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In the Matter of
OREGON FIR MILLWORK, INC., CASE No. 26-17
Amended* Final Order of Commissioner Brad Avakian
Issued March 21, 2017

SYNOPSIS

Six wage claimants worked for Respondent in March, April, and May 2016. They earned \$26,317.07 in wages, including \$503.25 in overtime wages, and were paid nothing. The forum awarded claimants \$26,317.07 in unpaid wages. Respondent's failure to pay claimants was willful and claimants were awarded a total of \$22,994.40 in ORS 652.140 penalty wages. Two of the claimants who worked overtime were also awarded \$7,320.00 in ORS 653.055 civil penalties.

The above-entitled case was assigned to 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 Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Rafael Colin, an employee of the Agency. Respondent was represented by Douglas C. Seeley, acting as Respondent's authorized representative.

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, On the Merits, and Ultimate¹), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) Andrade Concepcion, Ramon C. Castro, Stephen A. Hopkins, Elias Ontiveros, Luis J. Ontiveros, and Eric Rubio filed wage claims with the Agency's Wage and Hour Division alleging that Respondents owed them unpaid wages and assigned their claims to the Agency.

2) On August 24, 2016, Agency issued Order of Determination #16-1336 ("OOD") in which it alleged that Claimants were employed by Respondent in 2016 and

* The original Final Order was amended to correct a computation error in the Findings of Fact and Conclusions of Law regarding ORS 652.150 penalty wages due to claimant Ramon Castro.

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

were owed \$26,317.07 in unpaid wages, \$22,994.40 in ORS 652.150 penalty wages, and \$7,320.00 in ORS 653.055 civil penalties.

3) Respondent's registered agent was served with the OOD on August 30, 2016. On September 28, 2016, Respondent filed an answer and request for hearing through Douglas C. Seeley, its authorized representative.

4) On November 29, 2016, the forum issued a Notice of Hearing to Respondent, the Agency, and Claimants setting the time and place of hearing for 9:00 a.m. on March 7, 2017, in Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, 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.

5) On February 6, 2017, the Agency filed a motion for Summary Judgment, contending it was entitled to judgment as a matter of law. On February 7, 2017, the ALJ issued an order setting a deadline for a written response by Respondent. Respondent did not file a response.

6) On February 22, 2017, the ALJ issued an interim order **GRANTING** the Agency's motion for summary judgment. The ALJ's interim order is reprinted below:

"INTRODUCTION

"On August 24, 2016, Agency issued Order of Determination ('OOD') #16-1336 in which it alleged that Respondent owed \$26,317.07 in wages, bonuses, vacation benefits, on lawful deductions, and expenses to six wage claimants. The OOD further alleged that Respondent owed the six claimants \$22,994.40 in ORS 652.150 penalty wages and civil penalties of \$7,320.00 to two of the claimants. Finally, the OOD alleged that it was based on the 'assigned wage claims' filed by claimants.

"Respondent's registered agent was served with the OOD. On September 27, 2016, Douglas Seeley filed a statement that he was authorized to represent Respondent in this matter, along with an answer and request for hearing.

"On February 6, 2017, the Agency filed a motion for summary judgment in which it contended that it was entitled to judgment as a matter of law on all of the allegations in its OOD. In an interim order issued on February 7, 2017, the undersigned ALJ gave Respondents until February 16, 2017, to file a response. The interim order included the following information:

'OAR 839-050-0150(4) provides that any participant may make a motion for summary judgment for an accelerated decision in favor of the

participant as to all or part of the issues raised in the pleadings. In ruling on the Agency's motion, the forum will consider the existing record, the supporting documents provided by the Agency, and any documents provided by Respondents in response to the Agency's motion, in a manner most favorable to Respondents. Respondents' written response, including any opposing affidavits, if applicable, and supporting documents must be filed no later than **Thursday, February 16, 2017**. OAR 839-050-0150. The forum will rule on the Agency's motion promptly thereafter.

'PLEASE NOTE: Respondents have the burden of producing evidence on any issue raised in the motion as to which the Respondents have the burden of persuasion at hearing. See ORCP 47C.

'If Respondent fails to file a written response, the forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law.'

Respondents did not file a response and the forum rules on the motion based on the OOD, Respondents' answer, and the exhibits accompanying the Agency's motion.

"SUMMARY JUDGMENT STANDARD

"A motion for summary judgment may be granted when 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.

In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment * * * and in favor of the participant opposing the motion * * *.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993).

“UNPAID WAGES

“The Agency’s prima facie case consists of the following elements: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed, if other than the minimum wage; 3) The amount and extent of work Claimants performed for Respondent; and 4) Claimants performed work for which they were not properly compensated. See, e.g., *In the Matter of Christopher Lee Ruston and Christine M. Stahler*, 34 BOLI 56, 61 (2015).

“In paragraph II of its OOD, the Agency alleged that Claimants performed work, labor and services for differing agreed rates of pay for Respondent and are owed unpaid wages as set forth below:

<u>Claimant Wages</u>	<u>Employment Dates</u>	<u>Agreed Rate</u>	<u>Unpaid</u>
Andrade Concepcion	3/16/16 – 5/12/16	\$14.65/hour	\$3,414.70
Ramon Castro	3/1/16 – 4/28/16	\$4,100/month	\$8,540.38
Stephen Hopkins	3/1/16 – 4/7/16	\$14/hour	\$1,400.00
Elias Ontiveros	3/16/16 – 5/13/16	\$14.50/hour	\$5,220.88
Luis Ontiveros	3/16/16 – 5/13/16	\$16/hour	\$5,747.00
Eric Rubio	3/1/16 – 5/4/16	\$13/hour	\$1,994.11

In its answer, Respondent responded to these allegations as follows: ‘In response to paragraph II of the order and the alleged Wages in the amount of \$26,317.07 I agree that I owe that amount because of back wages to employees.’ Respondent’s statement constitutes an admission to all the elements of the Agency’s prima facie case concerning Claimants’ unpaid wages. Accordingly, the forum **GRANTS** summary judgment to the Agency for the unpaid wages set forth in the right-hand column above.

“PENALTY WAGES

“In paragraph III of its OOD, the Agency alleged that all six Claimants are entitled to ORS 652.150 penalty wages based on Respondent’s willful failure to pay unpaid, due and owing wages to Claimants upon the termination of their employment. The penalty wages sought by the Agency in its OOD, along with their computation, are set out below:

<u>Claimant</u>	<u>Computation of Penalty Wages</u>
Andrade Concepcion	\$14.65/hour x 8 hours = \$117.20 x 30 days = \$3,516.00
Ramon Castro	\$23.66/hour x 8 hours = \$189.28 x 30 days = \$5,670.40
Stephen Hopkins	\$14/hour x 8 hours = \$112.00 x 30 days = \$3,360.00
Elias Ontiveros	\$14.50/hour x 8 hours = \$116.00 x 30 days = \$3,480.00
Luis Ontiveros	\$16/hour x 8 hours = \$128.00 x 30 days = \$3,840.00
Eric Rubio	\$13/hour x 8 hours = \$104.00 x 30 days = \$3,120.00

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *See, e.g., In the Matter of Coast 2 Coast Construction, LLC*, 35 BOLI 151, 172 (2017).

“Respondent admitted in its answer that it owed Claimants the wages alleged in the OOD and the forum has granted summary judgment to the Agency as to those wages. In its answer, Respondent responded the Agency’s penalty wage allegations as follows: ‘In response to paragraph III of the order and the alleged Penalty Wages in the amount of \$22,994.40 I deny I owe this amount as all employees involved will be eligible to return to work at full wage and all prior wages will be paid in full.’ Respondent’s statement reaffirms its awareness that it owes unpaid, due and owing wages to the six Claimants and offers no reason for not having paid those wages. There is no evidence in the record that Respondents were not free agents in their decision not to pay Claimant those wages. Accordingly, the forum **GRANTS** the Agency’s motion for summary judgment.

“When a written notice of nonpayment is submitted on behalf of a wage claimant,² an employer receives the notice, and the employer fails to pay the full

² In support of its motion for summary judgment, the Agency did not submit any wage claim notices that it sent to Respondent during its investigation. However, the OOD itself, issued on August 24, 2016, serves the same function. *See In the Matter of Grant and Leslie Hamilton dba MacGregors*, 33 BOLI 209, 215 (2014) (when there is proof of service of an OOD that contains reference to the amounts claimed to be

amount of the employee's unpaid wages within 12 days after receiving the notice,³ penalty wages are computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. ORS 652.150(1) & (2); OAR 839-001-0470.⁴ Accordingly, Claimants' penalty wages are calculated as set out in the chart shown earlier in this section and the Agency is **GRANTED** summary judgment as the amount of penalty wages shown there, an amount that coincides with the amounts sought in the OOD.

"CIVIL PENALTY

"An employer who does not pay an employee the minimum wage or overtime wages is liable to a civil penalty computed in the same manner as ORS 652.150 penalty wages. See, e.g., *In the Matter of Coast 2 Coast, LLC*, 35 BOLI 151, 173 (2017). Respondent's defense that it plans to pay Claimants in full in the future is no defense.

"In paragraph III of its OOD, the Agency alleged that Claimants E. and L. Ontiveros are entitled to a civil penalty under ORS 653.055(1)(b) based on Respondent's failure to pay earned overtime wages to them. ORS 653.055(1) provides:

'(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

'(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

'(b) For civil penalties provided in ORS 652.150."

ORS 653.261(1) provides:

'(1) The Commissioner of the Bureau of Labor and Industries may adopt rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. The rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of

due, the fact of written notice is established, as is the amount of the penalty.)

³ The forum concludes that Respondent received the OOD based on the fact that Respondent filed an answer and request for hearing.

⁴ The next sentence in the ALJ's ruling on the motion for summary judgment stated: "Claimant's penalty wages equal \$2,160 (\$9 x 8 hours x 30 days)." That sentence, which is irrelevant to this case, was inadvertently included in the ALJ's ruling because of a clerical error and has been deleted from this proposed order.

pay of the employees when computed without benefit of commissions, overrides, spiffs and similar benefits.'

OAR 839-020-0030(1) provides, in pertinent part:

'Except as provided in OAR 839-020-0125 to 839-020-0135, all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1).'

As stated earlier, Respondent, in its answer, admitted owing \$26,317.07 in unpaid wages to the six Claimants. This total included \$239.25 and \$264.00 owed to E. and L. Ontiveros in overtime wages for 11 hours each of overtime work.⁵ Based on this admission, the forum concludes that Respondent did not pay overtime wages to E. and L. Ontiveros, thereby entitling them to an ORS 653.055(1)(b) civil penalty.

