second quarter of 2012 followed an appropriate delinquent contribution payback method. Rather, it appears that only the amounts deducted from the wage claimants' paychecks in April, May and June of 2012 were deposited into The Contractor's Plan several months later in October 2012. Accordingly, I find that the contributions Respondents made on October 1, 2012, do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a), and the Agency's motion on this issue is **GRANTED**.

"The Agency also contends that the Respondents did not timely submit the fourth quarter 2011 contribution for Claimant Leo Montgomery. Respondents argue that the contribution made on January 31, 2012, was made on a regular basis on a date established by the contractor. For summary judgment purposes when viewing the evidence in the light most favorable to Respondents, I find that there is an issue of fact as to whether this contribution was timely and the Agency's motion on this issue is **DENIED**.

2. Amount of Civil Penalties

"Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ORS 279C.865; OAR 839-025-0530(3)(a). The Agency may assess a civil penalty in the amount of the unpaid wages or $1000, whichever is lesser. OAR 839-025-0540. In this case, the

Agency seeks civil penalties of $1000 for each late contribution on behalf of a wage claimant. Respondents argue that this amount is "excessive and egregious due to the fact that all wages were paid." Viewing the evidence in the light most favorable to Respondents, it appears that Respondents have addressed at least some of the mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty. Accordingly, the Agency's motion on this issue is **DENIED.**

3. Placement on the List of Ineligibles

"The Agency argues, pursuant to ORS 279C.860 and OAR 839-025-0010, that Respondents should be placed on the list of ineligibles because Evan Williams directed his staff to sign false statements certifying that employees' full wages were paid. Respondents argue that it was Mr. Williams's intent to make the quarterly fringe benefit deposits when the weekly certified statements were completed. Therefore, Respondents contend that the Agency did not establish the element of 'intent' which is necessary to place Respondents on the list of ineligibles. Although the evidence submitted by Respondents as to a 'good faith' intention to submit fringe benefit contributions is weak, when viewing it in the light most favorable to Respondents, I am unable to grant the Agency's motion on this issue and thus the motion is **DENIED**.

"Summary of Rulings

"I have granted the Agency's motion for summary judgment on the following issues and, therefore, facts regarding these matters do not need to be presented at the upcoming hearing:

- The wage claimants listed in Exhibit A to the ANOI were employed by Respondent AD Traffic Control Services, LLC.

- The fringe benefit contributions Respondents made on October 1, 2012, on behalf of the wage claimants list in Exhibit A to the ANOI were not timely made, and do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a)."

"I have denied the Agency's motion for summary judgment on the following issues and, therefore, facts regarding these matters are at issue at the upcoming hearing:

- Whether the January 31, 2012, contribution made on behalf of Claimant Montgomery was timely.

- The amount of civil penalties that should be awarded based on the mitigating factors outlined in OAR 839-025-0520(1).

- Whether Respondents should be placed on the list of ineligibles.

IT IS SO ORDERED"

(Ex. X30) The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

24) On April 20, 2015, the Agency filed a motion for postponement. The Agency notified the ALJ and Respondents by email on April 20, 2015, that it was requesting to postpone the hearing by one day. On April 21, 2015, the ALJ issued an order postponing the hearing by one day and setting a new hearing date of April 22, 2015. (Exs. X31, X32)

25) On April 21, 2015, the ALJ issued an interim order supplementing its ruling on the Agency's motion for summary judgment that was filed on March 19, 2015. The ALJ's supplemental interim order is reprinted below in its entirety:

> "In response to a question from the Agency about the summary judgment ruling issued today, I hereby issue the following supplemental order.
>
> "Because the fringe benefit contributions made on October 1, 2012, for the second quarter of 2012, on behalf of the wage claimants listed in Exhibit A to the Amended Notice of Intent were not in compliance with the law, it follows that the certified payroll statements associated with the second quarter of 2012 were in violation of ORS 279C.845 and OAR 839-025-0010. However, as stated in the summary judgment ruling of this date, there is a question of fact as to whether the violations were "intentional" and, thus, whether Respondents should be placed on the list of ineligibles.
>
> "Because there is a question of fact as to whether the January 31, 2012, contribution made on behalf of Claimant Montgomery was timely, there is also a question of fact as to whether there was a violation for submitting inaccurate certified payroll statements.
>
> **IT IS SO ORDERED"**