"The forum calculates the civil penalty as follows and **GRANTS** the Agency's motion for summary judgment for the bolded amounts shown below:

<u>Claimant</u>	<u>Computation of ORS 653.055 Civil Penalty</u>
E. Ontiveros	\$14.50/hour x 1.5 = \$21.75/hour x 8 hours = \$239.25 x 30 days = \$3,480.00
L. Ontiveros	\$16/hour x 1.5 = \$24.00/hour x 8 hours = \$264.00 x 30 days = \$3,840.00

"CONCLUSION

"The Agency's motion for summary judgment is **GRANTED** in its entirety. The hearing in this matter is hereby cancelled and the forum will issue a proposed order in the near future that incorporates this interim order. OAR 839-050-0150(4)."

The ALJ's summary judgment ruling is **AFFIRMED**, except for the statement that Ramon Castro is entitled to \$5,670.40 in ORS 652.150 penalty wages. This was a miscalculation. The correct sum is \$5,678.40.

⁵ The overtime wages and their calculation is set out in Exhibit A attached to the Agency's OOD and incorporated by reference in paragraph III of the Agency's OOD. E. and L. Ontiveros are owed different amounts because their regular wage rates differed.

FINDINGS OF FACT – THE MERITS

1) Respondent engaged the personal services of Andrade Concepcion from 3/16/16 – 5/12/16 at the agreed rate of \$14.65/hour. Concepcion worked 77.11 hours and earned the following amounts: \$1,129.66 in wages, a bonus of \$67.50, and vacation pay of \$1,758.00. Respondent also unlawfully deducted \$459.54 from his pay. He was paid nothing and is owed \$3,414.70. (OOD; Respondent's answer)

2) Respondent engaged the personal services of Ramon C. Castro from 3/1/16 – 4/28/16 at the agreed salary of \$4,100.00 per month. Castro earned \$8,200.00 in salary and a bonus of \$130.00. Respondent also unlawfully deducted \$174.38 and charged a bank fee of \$36.00. He was paid nothing and is owed \$8,540.38. (OOD; Respondent's answer)

3) Respondent engaged the personal services of Stephen A. Hopkins from 3/1/16 – 4/7/16 at the agreed rate of \$14.00/hour. Hopkins worked 96.25 hours and earned \$1,347.50 in wages and a bonus of \$52.50. He was paid nothing and is owed \$1,400.00. (OOD; Respondent's answer)

4) Respondent engaged the personal services of Elias Ontiveros from 3/16/16 – 5/13/16. E. Ontiveros worked 334.25 hours of straight time at the agreed rate of \$14.50/hour and 11 hours of overtime for which he was entitled to be paid \$21.75/hour. He earned \$4,846.63 straight time wages and \$239.25 in overtime wages, along with a bonus of \$135.00. He was paid nothing and is owed \$5,220.88. (OOD; Respondent's answer)

5) Respondent engaged the personal services of Luis Ontiveros from 3/16/16 – 5/13/16. L. Ontiveros worked 334.25 hours of straight time at the agreed rate of \$16.00/hour and 11 hours of overtime for which he was entitled to be paid \$24.00/hour. He earned \$5,348.00 straight time wages and \$264.00 in overtime wages, along with a bonus of \$135.00. He was paid nothing and is owed \$5,747.00. (OOD; Respondent's answer)

6) Respondent engaged the personal services of Eric Rubio from 3/1/16 – 5/4/16 at the agreed rate of \$13.00/hour. Rubio worked 146.47 hours and earned \$1,904.11 in wages and a bonus of \$90.00. He was paid nothing and is owed \$1,994.11. (OOD; Respondent's answer)

7) At the latest, Respondent became aware that these amounts were due to Claimants on August 30, 2016, when Respondent's registered agent was served with the OOD. More than 30 days have elapsed since that time.

8) ORS 652.150 penalty wages are computed as follows:

Andrade Concepcion	$\$14.65/\text{hour} \times 8 \text{ hours} = \$117.20 \times 30 \text{ days} =$ \$3,516.00
Ramon Castro	$\$23.66/\text{hour} \times 8 \text{ hours} = \$189.28 \times 30 \text{ days} =$ \$5,678.40
Stephen Hopkins	$\$14/\text{hour} \times 8 \text{ hours} = \$112.00 \times 30 \text{ days} =$ \$3,360.00
Elias Ontiveros	$\$14.50/\text{hour} \times 8 \text{ hours} = \$116.00 \times 30 \text{ days} =$ \$3,480.00
Luis Ontiveros	$\$16/\text{hour} \times 8 \text{ hours} = \$128.00 \times 30 \text{ days} =$ \$3,840.00
Eric Rubio	$\$13/\text{hour} \times 8 \text{ hours} = \$104.00 \times 30 \text{ days} =$ \$3,120.00

9) ORS 653.055 civil penalties are computed as follows:

E. Ontiveros	$\$14.50/\text{hour} \times 1.5 = \$21.75/\text{hour} \times 8 \text{ hours} =$ $\$239.25 \times 30 \text{ days} =$ \$3,480.00
L. Ontiveros	$\$16/\text{hour} \times 1.5 = \$24.00/\text{hour} \times 8 \text{ hours} =$ $\$264.00 \times 30 \text{ days} =$ \$3,840.00

10) The ALJ issued a proposed order on March 2, 2017, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Claimants. ORS 652.310.

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

3) Respondents owe Claimants the amounts set out in Findings of Fact ##1-6 – The Merits, and more than five days have elapsed since Claimants' employment ceased. ORS 652.140.

4) Respondents' failure to pay Claimants all unpaid, due and owing wages after Claimants' employment ceased was willful and Claimants are entitled the penalty wages set out in Finding of Fact #8 – The Merits. ORS 652.150.

5) Claimants E. and L. Ontiveros were not paid overtime wages that they earned and are entitled to ORS 653.055 civil penalties of \$3,480.00 (E. Ontiveros) and \$3,840.00 (L. Ontiveros).

6) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages, ORS 652.150 penalty wages, ORS 653.055 civil penalties, unpaid bonuses, unlawful deductions, and bank fee, plus interest on all sums until paid. ORS 652.332.

OPINION

All allegations in the Agency's OOD were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Oregon Fir Millwork, Inc.** to deliver to the Fiscal Services Office 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 Claimant Andrade Concepcion in the amount of **SIX THOUSAND NINE HUNDRED THIRTY DOLLARS and SEVENTY CENTS** (\$6,930.70), less appropriate lawful deductions, representing \$3,414.70 in gross earned, unpaid, due and payable wages and \$3,516.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of \$3,414.70 from June 1, 2016, until paid, and interest at the legal rate on the sum of \$3,516.00 from July 1, 2016, until paid.
- 2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Ramon C. Castro in the amount of **FOURTEEN THOUSAND TWO HUNDRED EIGHTEEN DOLLARS and SEVENTY EIGHT CENTS** (\$14,218.78), less appropriate lawful deductions, representing \$8,540.38 in gross earned, unpaid, due and payable wages and \$5,678.40 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of \$8,540.38 from June 1, 2016, until paid, and interest at the legal rate on the sum of \$5,678.40 from July 1, 2016, until paid.
- 3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Stephen A. Hopkins in the amount of **FOUR THOUSAND SEVEN**

HUNDRED SIXTY DOLLARS (\$4,760.00), less appropriate lawful deductions, representing \$1,400.00 in gross earned, unpaid, due and payable wages and \$3,360.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of \$1,400.00 from May 1, 2016, until paid, and interest at the legal rate on the sum of \$3,360.00 from June 1, 2016, until paid.

- 4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Elias Ontiveros in the amount of **TWELVE THOUSAND ONE HUNDRED EIGHTY DOLLARS and EIGHTY EIGHT CENTS** (\$12,180.88), less appropriate lawful deductions, representing \$5,220.88 in gross earned, unpaid, due and payable wages, \$3,480.00 in ORS 652.150 penalty wages, and an ORS 653.055 civil penalty of \$3,480.00, plus interest at the legal rate on the sum of \$5,220.88 from June 1, 2016, until paid, and interest at the legal rate on the sum of \$6,960.00 from July 1, 2016, until paid.
- 5) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Luis Ontiveros in the amount of **THIRTEEN THOUSAND FOUR HUNDRED TWENTY SEVEN DOLLARS** (\$13,427.00), less appropriate lawful deductions, representing \$5,747.00 in gross earned, unpaid, due and payable wages, \$3,840.00 in ORS 652.150 penalty wages, and an ORS 653.055 civil penalty of \$3,840.00, plus interest at the legal rate on the sum of \$5,747.00 from June 1, 2016, until paid, and interest at the legal rate on the sum of \$7,680.00 from July 1, 2016, until paid.
- 6) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Eric Rubio in the amount of **FIVE THOUSAND ONE HUNDRED FOURTEEN DOLLARS and ELEVEN CENTS** (\$5,114.11), less appropriate lawful deductions, representing \$1,994.11 in gross earned, unpaid, due and payable wages and \$3,120.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of \$1,994.11 from June 1, 2016, until paid, and interest at the legal rate on the sum of \$3,120.00 from July 1, 2016, until paid.

In the Matter of

**BROWN'S ARCHITECTURAL SHEETMETAL,
INC., BRUN METALS COMPANY, LLC, AND
MARC BROWN, CASE No. 81-15**

**Final Order of Commissioner Brad Avakian
Issued June 19, 2017**

SYNOPSIS

The Agency's Notice of Intent ("NOI") alleged that Respondents Brown Architectural ("BAS") and Brun Metals Company, LLC ("BMC") employed four workers on two public works projects ("EG" and "ACMA") and (1) intentionally failed to pay them the prevailing wage rate; (2) failed to file certified payroll reports; and (3) took action to circumvent payment of the prevailing wage rate. The NOI sought \$52,270.60 in civil penalties and debarment of BAS, BMC, and Marc Brown. The forum held: (1) BMC was the workers' sole employer; (2) Respondents did not violate Oregon's prevailing wage rate law with respect to certified payroll reports or circumvention; (3) BMC failed to pay the prevailing wage rate to the four workers at EG and ACMA; and (4) BMC's failure was not intentional. The forum assessed \$4,270.60 in civil penalties against BMC based on its failure to pay the prevailing wage rate and did not debar Respondents.

This case was scheduled for hearing. Before the date set for hearing, the case was resolved by the ALJ's rulings on the Agency's and Respondents' motions for summary judgment, Respondents' motion to dismiss, and Respondents' motion to preclude the Agency from calling witnesses or presenting evidence at the contested case hearing. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Respondents were represented by Richard Hunt, attorney at law.

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 August 17, 2015, the Agency issued a Notice of Intent ("NOI") in case no. 81-15 that proposed to place Respondents Brown's Architectural Sheetmetal, Inc.

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

("BAS"), Brun Metals Company, LLC ("BMC"), and Marc Brown on the List of Ineligibles and to Assess Civil Penalties in the amount of \$48,270.60 against BAS and BMC. In part, the NOI was based on the Agency's allegation that BAS and BMC failed to pay the prevailing wage rate to their employees on two public works. Respondents, through attorneys Larry Brisbee and Christopher Allnatt, filed an answer and request for hearing on September 8, 2015. On September 11, 2015, BOLI issued a Notice of Hearing setting a hearing date of December 1, 2015. (Ex. X1)

2) On October 20, 2015, attorneys Brisbee and Allnatt filed a motion to postpone the hearing and a letter withdrawing as Respondents' counsel.

3) On October 21, 2015, the Agency filed a motion to consolidate case no. 81-15 with case no. 80-15, a wage claim case that involved the same four workers whom the Agency alleged were not paid the prevailing wage rate in case no. 81-15. (Ex. X5)

4) On October 22, 2015, Richard Hunt, attorney at law, filed a notice of appearance stating that he had been retained to represent Respondents in both cases on October 21, 2015, and that he would be Respondents' principal counsel. (Ex. X7)

5) On October 26, 2015, Respondents filed a supplemental motion to postpone the hearing based on Hunt's pre-existing conflicts and need for time to review the file and pleadings and prepare for hearing. On October 29, 2015, the Agency filed a response opposing Respondents' motion. On October 30, 2015, the ALJ issued an interim order granting Respondents' motion. (Exs. X7, X13)

6) On November 18, 2015, Respondents moved to amend their answer, supported by Hunt's Declaration as to the reasons for the amendment. The Agency did not object and the forum granted Respondent's motion. (Exs. X15, X18)

7) On December 2, 2015, the ALJ held a prehearing conference with Ms. Ortega, Mr. Hunt, and Ms. Ko, Mr. Hunt's associate. The purpose of the conference was to discuss the Agency's motion to consolidate case nos. 80-15 and 81-15 and determine the most efficient way of moving both cases forward. After the conference, the ALJ issued an interim order that denied the Agency's motion to consolidate and stated that the hearing in case no. 80-15 would be held first, with a hearing in case no. 81-15 to follow if any issues remained to be resolved. (Ex. X19)

8) Case no. 80-15 was heard on March 22-25, March 30-31, May 3-6, and May 17-18, 2016. On July 5, 2016, the ALJ issued a proposed order. On August 29, 2016, the Commissioner issued a Final Order. The Final Order concluded that BMC had employed four workers -- Don Gross, Don Leis, Robert Sinner, and Brady Steinmetz -- on two public works projects -- Elton Gregory Project ("EG") and Beaverton Performing Arts Project ("ACMA") and had not paid the prevailing wage rate to those workers on either project. (Judicial Notice)

9) On September 12, 2016, based on the mutual agreement of Agency and Respondents, the ALJ reset the hearing in case no. 81-15 to begin on November 29, 2016. (Ex. X21)

10) On September 22, 2016, the ALJ issued an interim order requiring case summaries to be filed no later than November 15, 2016. The ALJ's order included a statement of the possible sanctions for failure to comply with the case summary order. Among other things, the order required Respondents and the Agency to submit:

"A list of all persons to be called as witnesses, along with a statement identifying any person who will be called as a telephone witness, *except* those who will give testimony solely for the purpose of impeachment or Agency rebuttal.

"* * * * *

"Identification and description of any document or other physical evidence to be offered into evidence at the hearing, together with a copy of any such document or evidence, *except* for exhibits offered solely for the purpose of impeachment or Agency rebuttal." (Ex. X22)

11) On October 21, 2016, ALJ issued an interim order summarizing the issues left to be decided in case no. 81-15, taking into consideration the Final Order in case no. 80-15. In pertinent part, the order read as follows:

"Based on the doctrine of issue preclusion, the forum is of the opinion that the following issues remain unresolved:

- (1) Did [BMC] fail to file 41 certified payroll statements ('CPRs') on the [EG] and [ACMA] Project[s]?
- (2) If BMC failed to file CPRs, what civil penalty should be assessed?
- (3) What civil penalty should be assessed for BMC's failure to pay the prevailing wage rate to Don Gross, Don Leis, Robert Sinner, and Brady Steinmetz for their work on the EG and ACMA projects?
- (4) Did BMC intentionally fail to pay the prevailing wage rate to Gross, Leis, Sinner, and Steinmetz on the EG and/or ACMA projects?
- (5) If BMC intentionally failed to pay the prevailing wage rate to Gross, Leis, Sinner, and Steinmetz on the EG and/or ACMA projects, was Marc Brown responsible?
- (6) Should BMC be placed on the commissioner's list of ineligible under ORS 279C.860?
- (7) Should Marc Brown be placed on the commissioner's list of ineligible under ORS 279C.860?

"Based on the same doctrine, the forum also concludes that [BAS] was not an employer on the EG or ACMA projects and that the charges should be dismissed against BAS." (Ex. X23)

12) On October 26, 2016, Respondents filed a request for clarification of the ALJ's October 21, 2015, interim order. In particular, Respondents asked: (1) if Marc Brown "was found not to be responsible under Issue No. 5, then it is Respondents' assumption that Issue No. 7 would never be reached"; and "(2) if Marc Brown was found to be 'responsible,' the only consequence of that finding would be the possibility of his being placed on a list of ineligible for some period of time." (Ex. X24)

13) On October 27, 2016, the ALJ issued an amended interim order clarifying his original order in response to Respondents' request for clarification. (Ex. X25)

14) On November 2, 2016, the Agency amended its NOI to add the following allegations:

"Respondents took action to circumvent payment of prevailing wages in violation of ORS 279C.840(7) and OAR 839-025-0300 by failing to memorialize their agreement with the prime contractor in writing and failing to provide any records or information to the Agency regarding the specifics of that agreement."

"Respondents [sic] BROWN'S ARCHITECTURAL SHEETMETAL, INC. should be placed on the list of ineligible pursuant to *former and current* ORS 279C.860 (1)(a) and (3) and OAR *former and current* 839-025-0085(1)(a) and (2) because MARC BROWN was responsible for failing or refusing to pay the prevailing rate of wage and he has a financial interest in BROWN'S ARCHITECTURAL SHEETMETAL, INC."

The Agency proposed to assess an additional \$4,000 in civil penalties for the alleged circumvention violations. (Ex. X27)

15) On November 7, 2016, Respondents filed four motions: (1) motion for partial summary judgment; (2) motion to dismiss; (3) motion to postpone; and (4) motion to reset deadlines to file answer and motions and reset the date of hearing. (Exs. X29, X30, X31, X32)

16) On November 8, 2016, the Agency filed a motion for summary judgment as to all the allegations in its Amended NOI. (Ex. X28)

17) On November 9, 2016, Respondents filed an answer and affirmative defenses to the Agency's Amended NOI. (Ex. X33)

18) On November 14, 2016, Respondents filed a motion opposing the Agency's motion for summary judgment. (Ex. X35)

19) The Agency filed no objections to Respondents' motion for postponement. On November 15, 2016, ALJ issued an interim order granting Respondents' motion to

postpone the hearing based on the unanticipated family medical issues confronting Respondent Marc Brown. (Ex. X37)

20) On November 15, 2016, the ALJ granted Respondents' motion for additional time to file an answer to the Agency's Amended NOI in which the ALJ noted that Respondents had already filed an answer on November 9, 2016, and granted Respondents until November 28, 2016 to file a supplemental answer, should they choose to do so. (Ex. X38)

21) Respondent filed a case summary on November 15, 2016, the date case summaries were due. (Exs. X36, X48)

22) On December 1, 2016, the ALJ issued an interim order ruling on Respondents' motions to dismiss and for partial summary judgment. That order is reprinted below in its entirety.

"The Agency's amended NOI alleges that Respondents, including [BAS] and [BMC], committed numerous violations of Oregon's prevailing wage rate laws for which the Agency seeks to assess civil penalties. Additionally, the Agency seeks to place BAS, BMC, and Marc Brown on the commissioner's list of ineligible.

"On November 7, 2016, Respondents filed motions to dismiss and for partial summary judgment. The Agency did not file a response to either motion. This interim order rules on both motions.

"Respondents' motion for partial summary judgment asks that summary judgment be granted to BAS on all counts, arguing that all issues in which the Agency seeks to hold BAS liable in its amended NOI 'are dependent upon BAS having been found to be an employer,' that this issue was fully litigated and determined in a prior proceeding involving case no. 80-15 in which BAS was a named respondent, and that the Commissioner's Final Order in that case concluded that BAS was not an employer as alleged by the Agency.

"Respondents' motion to dismiss asked that all claims against [BAS] be dismissed 'because the forum lacks jurisdiction over that entity to hear any claims. All claims against BAS have been dismissed in Case No. 80-15.'

"RULING ON MOTION FOR PARTIAL SUMMARY JUDGMENT

"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 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.

“Ruling on Motion for Partial Summary Judgment

“The Agency’s amended NOI alleges that Respondents, including BAS, committed the following violations for which the Agency seeks to assess a total of \$52,270.60 in civil penalties:

- (1) Failure to pay the prevailing wage rates to wage claimants Don Gross, Christopher Leis, Robert Sinner, and Brady Steinmetz for work they performed while employed by Respondents on the EG and ACMA public works projects.
- (2) Failure to file certified statements for 41 pay periods in which Respondents employed the wage claimants on the EG and ACMA public works projects.
- (3) Taking action to circumvent payment of prevailing wages.

In addition, the Agency’s amended NOI seeks to place BAS on the commissioner’s list of ineligible based on allegations that: (4) BAS intentionally failed to pay the prevailing wage rate to workers employed on a public works project; and (5) Respondent Marc Brown was responsible for failing or refusing to pay the prevailing rate of wage and has a financial interest in BAS. Respondents’ motion asks the forum to grant summary judgment to BAS on all five issues based on the doctrine of issue preclusion.

A. Relevant Rulings in Case No. 80-15

“On August 29, 2016, Commissioner Avakian issued a Final Order in case no. 80-15. In that case, the Agency alleged that Respondents BMC and BAS jointly employed wage claimants Don Gross, Christopher Leis, Robert Sinner, and Brady Steinmetz and failed to pay them all wages due and owing for work they performed while employed by Respondents on two public works projects. Specifically, the Agency’s charging document alleged that claimants were underpaid because they were paid an agreed rate for all hours worked on the projects that was lower than the prevailing wage rate. Pertinent to this analysis, the Final Order held that: (1) BMC was claimants’ employer; (2) BAS was not claimants’ employer; (3) Both projects were public works projects on which BMC

was obligated to pay the prevailing wage rate to claimants; and (4) BMC failed to pay the prevailing wage rate to claimants as required by law.