(Ex. X33) The ALJ's supplemental ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

26) The hearing convened on April 22, 2015, and went into recess that afternoon. (Hearing Record)

27) Respondents were permitted to make an offer of proof regarding the testimony of witnesses who were not permitted to testify because they were not listed as witnesses on Respondents' Case Summary. (Hearing Record)

28) On February 10, 2016, a document signed by Commissioner Brad Avakian titled Notice to the Forum was filed. The Notice stated that the Commissioner designated and authorized Deputy Commissioner Christine N. Hammond to issue any and all Final Orders in this case. The Contested Case Coordinator served all of the parties with a copy of the Notice.

29) The ALJ issued a proposed order on February 12, 2016, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency timely filed exceptions on February 22, 2016. No exceptions were filed by Respondents. The Agency's exceptions are addressed following the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Portland Flagging and A D Traffic Control jointly employed workers as flaggers on a public works road construction project in 2011 and 2012. (Exs. A6, A9; Testimony of Wood)

2) The funds Portland Flagging and A D Traffic withheld from the paychecks of 12 workers from April 1 to June 30, 2012, for fringe benefits were not deposited into the workers' fringe benefit accounts until October 1, 2012. The dates of the fringe benefit deductions and the amounts deducted were as follows:

Worker	April 2012	May 2012	June 2012	**Total**
Brown	$68.10	$834.23	$68.10	$970.43
Dishman	$266.73	$1310.93	$102.15	$1,679.81
Ford	$0.00	$246.86	$0.00	$246.86
Ford III	$0.00	$246.86	$102.15	$349.01
Harrison	$649.79	$942.05	$73.78	$1,665.62
Kelley	$1,001.64	$666.81	$102.15	$1,770.60
Lewis	$312.13	$0.00	$0.00	$312.13
Lockhart	$0.00	$289.43	$102.15	$391.58
Peek	$0.00	$119.18	$102.15	$221.33
Stumpf	$527.78	$618.58	$107.83	$1,254.19
Trent	$720.73	$743.43	$102.15	$1,566.31
Triplett	$442.65	$817.20	$102.15	$1,362.00

(Exs. A12, A13)

3) Deductions in the amount of $1,623.45 were taken from the paychecks of Leo Montgomery during the fourth quarter (October, November and December) of 2011. The withheld funds were deposited into a fringe benefit account on his behalf on January 31, 2012. (Ex. A7, p. 5)

4) Respondents provided the Compliance Specialist with WH-38 certified payroll statements for weeks ending as follows: 9/24/11, 10/8/2011, 10/15/2011, 10/22/11, 10/29/11, 11/5/11, 12/3/11, 4/7/12, 4/14/12, 4/21/12, 4/28/12, 5/5/12, 5/12/12, 5/19/12, 5/26/12 and 6/2/12. Each of those statements was signed by "Alene Watkins, Payroll," and was certified to be accurate. The statements identified amounts withheld for fringe benefits on behalf of the workers and included the following statement:

> "Where fringe benefits are paid to approved plans, funds, or programs[,] * * * in addition to the basic hourly rates paid to each laborer or mechanic listed in the above referenced payroll, *payments of fringe benefits as listed in the contract have been or will be made to the appropriate programs for the benefit of such employee*."