B. Issue Preclusion

“Issue preclusion is a common-law doctrine that promotes judicial efficiency and is applicable to court and contested case proceedings.² The Oregon Supreme Court has identified five requirements that are essential to the application of common-law issue preclusion:

‘(1) The issue in the two proceedings must be identical;

‘(2) The issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding;

‘(3) The party against whom issue preclusion is asserted must have had a full and fair opportunity to be heard on that issue in the prior proceeding;

‘(4) The party against whom issue preclusion is asserted must been a party or be in privity with a party to the prior proceeding; and

‘(5) The prior proceeding must be the type of proceeding to which [the forum] will give preclusive effect.’

Hancock v. Pioneer Asphalt, Inc., 276 Or App 875, 880 (2016), *quoting Nelson v. Emerald People’s Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993).

C. Failure to pay the prevailing wage rate.

“In case no. 80-15, the Final Order held that BMC failed to pay the prevailing wage rate to claimants and dismissed the wage claims against BAS on the grounds that BAS had no obligation to pay wages to claimants because BAS was not claimants’ employer. An element of the Agency’s *prima facie* case was BMC’s and BAS’s joint employment of the four wage claimants, making the determination of BAS’s status as an employer an issue that was essential to the final decision reached. Over the course of a 12-day hearing, the issue of whether BAS employed the four wage claimants was actually and fully litigated. In his Final Order, the Commissioner found that BMC was claimants’ sole employer and ordered BMC to pay unpaid, due and owing wages to each claimant. The Commissioner also found that BAS was not the claimants’ employer and dismissed the wage claims against BAS. *In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC*, 35 BOLI 68, 90, 109 (2016). Stated another way, the Commissioner concluded that BAS did not fail to pay the prevailing wage rate because BAS had no legal obligation to do so. Based on the above, the forum finds that the doctrine of issue preclusion entitles

² OAR 839-050-0150(4)(a)(A) provides that a motion for summary judgment in this forum may be based on issue preclusion.

BAS to summary judgment on the Agency's charge that BAS failed or refused to pay the prevailing wage rate.³ Accordingly, Respondents are **GRANTED** summary judgment on the Agency's charge that BAS failed or refused to pay the prevailing wage rate.

D. Failure to file certified statements.

"In paragraph 6 of the Agency's amended NOI, the Agency alleges that Respondents, including BAS, 'failed to file certified statements by the fifth business day of the following month in which they employed workers upon the public works * * *.' The forum is foreclosed from granting summary judgment to BAS based on issue preclusion because this issue was not litigated during the contested case proceeding in case no. 80-15. Respondents' motion for summary judgment on this issue is **DENIED**.

E. Circumventing payment of prevailing wages.

"In paragraph 7 of the Agency's amended NOI, the Agency alleges that Respondents, including BAS, took 'action to circumvent payment of prevailing wages by failing to memorialize their agreement in writing with the prime contractor on two public works and failing to provide any records or information to the Agency regarding the specifics of that agreement,' thereby violating ORS 279C.840(7) and OAR 839-025-0300. Again, the forum cannot award summary judgment on the basis of issue preclusion because this issue was not litigated during the contested case proceeding in case no. 80-15 and did not even exist until the Agency issued its amended NOI, two months after the Final Order in case no. 80-15 was issued. Respondents' motion for summary judgment on this issue is **DENIED**.

F. Intentional Failure by BAS to Pay the Prevailing Wage Rate.

"In paragraph 8 of the Agency's amended NOI, the Agency alleges that Respondents, including BAS, should be placed on the list of ineligible 'because they intentionally failed or refused to pay the prevailing wage rate to workers employed on a public works.' As stated earlier, the Commissioner's Final Order in case no. 80-15 concluded that BAS employed no workers on the subject public works projects and had no legal obligation to pay any wages. Restated, the conclusion that BAS did not intentionally fail or refuse to pay the prevailing wage rate is merely a logical extension of the Commissioner's conclusion that BAS had no obligation to pay any wages. Based on the above, the forum finds that the doctrine of issue preclusion entitles BAS to summary judgment on the Agency's charge that BAS intentionally failed or refused to pay the prevailing wage rate. Respondents' motion for summary judgment on this issue is **GRANTED**.

³ This allegation is contained in Paragraph 5 of the Agency's Amended NOI.

G. Placement of BAS on the list of ineligible because Respondent Marc Brown was responsible for failing or refusing to pay the prevailing rate of wage and has a financial interest in BAS.

“BAS is not entitled to summary judgment on this allegation based on the doctrine of issue preclusion because these issues were not actually litigated and essential to a final decision on the merits in the case no. 80-15.⁴ Respondents’ motion for summary judgment on this issue is **DENIED**.

“RULING ON MOTION TO DISMISS

“OAR 839-050-0150(1) provides that a motion to dismiss must be based on lack of jurisdiction, insufficiency of process or service of process, or failure to state a claim upon which relief can be granted.

“The wage claims filed against BAS in case number 80-15 were dismissed in the Final Order issued after a contested case proceeding and the forum has granted summary judgment to BAS on that issue. However, the Agency’s amended NOI contains three collateral issues related to BAS that were neither alleged nor litigated in case number 80-15. Those issues are: (1) whether BAS failed to file certified statements for workers it employed at the EG and ACMA public works projects; (2) whether BAS took action to circumvent payment of prevailing wages in violation of ORS 279C.840(7) and OAR 839-025-0300; and (3) whether BAS should be placed on the list of ineligible because of Respondent Marc Brown’s financial interest in BAS.

1. Failure to file certified statements.

“Only contractors and subcontractors who employ workers on a public works project are required to file certified statements under ORS 279C.845(4) and OAR 839-025-0010(3). In order to prevail on this allegation, the Agency must prove BAS was a contractor or subcontractor that employed workers. In case no. 80-15, that issue was litigated and the commissioner concluded that BAS did not employ workers on those projects. Based on the Commissioner’s Final Order in case no. 80-15, the Agency is now precluded from re-litigating its allegation that BAS employed workers on the EG and ACMA projects. Because the Agency has no way of proving that BAS employed workers on those projects, it cannot prove that BAS was required to file certified statements. BAS cannot violate the provisions of a statute it had no legal obligation to follow. Accordingly, Respondents’ motion to dismiss is **GRANTED** with respect to the Agency’s certified statement allegations against BAS.

⁴ This allegation is contained in Paragraph 10 of the Agency’s Amended NOI.

2. *Circumvention of payment of prevailing wage.*

“ORS 279C.840(7) provides:

‘A person may not take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee’s regular rate of pay on any project not subject to ORS 279C.800 to 279C.870 in a manner that has the effect of offsetting the prevailing rate of wage on a public works project.’

OAR 839-025-0300 provides that ‘[n]o person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects.’ ‘Person’ includes a corporation. ORS 279A.010(1)(t). As discussed earlier, BAS was not a subcontractor, contractor, or employer on the EG or ACMA projects. However, the statute’s use of the word ‘person’ instead of ‘subcontractor,’ ‘contractor,’ or ‘employer’ or another restrictive term indicates that the legislature did not intend the statute’s coverage to be limited to one of those specific entities. Because of this, the forum’s conclusion in case no. 80-15 that BAS was not an employer on the EG or ACMA projects does not deprive the forum of jurisdiction over the Agency’s circumvention allegations.

“Respondents’ motion to dismiss the Agency’s circumvention allegation in paragraph 7 of the Agency’s amended NOI is **DENIED**.

3. *Placement of BAS on the list of ineligible because Respondent Marc Brown was responsible for failing or refusing to pay the prevailing rate of wage and has a financial interest in BAS.*

“As stated earlier, OAR 839-050-0150(1) provides that a motion to dismiss must be based on lack of jurisdiction, insufficiency of process or service of process, or failure to state a claim upon which relief can be granted. Respondents’ motion asks that this allegation, set out in paragraph 10 of the Agency’s amended NOI, be dismissed based on lack of jurisdiction. Lack of jurisdiction is not grounds for dismissing this allegation, as a financial relationship between Marc Brown and BAS is a statutory basis for debarment that is independent of BAS’s status as an employer on the EG and ACMA projects. However, based on the language in the Agency’s amended NOI, and in the interests of judicial economy, the forum **GRANTS** Respondents’ motion to dismiss for another reason.

“ORS 279C.860(1) provides, in pertinent part: ‘A contractor or a subcontractor or a * * * corporation * * * in which the contractor or subcontractor has a financial interest may not receive a contract or subcontract for public works for a period of three years after the date on which the Commissioner of [BOLI] publishes the contractor’s or subcontractor’s name on the list described in

subsection (2) of this section.’ Based on the plain wording of this provision, the forum concludes that the commissioner can only bar a corporation in which a ‘contractor’ or ‘subcontractor’ has a financial interest. In its amended NOI, the Agency seeks to place BAS on the list of ineligible based on Marc Brown’s financial interest in BAS. In paragraph 1 of the amended NOI, the Agency alleges that ‘[a]t times material to this Notice, Respondents [BAS] and [BMC] were contractors on public works projects within the state of Oregon.’ In contrast, the amended NOI does not allege that Marc Brown was a contractor or subcontractor. By not alleging that Marc Brown was a contractor or subcontractor, the Agency has failed to state a claim upon which the forum can grant relief.

“IT IS SO ORDERED.”

This ruling is **AFFIRMED**. (Ex. X41)

23) On December 1, 2016, the ALJ issued an interim order ruling on the Agency’s motion for summary judgment. That order is reprinted below in its entirety.

“On November 8, 2016, the Agency filed a motion for summary judgment as to all the allegations in the Agency’s amended NOI. On November 14, 2016, Respondents filed objections.

“The Agency’s amended NOI alleges that Respondent [BAS] and Respondent BMC committed numerous violations of Oregon’s prevailing wage rate laws for which the Agency seeks to assess civil penalties. Additionally, the Agency seeks to place all three Respondents on the commissioner’s list of ineligible.

“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 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 Agency’s Motion

“The Agency’s amended NOI alleges that Respondents committed the following violations for which the Agency seeks to assess a total of \$52,270.60 in civil penalties:

1. BAS and BMC failed to pay the prevailing wage rates to wage claimants Don Gross, Christopher Leis, Robert Sinner, and Brady Steinmetz for work they performed while employed by Respondents on the EG and ACMA public works projects, thereby violating ORS 279C.840(1) and OAR 839-025-0040.
2. BAS and BMC failed to file certified statements for 41 pay periods in which BAS and BMC employed the wage claimants on the EG and ACMA public works projects, thereby violating ORS 279C.845(4) and OAR 839-025-0010(3).
3. BAS and BMC took action to circumvent payment of prevailing wages, thereby violating ORS 279C.840(7) and OAR 839-025-0300.