(Ex. A9, emphasis added)

5) BOLI's Compliance Specialist previously investigated complaints from four other workers who worked on the same project. Although the Agency may assess civil penalties for first time violations, the Agency did not do so with respect to those initial four complaints because it is the Agency's practice to first attempt to bring employers into compliance before assessing civil penalties. The Compliance Specialist met with Evan Williams and another employee in 2011 or early 2012 at Williams' office for at least two hours to discuss the four wage claims. The fringe benefit contribution for at least one of those workers was made after the Compliance Specialist sent her demand letter. The contribution was about 14 months after the worker earned the wages. In the interactions the Compliance Specialist had with Williams and his employees, sometimes they were cooperative with her requests and sometimes they were not. Sometimes requested records were received from Respondents, and sometimes the records were not provided. (Testimony of Wood)

6) By the time, the Agency received a claim from Leo Montgomery in June of 2012, the decision was made to seek civil penalties because the Agency had already investigated other claims and had previously attempted to bring A D Traffic into compliance. The Agency considered the Montgomery claim to be a second violation. (Testimony of Wood)

7) Subcontractors have the ability to amend certified payroll statements and have a responsibility to do so. Respondents did not amend their inaccurate statements. When the Compliance Specialist received certified payroll statements regarding Leo Montgomery, the statements led her to believe that the fringe benefits had been paid as

represented on the statements. When the Compliance Specialist was making inquiries about the payment of fringe benefits, she was not told that they had not been paid. (Exs. A9, A10, Testimony of Wood)

8) On September 28, 2012, the Compliance Specialist sent a letter addressed to Evan Williams at A D Traffic Control, which informed him that in order to close the file, evidence must be provided to show "that fringe benefits earned in the 2nd quarter of 2012 by workers employed on this project have been paid." The letter further stated that if the evidence of fringe benefit payments was not provided by October 12, 2012, then action would be taken to collect the fringe benefit wages from the primary contractor's payment bond. Subsequently, a copy of a check stub dated October 1, 2012, issued from A D Traffic's general account was provided to BOLI showing a payment to The Contractor's Plan fringe benefit plan on behalf of the 2012 Workers. (Exs. A11, A12; Testimony of Wood)

9) The sole witness, Compliance Specialist Hannah Wood, was credible. (Hearing Record)

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 279C.860; ORS 279C.865.

2) Portland Flagging and AD Traffic are joint employers who employed workers Charles Brown, Kimberly Dishman, Mitchell Ford, Mitchell Ford III, Darcy Harrison, Cherilee Kelley, Chauncey Lewis, Ginai Lockhart, Shannon Peek, Teresa Stumpf, Martin Trent, and Leslie Triplett during the second quarter of 2012 ("2012 Workers", and Leo Montgomery during the fourth quarter of 2011. (Exs. A6; A7, A13; *In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 265 (2016))

3) Portland Flagging and A D Traffic violated Oregon's prevailing wage rate law when they withheld fringe benefit wages from the paychecks of the 2012 Workers for nine weekly pay periods during the second quarter of 2012, but did not deposit those funds into their fringe benefit accounts by July 15, 2012.

4) Portland Flagging and A D Traffic violated Oregon's prevailing wage rate law when they withheld fringe benefit wages from the paychecks of Montgomery for seven weekly pay periods during the 4th quarter of 2011, but did not deposit those funds into his fringe benefit account by January 15, 2012.

5) Portland Flagging and A D Traffic submitted 16 certified payroll reports for work performed on public works projects that inaccurately stated that all prevailing wage payments had been made, committing 16 violations of ORS 279C.845 and OAR 839-025-0010.

6) The Commissioner has the authority to assess civil penalties for violations of ORS 279C.845, OAR 839-025-0010, ORS 279C.840(1), OAR 839-025-0035(1), and

ORS 279C.540. The imposition of $9,491.34 in civil penalties for failing to pay the prevailing wage rate and $16,000 in civil penalties for submitting inaccurate certified payroll statements is an appropriate exercise of the Commissioner's authority. ORS 279C.865, OAR 839-025-0530, and OAR 839-025-0540.

7) The filing of 16 inaccurate certified payroll statements was intentional. Portland Flagging and A D Traffic are placed on the list of those contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period of three years from the date on which their names are published on the list. ORS 279C.860, OAR 839-025-0085.