In addition, the Agency’s amended NOI seeks to place all three Respondents on the commissioner’s list of ineligible based on the following allegations:

4. BAS and BMC intentionally failed or refused to pay the prevailing wage rate to workers they employed on the EG and ACMA projects and any firm, corporation, partnership or association in which they have a financial interest should be placed on the list of ineligible.
5. Marc Brown is the president of BAS and is or was manager of BMC and was responsible for failing or refusing to pay the prevailing rate of wage and should be placed on the list of in ineligible.
6. BAS should be placed on the list of ineligible because Marc Brown was responsible for failing or refusing to pay the prevailing rate of wage and has a financial interest in BAS.

As numbered above, the Agency asks for summary judgment against: (a) Respondent BMC as to allegations 1, 2, 4; (b) Respondent Marc Brown with respect to allegation 5; and (c) Respondent BAS with respect to allegation 6. The Agency does not seek summary judgment with respect to allegation 3.

“The Agency asserts it is entitled to summary judgment because there are no genuine issues of material fact as to any these allegations. In support of its argument, the Agency attached a copy of its Order of Determination (‘OOD’) issued in case no. 80-15, a copy of its original NOI in this case, a copy of its motion to consolidate regarding case nos. 80-15 and 81-15, a copy of the forum’s interim order denying the Agency’s motion to consolidate, a copy of the Final

Order issued in case 80-15 on August 29, 2016, and a copy of the Agency's amended NOI issued on November 3, 2016, in the present case.

"Discussion

"The Agency presents no new evidence in support of its motion and appears to rely entirely on the facts set out in the Final Order in case no. 80-15 for its conclusion that there are no questions of material fact as to the allegations summarized above. Except for allegation 1 as it pertains to BMC, the Agency's reliance is misplaced for the reason that, unless the doctrine of issue preclusion applies, none of the material facts determined in a prior hearing can be used to show that there are no questions of material fact in this case.

"Issue preclusion is a common-law doctrine that promotes judicial efficiency and is applicable to court and contested case proceedings.⁵ The Oregon Supreme Court has identified five requirements that are essential to the application of common-law issue preclusion:

'(1) The issue in the two proceedings must be identical;

'(2) The issue must have been actually litigated and essential to a final decision on the merits in the prior proceeding;

'(3) The party against whom issue preclusion is asserted must have had a full and fair opportunity to be heard on that issue in the prior proceeding;

'(4) The party against whom issue preclusion is asserted must be a party or be in privity with a party to the prior proceeding; and

'(5) The prior proceeding must be the type of proceeding to which [the forum] will give preclusive effect.'

Hancock v. Pioneer Asphalt, Inc., 276 Or App 875, 880 (2016), *quoting Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 862 P2d 1293 (1993).

"The Agency's allegations related to certified statements, intentional failure or refusal to pay the prevailing wage rate, and Marc Brown's responsibility for BMC's failure to pay the prevailing wage rate (paragraphs 6, 8, 9, and 10 in the Agency's amended NOI) were not an issue in case no. 80-15 and were not actually litigated and essential to a final decision on the merits in that case. Therefore, issue preclusion does not apply. The Agency's motion for summary judgment as to these allegations is **DENIED**.

⁵ OAR 839-050-0150(4)(a)(A) provides that a motion for summary judgment in this forum may be based on issue preclusion.

“In contrast, BMC was a party to the proceeding in case no. 80-15 in which the forum determined that BMC failed to pay the prevailing wage rate to wage claimants Don Gross, Christopher Leis, Robert Sinner, and Brady Steinmetz for work they performed while employed by Respondents on the EG and ACMA public works projects. That issue was actually litigated and essential to a final decision on the merits in that prior proceeding. Accordingly, based on the doctrine of issue preclusion, the forum **GRANTS** summary judgment to the Agency as to BMC’s violation of ORS 279C.840(1) as alleged in paragraph 5 of the Agency’s amended NOI. The forum **DENIES** summary judgment to the Agency on the issue of civil penalties for this violation because civil penalties were not an issue in case no. 80-15.

“IT IS SO ORDERED.”

This ruling is **AFFIRMED**. (Ex. X40)

24) On December 1, 2016, the ALJ issued an interim order summarizing the remaining issues in the case, identifying them as follows:

“(1) What is the appropriate civil penalty for BMC’s violation of ORS 279C.840(1)?

“(2) Did BMC and BAS circumvent the payment of the prevailing wage rate as alleged in ¶7 in the Agency’s amended NOI. If so, what is the appropriate civil penalty?

“(3) Did BMC fail to file certified statements as alleged in ¶6 in the Agency’s amended NOI? If so, what is the appropriate civil penalty?

“(4) Was BMC’s failure to pay the prevailing wage rate intentional as alleged in ¶8 in the Agency’s amended NOI?

“(5) If BMC’s failure to pay the prevailing wage rate was intentional as alleged in ¶8 in the Agency’s amended NOI, was Marc Brown responsible for that failure?”

(Ex. X42)

25) On December 19, 2016, the ALJ issued an interim order setting a new hearing date of May 2, 2017. (Ex. X43)

26) On April 17, 2017, the ALJ issued an interim order regarding case summaries that stated:

“On September 22, 2016, I issued a case summary order requiring case summaries to be filed by November 15, 2016. Respondents filed their case

summary on that date.⁶ Respondents' case summary included a witness list and a list of exhibits numbered R1, R2, R3, R4, R16, R17, R18, R19, R43, R46, R47, and R48, accompanied by a summary of the contents of each exhibit. Respondents did not file a separate copy of each exhibit.

"It is readily apparent that the exhibit descriptions and numbers are the exact same exhibits submitted under the same numbers in Respondents' case summary in case no. 80-15, a 'companion' case in which a Final Order has been issued and which the Agency unsuccessfully sought to have consolidated for hearing with the present case.

"Under these unique circumstances, the forum concludes that Respondents have met the forum's case summary requirement with respect to timely submission of its exhibits. However, it is Respondents' job, not the forum's or the Agency's, to provide copies of those exhibits for use in this hearing.

"Respondents are hereby ordered to provide two copies of exhibits R1, R2, R3, R4, R16, R17, R18, R19, R43, R46, R47, and R48 to the forum and one copy of those exhibits to the Agency. Respondents are instructed to file these copies no later than Wednesday, April 19, 2017."

On April 19, 2017, Respondents refiled their November 15, 2016, case summary, accompanied by copies of exhibits R1, R2, R3, R4, R16, R17, R18, R19, R43, R46, R47, and R48. (Ex. X45)

27) On April 17, 2017, the Agency filed a case summary. (Ex. X46)

28) On April 17, 2017, the Agency requested reconsideration of the ALJ's December 1, 2016, interim orders ruling on the Agency's motion for summary judgment and Respondents' motions to dismiss and for partial summary judgment. (Ex. X47)

29) On April 19, 2017, Respondents filed a motion to preclude the Agency from calling witnesses or presenting evidence at the contested case hearing based on the Agency's failure to timely submit a case summary or, in the alternative, granting a continuance of the hearing. (Exs. X49, X50)

30) On April 24, 2017, the Agency filed a response objecting to Respondents' motion. (Ex. X52)

31) On April 24, 2017, Respondents filed objections to the Agency's motion for reconsideration of the ALJ's December 1, 2016, interim orders. (Ex. X53)

⁶ The Agency did not file a case summary. NOTE: The Agency had not filed a case summary at the time the ALJ issued this interim order but filed one later that same day.

32) On April 25, 2017, the ALJ issued an interim order ruling on Respondents' motion to preclude the Agency from calling witnesses or presenting evidence at the contested case hearing. That order is reprinted below in its entirety.

"On April 19, 2017, Respondents filed a motion 'To Preclude Agency from Calling Witnesses or Presenting Evidence at Contested Case Hearing' based on the Agency's failure to timely file a case summary. The Agency filed a response on April 24, 2017.

"On September 22, 2016, I issued a case summary order requiring case summaries to be filed by November 15, 2016. Respondents filed their case summary on that date. In contrast, the Agency did not file its case summary until April 17, 2017, five months after it was due.

"OAR 839-050-0210(5) provides:

'(5) The administrative law judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that 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 an opportunity for the other participants to respond.'

In its response, the Agency offers two reasons for not submitting its case summary on November 15, 2016.

"First, the Agency contends that case summaries were not due on November 15, 2016, because the hearing was postponed on the same day that case summaries were due. The Agency argues that the forum's practice is that 'when a hearing is postponed, the case summary deadline is also postponed.' Although this may be a common practice, it is not universal and is not required by any rule. Furthermore, when a case summary deadline is postponed, the ALJ notifies the participants of that fact, something that did not occur in this case. The Agency should have made a timely inquiry if it questioned whether the case summary deadline had been postponed after receiving my email stating that the hearing had been postponed. Finally, the forum notes that the Agency does not contend that its case summary was ready to file on November 15, 2016, and that the Agency elected not to file it because it believed the deadline had been changed. In conclusion, the Agency's oversight does not constitute a satisfactory reason for untimely filing under OAR 839-050-0210(5).

"Second, the Agency argues that 'excluding the Agency's case summary will violate the forum's duty to conduct a full and fair inquiry because the forum will not have the full record before it.' Having the 'full' record suggested by the

Agency consists of the complete record, including the full audio record, of the hearing in case no. 80-15. This not the forum's standard for 'full and fair.' If it were, the forum would never be able to exclude a case summary for untimeliness because the record can never be 'full' in the context of containing all relevant evidence if any relevant evidence is excluded. In prior cases, the forum has sustained the Agency's objection to the admission of respondent case summaries that were untimely filed. See, e.g., *In the Matter of Susan C. Steves*, 32 BOLI 43, 48 (2012); *In the Matter of Hey Beautiful Enterprises, Ltd.*, 33 BOLI 189, 193 (2014). Similarly, the forum sustains Respondents' objection in this case.

"Respondents' motion is **GRANTED**. The Agency will not be allowed to present the testimony of any witnesses listed in its case summary or to offer any evidence identified in its case summary at the hearing. Assuming the hearing proceeds as scheduled, the Agency's presentation of evidence will be limited solely to impeachment and rebuttal evidence."

(Ex. X54)

33) On April 25, 2017, the ALJ issued an interim order denying the Agency's request for reconsideration of the ALJ's December 1, 2016, interim orders. That order is reprinted below in its entirety.

"On April 17, 2017, the Agency filed a motion in which it asked the forum to reconsider the rulings it issued on December 1, 2016, on Respondents' motion for partial summary judgment, the Agency's motion for summary judgment, and Respondents' motion to dismiss. On April 24, 2017, Respondents filed a response objecting to the Agency's motion in its entirety.

"The Agency's motion lacks merit and is **DENIED**.

"The forum briefly addresses the Agency's point concerning the Commissioner's Final Order in the *Green Thumb* case issued on February 14, 2017. That case had three corporate respondents – GTM, GTL, and CJ. In *Green Thumb*, the Commissioner debarred J. Friedman, a corporate officer of CJ, because she was responsible for GTM's and GTL's intentional failure to pay the prevailing wage rate. The Commissioner held that J. Friedman's officer status in CJ established that she had 'a financial interest' in CJ and debarred CJ based on the provisions of ORS 279C.860(1). The Agency contends that it is entitled to summary judgment as to the debarment of Respondent Brown's Architectural Sheetmetal (BAS) based on the holding in *Green Thumb*. The forum need not determine whether this holding in *Green Thumb* should, as a matter of law, result in the debarment of BAS because the Agency has not proven the underlying facts necessary to reach a *Green Thumb* analysis. In order to debar BAS based on Marc Brown's financial interest in BAS, the Agency must first prove that Respondent BMC intentionally failed to pay the prevailing

wage rate and that Marc Brown was responsible for that failure. The Agency has done neither, as these issues were not litigated in case no. 80-15. Furthermore, based on the forum's interim order excluding the Agency's case summary and the presentation of any witnesses or evidence listed in that case summary, the Agency will not be able to present evidence to prove these issues in its case in chief. Accordingly, the Agency's argument related to *Green Thumb* is moot."

This ruling is **AFFIRMED**. (Ex. X55)

34) On April 25, 2017, the ALJ issued an additional interim order regarding the status of the case, reprinted below in its entirety.

"Today, I have issued rulings denying the Agency's Motion for Reconsideration and granting Respondents' Motion to Preclude the Agency from Calling Witnesses or Presenting Evidence at the Contested Case Hearing. The issues remaining to be resolved remain the same as those identified in my December 1, 2016, interim order, reprinted below.

1. What is the appropriate civil penalty for BMC's violation of ORS 279C.840(1)?
2. Did BMC and BAS circumvent the payment of the prevailing wage rate as alleged in ¶7 in the Agency's amended NOI. If so, what is the appropriate civil penalty?
3. Did BMC fail to file certified statements as alleged in ¶6 in the Agency's amended NOI? If so, what is the appropriate civil penalty?
4. Was BMC's failure to pay the prevailing wage rate intentional as alleged in ¶8 in the Agency's amended NOI?
5. If BMC's failure to pay the prevailing wage rate was intentional as alleged in ¶8 in the Agency's amended NOI, was Marc Brown responsible for that failure?

"With respect to items 2-5, I note that the Agency bears the burden of proof on all of these issues and therefore must present evidence at hearing that establishes these items by a preponderance of the evidence in order to prevail.

"The forum granted the Agency's motion for summary judgment with respect to BMC's violations of ORS 279C.840(1), finding that BMC failed to pay the prevailing wage rate on both the EG and ACMA projects. Based on its review of ORS chapter 279C and OAR 839-025-0540, the forum concludes that the mitigating and aggravating circumstances that the forum is required to consider in other types of civil penalty cases are not a factor in this case. Rather, there is a specific formula for calculating civil penalties set out in OAR 839-025-0540(2) and (3). Accordingly, the forum puts the Agency and Respondents on notice that civil penalties for BMC's

violations of ORS 279C.840(1) will be calculated based on the provisions of OAR 839-025-0540(2) and (3) and the Agency's Amended Notice of Intent.

"Based on the above and the forum's rulings denying the Agency's Motion for Reconsideration and granting Respondents' Motion to Preclude the Agency from Calling Witnesses or Presenting Evidence at the Contested Case Hearing, Respondents are requested to notify the forum, no later than noon on April 28, 2017, as to whether they desire to proceed with the hearing that is presently set to begin on May 2, 2017. If Respondents elect not to proceed with the hearing, the hearing will be canceled, Respondents will not be held in default for failure to appear, and the undersigned ALJ will prepare a Proposed Order. Among other things, the Proposed Order will incorporate my rulings on the motions for summary judgment, Respondents' motion to dismiss, the Agency's motion for reconsideration, Respondents' motion to preclude the Agency from calling witnesses or presenting evidence at the contested case hearing, and this interim order. It will also assess civil penalties for BMC's violations of ORS 279C.840(1) that will be calculated based on the provisions of OAR 839-025-0540(2) and (3) and the Agency's Amended Notice of Intent.

"As a matter of course, Respondents and the Agency will be able to file exceptions to the Proposed Order."

(Ex. X56)

35) On April 27, 2017, Respondents' counsel notified the forum that Respondents did not desire to proceed with the hearing. (Ex. X57)

36) On April 28, 2017, the Agency objected to the forum's ruling "allowing Respondents to determine whether a hearing will be held because in doing so it denied the Agency the right to present argument on the issues in this case." (Ex. X59)

37) On April 28, 2017, the ALJ issued an interim order canceling the hearing. (Ex. X58)

38) On May 22, 2017, 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 timely filed exceptions.

39) On June 5, 2017, Respondents filed a motion to strike the Agency's exceptions on the grounds that the Agency had attempted to "present new facts and issues under the guise of filing Agency Exceptions to Proposed Order." Respondents' motion is DENIED.⁷

⁷ Although Respondents' motion is denied, the forum's discussion of the Agency's exceptions, contained in the Opinion section of this Final Order, makes it clear that the forum has not considered any new evidence or issues referred to in the Agency's exceptions. However, the forum has expanded its discussion of the issues to clarify the reasons for its Conclusions of Law.

FINDINGS OF FACT – THE MERITS

1) BAS is an Oregon domestic business corporation that was incorporated on June 4, 1990, with Marc Brown as its corporate president. BAS's primary business is the custom design, fabrication, and installation of custom-designed sheet metal, with the fabrication done in BAS's shop in North Plains, Oregon. BAS was administratively dissolved on August 4, 2006, and reinstated on May 15, 2008. Between 2004 and 2010, Brown was BAS's only employee. (Judicial Notice⁸)

2) BMC was a domestic limited liability company that was administratively dissolved on June 7, 2013. Marc Brown was BMC's manager. (Judicial Notice)

Elton Gregory Project (EG)

5) On July 9, 2004, Redmond School District 2J advertised the EG public works project for bid. On March 11, 2005, the contract was awarded to Robinson Construction Co. ("RCC") in the amount of \$20,000,000. The project design called for a metal roof. (Judicial Notice)

6) The prevailing wage rates published by BOLI "effective" January 1, 2005, were in effect at EG. The applicable rate for sheet metal workers and sheet metal duct installers was \$22.91 per hour, with a fringe rate of \$8.27 per hour, totaling \$31.18 per hour. (Judicial Notice)

7) RCC completed work at EG in 2005. (Judicial Notice)

8) Within a few months after the EG project was complete, roof leaks were reported to RCC. In succession, RCC contracted with two companies to fix the leaks, but their efforts were unsuccessful. (Judicial Notice)

9) In 2009, Randall Robinson ("Robinson"), RCC's owner, called Marc Brown and asked him to identify and fix the leaks at EG on a "time and materials" basis. Marc Brown agreed to do this. (Judicial Notice)

10) Between June 15, 2009, and March 2, 2010, BMC employed workers to fix the leaks at EG, including Christopher Leis, Robert Sinner, Don Gross, and Brady Steinmetz. During the workers' employment, the EG project remained a public works project for which the workers were entitled to be paid the prevailing wage rate. The last day worked by Leis, Sinner, and Steinmetz was December 31, 2009. Gross worked a total of 20 hours in 2010, with his last day of work being March 2. (Judicial Notice)

⁸ All the Findings of Fact – The Merits are summaries of facts contained in the Final Order in case no. 80-15 and reflect the application of the doctrine of issue preclusion that was used as the basis for the forum's ruling on the Agency's motion for summary judgment that BMC did not pay the prevailing wage rate to four workers on the EG and ACMA public works projects.

11) Leis, Sinner, Gross, and Steinmetz all performed some work at EG for which they should have been paid the prevailing wage rate for sheet metal workers and other work for which they were not entitled to be paid the prevailing wage rate, such as walking, general observation, consulting with other workers, talking with Marc Brown, taking photos, attendance at safety meetings, submitting reports of observations, giving advice to co-workers, driving, and working at BMC's shop in North Plains. (Judicial Notice)

12) BMC paid Leis, Sinner, Gross, and Steinmetz the following wage rates for all their work at EG, including the work for which they were properly classified as sheet metal workers: Leis - \$12.00/hr.; Sinner - \$10.50/hr.; Gross - \$20.00/hr.; and Steinmetz - \$25.00/hr. (Judicial Notice)

13) There was insufficient presented in case no. 80-15 for the forum to be able to determine the number of hours that Sinner, Leis, and Steinmetz worked as sheet metal workers at EG. Gross was underpaid \$1,104.96 for work that he performed as a sheet metal worker at EG. (Judicial Notice)

Beaverton Performing Arts Project (ACMA)

14) In November 2008, Beaverton School District #48 advertised the ACMA public works project for bid. On March 9, 2009, the contract was awarded to RCC in the amount of \$7,790,000. The applicable prevailing wage rates for the ACMA project were those effective July 1, 2008. The rates relevant to this case were:

<u>Classification</u>	<u>Base Rate</u>	<u>Fringe Rate</u>
Carpenter, Group 1	\$30.30	\$13.32
Laborer, Group 1	\$24.66	\$11.15
Sheet Metal Worker	\$33.27	\$16.05
Bricklayer/Stonemason	\$31.12	\$13.80

(Judicial Notice)

15) After RCC had finished construction of the concrete slab and framed the walls with steel studs at the ACMA project, Marc Brown and RCC made an agreement for Brown to do "quality assurance" at ACMA, with Brown to be compensated for "time and materials" for work performed by Brown and work performed by any employees that Brown dispatched to work at ACMA. (Judicial Notice)

16) Marc Brown, on behalf of BAS, conducted quality assurance at the ACMA project, then brought Gross, Leis, Sinner, and Steinmetz in as BMC employees to work at ACMA. (Judicial Notice)

17) Gross worked at ACMA between January 4 and February 19, 2010, and was paid \$20.00 per hour for all his work. In total, Gross worked 156.25 hours at ACMA that were properly classified as belonging to the following trades: Carpenter Group 1 -

69.5 hours; Laborer Group 1 – 56 hours; Sheet Metal Worker - 16.25 hours; Bricklayer/Stonemason - 14.5 hours. In total, Gross earned \$6,489.74 and was only paid \$3,125.00, leaving \$3,364.74 in unpaid prevailing wages. (Judicial Notice)

18) Sinner worked at ACMA between January 15 and March 3, 2010 and was paid \$10.50 per hour for all his work. In total, Sinner worked 277.65 hours at ACMA that were properly classified as belonging to the following trades: Carpenter Group 1 - 173.15 hours; Laborer Group 1 – 57.25 hours; Sheet Metal Worker - 23.25 hours; Bricklayer/Stonemason - 24 hours. In total, Sinner earned \$11,572.15 and was only paid \$2,852.33, leaving \$8,719.82 in unpaid prevailing wages. (Judicial Notice)

19) Steinmetz worked at ACMA on December 28, 2009, and on January 15 and 16, 2010, and was paid \$25.00 per hour for all his work. In total, Steinmetz worked 14.5 hours at ACMA that were properly classified as belonging to the following trades: Carpenter Group 1 - 12.5 hours; Laborer Group 1 – 2 hours. In total, Steinmetz earned \$616.87 and was only paid \$362.50, leaving \$254.37 in unpaid prevailing wages. (Judicial Notice)

20) Leis worked at ACMA from January 6 through February 24, 2010 and was paid \$12.00 per hour for all his work. In total, Leis worked 214.75 hours at ACMA that were properly classified as belonging to the following trades: Carpenter Group 1 - 149 hours; Laborer Group 1 – 51 hours; Sheet Metal Worker – 7.75 hours; Bricklayer/Stonemason - 7 hours. In total, Sinner earned \$8,120.12 and was only paid \$2,319.24, leaving \$5,800.88 in unpaid prevailing wages. (Judicial Notice)

CONCLUSIONS OF LAW

1) BMC employed Gross, Leis, Sinner, and Steinmetz to work at EG and ACMA.