8) Williams was the corporate officer responsible for the intentional failure to pay the prevailing wage rate and, thus, is placed on the list of those contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period of three years from the date on which their names are published on the list.

OPINION

This is a proceeding brought under Oregon's prevailing wage rate laws in which the Agency seeks civil penalties against Respondents and also seeks to place Respondents on the List of Ineligibles[3] to receive any contract for public works projects for a period of three years after first publication on that list. ORS 279C.860.

A. Failure to Pay the Prevailing Wage Rate

1. Violation

It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013). Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1). Prevailing wage payments must be made to employees "in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a)." ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the "rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program." Payments must be made on the 15th day following the end of a calendar quarter. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 260 (2016)).

The ALJ issued the following ruling on the Agency's motion for summary judgment: "The fringe benefit contributions Respondents made on October 1, 2012, on behalf of the [2012 Workers] were not timely made." As previously stated, that ruling has been confirmed.

[3] In this Final Order, the term "debar" may alternatively be used in place of the phrase "placement on the List of Ineligibles."

At hearing, the Agency presented undisputed evidence that wages deducted from the paycheck of Leo Montgomery in the fourth quarter of 2011 were not deposited into his fringe benefit until January 31, 2012, which was 16 days after the due date of January 15, 2012.

Thus, the Agency sustained its burden of proof in demonstrating that the untimely deposit of funds into the fringe benefit accounts of 13 workers violated the requirement to pay the prevailing wage rate.

2. Civil Penalties

The Agency seeks civil penalties of $1,000 for each of the 13 late fringe benefit contribution made on behalf the workers. Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ORS 279C.865; OAR 839-025-0530(3)(a). The Agency may assess a civil penalty in the amount of the unpaid wages or $1,000, whichever is lesser. OAR 839-025-0540. The criteria used to determine the amount of penalties are "the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation." *In the Matter of Hard Rock Concrete, Inc. and Rocky Evans*, 33 BOLI 77, 103 (2014), *appeal pending;* OAR 839-025-0520. When determining the appropriate amount of civil penalties, the existence of intent is irrelevant. *In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley*, 33 BOLI 68, 73 (2014).

The Agency presented evidence of Respondents' previous violations of the prevailing wage statutes, Respondents' knowledge of the violations, and that, at times, Respondents did not respond to the Agency's requests. These factors weigh in favor of assessing a civil penalty up to the full amount each underpayment or $1,000, whichever is lesser. OAR 839-025-0540; OAR 839-025-0520.

Thus, the forum imposes penalties for underpayment, as follows:

Worker	Underpayment Violation	Amount of Civil Penalty
Montgomery	$1623.45	$1,000.00
Brown	$970.43	$970.43
Dishman	$1,679.81	$1,000.00
Ford	$246.86	$246.86
Ford III	$349.01	$349.01

Harrison	$1,665.62	$1,000.00
Kelley	$1,770.60	$1,000.00
Lewis	$312.13	$312.13
Lockhart	$391.58	$391.58
Peek	$221.33	$221.33
Stumpf	$1,254.19	$1,000.00
Trent	$1,566.31	$1,000.00
Triplett	$1,362.00	$1,000.00
Total		**$9,491.34**[4]

B. Certified Payroll Statements

1. Violation

The Agency alleges that Respondents committed 16 violations of ORS 279C.845 and OAR 839-025-0010(1) by filing "inaccurate and/or incomplete" certified payroll reports for 16 weekly pay periods. ORS 279C.845 provides, in pertinent part:

> "(1) * * * every subcontractor * * * shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:
>
> "* * * * *
> "(3) The certified statements shall set out accurately and completely the * * * subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement."

OAR 839-025-0010(1) also imposes these requirements.

[4] In the Amended NOI, the Agency requested civil penalties of $13,000, representing "Thirteen violations, ($1,000 per violation)." Amended NOI, p. 7. However, the forum has previously recognized that OAR 839-025-0840 imposes a "floor" for each violation, which "is the lesser of $1,000 or the amount of the underpayment." *In the Matter of Hard Rock Concrete, Inc. and Rocky Evans*, 33 BOLI at 103, n.15. Thus, if any underpayment was less than $1,000, then the civil penalty would be the lesser amount of the underpayment.