2) EG and ACMA were public works projects during the time that Gross, Leis, Sinner, and Steinmetz performed work on those projects. Gross, Leis, Sinner, and Steinmetz were entitled to be paid the prevailing wage rate for work they performed at EG and ACMA that fit in the job classification of Sheet Metal Worker, Laborer, Bricklayer/Stonemason, and Carpenter. BMC violated ORS 279C.840 and OAR 839-025-0035 on both projects by failing to pay Gross, Leis, Sinner, and Steinmetz the prevailing wage rate for all hours worked in a trade classification for which they were entitled to be paid the prevailing wage rate at EG and ACMA.

3) Respondents did not violate ORS 279C.845(4) and OAR 839-025-0010(3) with respect to the work performed at EG and ACMA.

4) Respondents did not violate ORS 279C.840(7) and OAR 839-025-0300 with respect to the work performed at EG and ACMA.

5) Respondents did not intentionally fail or refuse to pay the prevailing rate of wage to BMC's employees Gross, Leis, Sinner, and Steinmetz with respect to the work they performed at EG and ACMA and will not be placed on the commissioner's list of ineligibles pursuant to ORS 279C.860(1)(a) and OAR 839-025-0085(1)(a).

6) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein. ORS 652.332.

7) The Commissioner has the authority to assess civil penalties under ORS 279C.865, OAR 839-025-0520, OAR 839-025-0530, OAR 839-025-0540.

OPINION

In its Amended Notice of Intent, the Agency alleged the following:

1. The EG and ACMA projects were public works projects on which Respondents employed four workers and failed to pay them the prevailing rate of wage, thereby violating ORS 279C.840(1) and OAR 839-025-0040. The Agency sought \$7,270.60 in civil penalties.
2. Respondents failed to file 41 certified statements as required by ORS 279C.845(4) and OAR 839-025-0010(3) for weeks that their workers performed work at EG and ACMA. The Agency sought \$41,000.00 in civil penalties.
3. Respondents took action to circumvent payment of prevailing wages in violation of ORS 279C.840(7) and OAR 839-025-0300 "by failing to memorialize their agreement with the prime contractor in writing and failing to provide any records or information to the Agency regarding the specifics of that agreement." The Agency sought \$4,000.00 in civil penalties.
4. Respondents BAS and BMC should be placed on the commissioner's list of ineligibles pursuant to ORS 279C.860(1)(a) and OAR 839-025-0085 "because they intentionally failed or refused to pay the prevailing rate of wage to workers employed on a public works project as required under ORS 279C.840."
5. Respondent Marc Brown should be placed on the commissioner's list of ineligibles pursuant to ORS 279C.860(3) and OAR 839-025-0085(2) "because he is president of [BAS] and is or was Manager of [BMC] and was responsible for failing or refusing to pay the prevailing rate of wage."
6. Respondent BAS should be placed on the commissioner's list of ineligibles pursuant to ORS 279C.860(1)(a) & (3) and OAR 839-025-0085(1)(a) "because Marc Brown was responsible for failing or refusing to pay the prevailing rate of wage and he has a financial interest in [BAS]."

The Agency filed a motion for summary judgment and Respondents filed a motion for partial summary judgment and a motion to dismiss all charges against

Respondent BAS. The ALJ issued the following rulings, with the numbered paragraphs corresponding to the above paragraphs with the same number:

1. The Agency was granted summary judgment as to BMC, with the amount of civil penalties to be determined at hearing. Respondents were granted summary judgment with respect to their denial of the charges against BAS.
2. The Agency was denied summary judgment and the charges against BAS were dismissed.
3. The Agency was denied summary judgment.
4. The Agency was denied summary judgment and the charges against BAS were dismissed.
5. The Agency was denied summary judgment.
6. The Agency was denied summary judgment and the charges against BAS were dismissed.

This left the following issues for hearing:

1. What is the appropriate civil penalty for BMC's violations of ORS 279C.840(1)?
2. Did BMC and BAS circumvent the payment of the prevailing wage rate as alleged in ¶7 in the Agency's amended NOI and, if so, what is the appropriate civil penalty?
3. Did BMC fail to file certified statements as alleged in ¶6 in the Agency's amended NOI and, if so, what is the appropriate civil penalty?
4. Was BMC's failure to pay the prevailing wage rate intentional as alleged in ¶8 in the Agency's amended NOI?
5. If BMC's failure to pay the prevailing wage rate was intentional as alleged in ¶8 in the Agency's amended NOI, was Marc Brown responsible for that failure?

Prior to hearing, Respondents objected to the Agency's presentation of any evidence set out in the Agency's untimely filed case summary and the ALJ ruled in Respondents' favor.⁹ Based on that ruling, Respondents elected not to proceed with the hearing and to let the ALJ prepare a proposed order based on the existing record.

⁹ Compare *In the Matter of Entrada Lodge, Inc.*, amended final order on remand, 24 BOLI 125, 129 (2003) (When respondent objected to the agency's case summary, contending it had received the case summary the day before the hearing and was prejudiced by the agency's failure to provide it in a timely

The Agency has the burden of proof on issues ##2-5 set out above. To prevail on those issues, the Agency must prove its allegations by a preponderance of the evidence. See, e.g., *In the Matter of Mohammad Khan*, 15 BOLI 191, 207-11 (1996), ORS 183.450(5). Because of the ALJ's ruling disallowing the Agency's untimely filed case summary, the Agency presented no evidence at hearing and Respondents elected to do the same. In its exceptions, the Agency argued that it should still prevail because it is entitled to rely on the facts set out in the Final Order in case no. 80-15 to prove its allegations in this case, regardless of whether they were litigated in case no. 80-15.

Did BMC Fail to File Certified Statements?

The Agency's amended NOI alleged that Respondents failed to file 41 certified statements as required by ORS 279C.845(4) and OAR 839-025-0010(3) for weeks that their workers performed work at EG and ACMA. The Agency sought \$41,000.00 in civil penalties. The Agency filed exceptions to the ALJ's conclusion in the Proposed Order that Respondents did not violate this rule and statute, asserting that Respondents "failed to file certified statements," and arguing the following:

"In case number 80-15, the forum determined that ACMA and EG were both prevailing wage rate projects; based on the forum's finding, it follows that certified statements are required to be filed. In this context, the forum's finding that Respondents did not violate ORS 279C.845(4) and OAR 839-025-0010(3) when they did not file certified statements is not supported."

The Agency has the burden of proof on this issue and supported its allegation with no evidence, other than the conclusory statement in its exception, to prove that Respondents did or did not file certified statements in case no. 80-15 or this case.¹⁰ Having failed to meet its burden of proof, the Agency cannot prevail and the Agency's exception is OVERRULED.

Did Respondents Take Action to Circumvent the Payment of Prevailing Wages?

The Agency's amended NOI alleged that Respondents took action to circumvent the payment of the prevailing wage rate in violation of ORS 279C.840(7) and OAR 839-025-0030 "by failing to memorialize their agreement with the prime contractor in writing and failing to provide any records or information to the Agency regarding the specifics of that agreement." The Agency sought \$4,000 in civil penalties. The Agency filed exceptions to the ALJ's conclusion in the Proposed Order that Respondents did not

manner, the forum admitted the case summary when it determined (1) that the envelope containing the case summary bore a postmark that established it was timely filed and (2) an agency employee responsible for internal controls regarding the agency's mailroom procedures testified that the envelope was in fact postmarked and placed in a US Postal Service receptacle in the normal course of business).

¹⁰ Even if there had been findings of fact concerning certified statements in case no. 80-15, the forum is unaware of any legal theory that would give the forum a basis to draw a legal conclusion in this case from those findings.

violate this rule and statute, arguing that the findings of fact and a statement in the Opinion in the Final Order in case no. 80-15 prove the Agency's case. Specifically, the Agency argues:

"In the final order for case number 80-15, the forum found that Marc Brown's reliance on Robinson's assurance was 'ill-founded and establishes Respondents' willful failure to pay the prevailing wage rate on the ACMA project.' (citation omitted). That finding, along with other findings in case number 80-15, including Marc Brown's failure to provide documents to the Agency support a finding that Respondents took action to circumvent prevailing wage rate law."

Again, the Agency seeks to remedy its failure to present any evidence in this case by relying on facts determined in a companion case in which the circumvention allegation was not an issue. The Agency contends that, had it been allowed to make oral argument at hearing, it would have made this argument. OAR 839-050-0250(8) provides that "participants may be given the opportunity to make a closing statement at the conclusion of the testimony." This rule gives the ALJ the discretion to allow oral arguments. In this case, the ALJ properly exercised his discretion by not allowing oral argument.

The Agency has the burden of proof on this issue and supported its allegation with no evidence other than the arguments in its exception. Having failed to meet its burden of proof, the Agency cannot prevail and the Agency's exception is OVERRULED.¹¹

Did BMC "Intentionally" Fail to Pay the Prevailing Wage Rate?

In the Proposed Order, the ALJ concluded that BMC did not intentionally fail to pay the prevailing wage rate to its workers on the ACMA and EG public works projects. To "intentionally" fail to pay the prevailing wage rate, an employer:

"must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it. 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. Rather, a culpable mental state must be shown for the forum to conclude that respondent 'intentionally' failed to pay the prevailing wage rate."

In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 287 (2016), citing *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).