With respect to all workers except Montgomery, this matter was resolved in the summary judgment ruling. Thus, nine violations were established for the second quarter of 2012. At hearing, the Agency also established that seven certified payroll statements inaccurately stated that work Montgomery had also been paid all prevailing wages due and owing to him. Accordingly, seven violations were established for the fourth quarter of 2011. In total, the Agency sustained its burden in proving 16 violations.

2. Civil Penalties

The Agency asks for the imposition of 16 penalties in the amount of $1,000 for each violation. ORS 279C.865 also allows imposition of a penalty for each filing of an inaccurate or incomplete payroll record, which are required to be filed by ORS 279C.845 and OAR 839-025-0010. The same factors discussed above in Section A.2. are also used to determine the penalties for violations based on the filing of inaccurate certified payroll statements.

The Agency seeks a $1,000 penalty for each of the 16 separate violations. The criteria for determining the amount of civil penalties is governed by OAR 839-025-0520. Given the nature of the violations and the criteria of OAR 839-025-0520 previously discussed in Section A.2., a penalty of $1,000 for each inaccurate WH-38 payroll statement is appropriate, resulting in a total penalty of $16,000 for these violations.

3. Placement on the List of Ineligibles

The Agency contends that Respondents should be placed on the list of ineligibles because Williams directed his staff to sign false statements certifying that employees' full wages were paid. OAR 839-025-0085(1)(d) provides that the commissioner may place a subcontractor on the list of those ineligible to receive public contracts when "[t]he contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845." Respondents contend that they should not be debarred because there was a lack of "intent" to submit false information. Respondents' argument on this matter was set forth by Williams in response to the Agency's motion for summary judgment as follows:

> "In admitting that fringes were paid late was not an admission to falsifying this report(s). At the time that the reports were signed it was my intent to pay the fringes on a quarterly bases [sic] and I always prepared to do so. However there were at times situation[s] would arise that we would not get paid by contractors and in order to make my weekly payroll I would use whatever funds I had available. Thus making me late in my quarterly fringe payment. When working within the parameters that BOLI has established in allowing employers to make fringe contributions on a quarterly bases [sic], this will always be after the fact of the Certified Payroll Reports, WH-38, being submitted as these must be done on a monthly, and in most cases weekly bases.
>
> ***

> "I was operating in good faith when I elected to pay the fringe on a quarterly bases [sic] as BOLI allows.
>
> "***
>
> "As to my actions being intentional, I at no time intended not to pay the employees their fringe and I at no time wanted to be late. It was always my intentions to make all payments on time and as I should.
>
> "If it was my intentions to not pay my employees I would have kept the money. Why have intentions not to pay them, but pay them.
>
> "I have always acted within what I thought was the law. Was I late, again I say yes. But was it my intentions, No it was not.
>
> "At the time the WH-38 form was signed I had every intention on submitting those monies at the end of the [quarterly] period.
>
> "It came down to me making a decision to do what I felt was best at the time."

(Ex. X17)

There was no admissible evidence to support Respondents' arguments on this point at hearing. Nevertheless, even if one accepts Respondents' assertion that there is a lack of intent because they intended to make fringe benefit deposits at the time the certified statements were made, it is important to note that *subsequent* acts show a failure to correct the inaccurate information or provide notification that the statements were in error.

The forum has previously discussed the element of "intent" in a prevailing wage rate case as follows:

> "To 'intentionally' fail to pay the prevailing rate of wage, 'the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it.' In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 287 (2001), rev'd in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries, 188 Or App 346, 364, 71 P3d 559 (2003), rev den 336 Or 534, 88 P3d 280 (2004). '[A] negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment.' Id. Rather, a 'culpable mental state' must be shown for the forum to conclude that HMPC 'intentionally' failed to pay the prevailing wage rate.
>
> "* * * * *

> "Based on Cina's testimony, the forum concludes that Cina's failure to pay overtime wages to Williamson, Gray, Murphy, and Petersen on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay Williamson anything for his work on August 12, 19, and 26, and September 2, 16 and 23, 2011, because he did not tell Cina he had worked those days. *However, Cina's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that Williamson did not work those hours, was a deliberate and conscious choice on her part and converts her inadvertent failure to pay into an intentional failure to pay*. Based on that intentional failure, the Commissioner is required to place HMPC and Cina on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years."

High Mountain Plumbing, 33 BOLI 40, 51-52 (2014) (emphasis added).

Similar to the conduct at issue in *High Mountain Plumbing*, in this case there was a "deliberate and conscious choice" to fail to correct the inaccurate certified statements. Notably, the certified statements were not amended after Williams admittedly made a conscious choice to fail to timely fund the fringe benefit accounts. Those inaccurate statements were then sent on to the Compliance Specialist without making her aware that the statements falsely represented that all prevailing wages had been paid. It appears that the deposits were made only after the Compliance Specialist sent a letter to Williams on September 28, 2012, notifying him that the "the Bureau will take action to collect fringe benefit wages from the [primary contractor's] Payment Bond" if evidence of fringe benefit deposits was not provided by October 12, 2012.

Moreover, because no effort was made to correct the false certified statements or inform the Compliance Specialist of the inaccuracies, she was originally led to believe that the deposits had actually been made. Therefore, regardless of what the intent was at the time the weekly certified statements were signed, the actions taken thereafter demonstrate intent to falsify information in the certified statements. Based on that intentional falsification, Portland Flagging and A D Traffic should be placed on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years.

Additionally, Williams has identified himself as the authorized representative and "President" of all the companies who are Respondents in this matter and, thus, is the corporate officer or manager responsible for intentionally falsifying information in the certified statements. Therefore, Williams should also be placed on the list of ineligibles for a period of three years. ORS 279C.860(3).

C. Additional Named Respondents

The issue of the liability of the remaining Respondents has been bifurcated and that portion of the case was consolidated with Case Nos. 55-15, 28-15 and 14-14 into a

separate proceeding. *In the Matter of Portland Flagging, LLC*, 34 BOLI 208, 213 (2015). No further discussion is required as to the merits.

AGENCY EXCEPTIONS

The Agency's Exceptions to the Proposed Order primarily requested modifications for clarification purposes or to describe matters on the record in further detail. The following sections were modified in response to the Agency's exceptions:

- Proposed Findings of Fact – Procedural Nos. 1, 14, 18 and 21
- Proposed Findings of Fact – The Merits No. 5
- Proposed Opinion, Section B.2.
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Proposed Finding of Fact – Procedural No. 10 was not modified because the additional information that the Agency requested was already included in Proposed Finding of Fact – Procedural No. 9, and did not need to be duplicated.

ORDER

A. NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.540, ORS 279C.840(1), ORS 279C.845, OAR 839-025-0010(1), OAR 839-025-0035, and OAR 839-025-0050, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Portland Flagging, LLC, and A D Traffic Control Services, LLC,** 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, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of **TWENTY FIVE THOUSAND, FOUR HUNDRED NINETY ONE DOLLARS AND THIRTY FOUR CENTS ($25,491.34)**, plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date **Respondents Portland Flagging, LLC, and A D Traffic Control Services, LLC,** comply with the Final Order.

B. As authorized by ORS 279C.860(1)(a) and OAR 839-025-0085(1)(a), as a result of intentional violations of ORS 279C.840 and OAR 839-025-0035, the Commissioner of the Bureau of Labor and Industries further orders—

> **Respondents Portland Flagging, LLC, and A D Traffic Control Services, LLC,** shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there; and
>
> **Respondent Evan Williams** shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive

any contract or subcontract for a public works for a period of three years from the date first published there.