¹¹ *Id.*

The Agency excepted to the ALJ's conclusion that BMC did not intentionally fail to pay the prevailing wage rate on the ACMA and EG projects, once more relying on findings of fact in the Final Order in case no. 80-15 and the forum's award of penalty wages in that case that was necessarily predicated on a finding that BMC's failure to pay its workers was "willful." ORS 652.150(1). As stated above, the Oregon Court of Appeals has held that "willful" is not synonymous with "intentional." Although the issue of BMC's "willfulness" was litigated in case no. 80-15, "intentional" is a higher standard, as well as an issue that was not litigated in the prior case. The Agency presented no additional evidence in this case to show that BMC intentionally failed to pay the prevailing wage rate to its workers. Having failed to meet its burden of proof, the Agency cannot prevail and the Agency's exception is **OVERRULED**.

Should BMC, BAS, and Marc Brown be Placed on the List of Ineligibles?

The Agency excepted to the ALJ's dismissal of all charges against BAS and the ALJ's failure to place BMC, BAS, and Marc Brown on the List of Ineligibles. The Agency's exception as to BMC is **OVERRULED** because the Agency failed to prove that BMC's failure to pay the prevailing wage rate was intentional. The Agency's exception with respect to Marc Brown is **OVERRULED** because the Agency did not prove that he was responsible for BMC's failure to pay the prevailing wage rate or that BMC's failure to pay the prevailing wage rate was intentional.¹² The Agency excepted to the dismissal of all charges against BAS on the grounds that it is inconsistent with the forum's holding on similar facts in the case of *In the Matter of Green Thumb Maintenance and Landscape, Inc.*, 35 BOLI 178 (2017). The forum has already addressed that issue in its April 25, 2017, interim order denying the Agency's motion for reconsideration, set out in full in Procedural Finding of Fact #33, and need not revisit it. The Agency's exceptions are **OVERRULED**.

Civil Penalties for BMC's Violations of ORS 279C.840(1) and OAR 839-025-0040.

The forum's remaining task is to determine the amount of civil penalties to be assessed for BMC's violations of ORS 279C.840(1) and OAR 839-025-0040. Prior to hearing, the forum granted summary judgment to the Agency on its allegation that BMC committed (1) four violations of ORS 279C.840(1) and OAR 839-025-0040 on the EG project by failing to pay the prevailing wage rate to Gross, Leis, Sinner, and Steinmetz and (2) another four violations on the ACMA project with regard to the same four workers.¹³ In its Amended NOI, the Agency proposed to assess the following civil penalties per worker for the EG and ACMA projects:

<u>Worker</u>	<u>EG</u>	<u>ACMA</u>
Don Gross	\$1,000	\$1,000
Christopher Leis	\$1,000	\$1,000
Robert Sinner	\$1,000	\$1,000

¹² A member or manager of an LLC cannot be debarred based on the LLC's failure to pay the prevailing wage rate unless it is first shown that the LLC's failure to pay was intentional.

¹³ See Finding of Fact #23 – Procedural.

<u>Brady Steinmetz</u>	<u>\$1,000</u>	<u>\$ 270.60</u>
Totals:	\$4,000	\$3,270.60

OAR 839-025-0540 sets out the criteria for assessing civil penalties for violations of ORS 279C.840(1) and OAR 839-025-0040. In pertinent part, it states:

“(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279C.840 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:

“(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;

“(b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation[.]”

A “repeated” violation is a “violation[] of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.”

BMC’s four EG violations occurred between October 15, 2009, and March 2, 2010, and the Agency seeks a \$1,000 civil penalty for each violation. Since these violations are classified as “first” violations under OAR 839-025-0540(3)(a), this would be an appropriate assessment of civil penalties if BMC owed more than \$1,000 in unpaid prevailing wages to each worker for their work at EG. In case no. 80-15, the forum concluded that BMC paid a sub-prevailing wage rate to Leis, Sinner, Gross, and Steinmetz for all the work they performed at EG, including the work for which they were properly classified as sheet metal workers. In this case, the forum applied the doctrine of issue preclusion in awarding summary judgment to the Agency on that issue.¹⁴ However, the lack of evidence in the record in case no. 80-15 that precluded the forum from determining the amount of unpaid prevailing wages owed to Sinner, Leis, and Steinmetz similarly precludes that determination in this case.

OAR 839-025-0540(3)(a) requires the forum to assess a civil penalty of “[a]n equal amount of the unpaid wages or \$1,000, whichever is less.” Since the forum has no way to determine the lesser amount, it takes the only available option and assesses

¹⁴ See, e.g., *In the Matter of Scott Nelson*, 15 BOLI 168, 175-81 (1996)(forum granted summary judgment to the agency based on issue preclusion on the issue of whether respondents paid sufficient workers’ compensation insurance when due when a prior final order of the Department of Consumer and Business Services held that respondents owed over half a million dollars in insurance premiums and all five requirements for issue preclusion to apply had been met); *In the Matter of Efrain Corona*, 11 BOLI 44, 57 (1992), *affirmed without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993)(issue preclusion applied and summary judgment granted when identical issue was previously litigated in a Department of Insurance and Financial hearing).

no civil penalty for BMC's ORS 279C.840(1) and OAR 839-025-0040 violations at EG with regard to Sinner, Leis, and Steinmetz. On the other hand, the forum was able to determine that Gross was underpaid \$1,104.96 in prevailing wages for work he performed at EG. Since \$1,000 is a lesser amount than \$1,104.96, the forum assesses a \$1,000 civil penalty for BMC's 279C.840(1) and OAR 839-025-0040 violations at EG with regard to Gross.

Gross, Sinner, Leis, and Steinmetz all commenced work for BMC at ACMA months after they began work at EG, and Sinner and Leis did not begin work at ACMA until after their last day of work at EG. Accordingly, this places BMC's ACMA violations of ORS 279C.840(1) and OAR 839-025-0040 in the category of "first repeated" violations. OAR 839-025-0540(3)(b) requires the forum to assess a civil penalty of "[t]wo times the amount of the unpaid wages or \$3,000, whichever is less," for a first repeated violation. In case no. 80-15, the forum concluded that BMC paid a sub-prevailing wage rate at ACMA to Gross, Leis, Sinner, and Steinmetz for all the work they performed at ACMA for which they should have been paid the prevailing wage rate. As with EG, the forum applied the doctrine of issue preclusion in awarding summary judgment to the Agency on that issue. The amount of the underpayments was: Gross - \$3,364.74; Leis - \$5,800.80; Sinner - \$8,719.82; and Steinmetz - \$254.82. Under OAR 839-025-0540(3)(b), the appropriate civil penalty for each worker is: Gross - \$3,000; Leis - \$3,000; Sinner - \$3,000; and Steinmetz - \$509.64. However, there is a due process issue related to notice in the pleadings in the Agency's Amended NOI that forecloses the application of the formula set out in OAR 839-025-0540(3)(b).

OAR 839-050-0060 provides, in pertinent part, that:

"(1) A charging document will contain:

"* * * * *

(c) A statement of the remedies sought, the statutes or rules involved and, when appropriate, the penalty imposed."

The purpose of this rule is to give a respondent notice of the amount of civil penalties being sought by the Agency. The rule correspondingly limits the sanction the forum can impose to the sanction proposed in the Agency's charging document and, in this case, supersedes OAR 839-025-0540(3)(b). The Agency's Amended Notice of Intent specifically requested a civil penalty of \$1,000 for BMC's violations at ACMA related to Gross, Sinner, and Leis, and a civil penalty of \$270.60 for BMC's violation related to Steinmetz. Based on OAR 839-050-0060(1)(c), the forum assesses civil penalties in those amounts for BMC's violations of 279C.840(1) and OAR 839-025-0040 violations at ACMA.

Exceptions to Proposed Procedural Findings of Fact

The Agency filed exceptions to the Proposed Procedural Findings of Fact, Proposed Conclusions of Law, Proposed Order, and specifically to the dismissal of the charges against BAS. The Agency's objections to the Proposed Procedural Findings of Fact have been addressed by incorporating the omissions excepted to in the Procedural Findings of Fact. The remainder of the exceptions have been addressed in the Opinion section of this Final Order.

ORDER

A. NOW, THEREFORE, the charges against Brown's Architectural Sheetmetal, Inc. are **DISMISSED**.

B. NOW, THEREFORE, the charges against Marc Brown are **DISMISSED**.

C. NOW, THEREFORE, as authorized by ORS 279C.840, OAR 839-025-0040, 279C.865, OAR 839-025-0520, OAR 839-025-0530, and OAR 839-025-0540, and as payment of the civil penalties assessed for Brun Metals Company, LLC's violations of 279C.840(1) and OAR 839-025-0040, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Brun Metals Company, LLC**, to deliver to the Fiscal Services Office 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 the amount of **FOUR THOUSAND TWO HUNDRED SEVENTY DOLLARS AND SIXTY CENTS (\$4,270.60)**, 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 Brun Metals Company, LLC complies with the Final Order.

In the Matter of

**FREHOO, INC. DBA STARS CABARET & STEAK HOUSE, AND PAMELA COLBURN,
LISA HEINZMAN-MYERS, JON HERKENRATH, RANDY KAISER, TODD MITCHELL,
AND JEFF STRUHAR, INDIVIDUALLY,**

**CASE No. 37-16
Final Order of Deputy Commissioner Christie Hammond
Issued October 5, 2017**

SYNOPSIS

The Agency established by a preponderance of the evidence that that Respondent Frehoo, Inc. ("Frehoo"), an adult entertainment club featuring nude female dancers, subjected a 15-year-old female dancer to unlawful sexual harassment by Frehoo's customers in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(5), (7). The forum also concluded that Respondents Jon Herkenrath, Randy Kaiser, Todd Mitchell, and Jeff Struhar aided and abetted the unlawful sexual harassment. ORS 659A.030(1)(g). Respondents Pamela Colburn and Lisa Heinzman-Myers are not liable as aiders and abettors. The forum awarded the aggrieved person \$1,000,000 in compensatory damages for the mental and physical suffering she experienced as a result of the unlawful conduct. The forum also ordered Respondents Frehoo, Herkenrath, Kaiser, Mitchell and Struhar to cease and desist from continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace. ORS 659A.050(2), (4).

NOTE: The procedural history of this case is extensive and includes the ALJ's lengthy rulings on several motions filed by the parties. For ease of reading, all procedural facts, pre-hearing motions, and rulings on those motions are included as Appendix A to this Final Order. Appendix A immediately follows the "Order" section of this Final Order that bears the Deputy Commissioner's signature.

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

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 November 9-10, 14-18, 29-30, December 1-2, 5-7, 2016, in Conference Rooms A and B of the Oregon Employment Department, WorkSource Tualatin Office, 7995 SW Mohawk Street, Tualatin, Oregon. Closing arguments were held on December 21, 2016, at 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 Chief Administrative Prosecutor Jenn Gaddis and Administrative Prosecutor Cristin Casey, employees of the Agency. Anthony Reiner, Joel Shapiro and Janis Puracal, attorneys for the Aggrieved Persons, were present throughout the hearing. Respondents were represented by Courtney Angeli and Angela Ferrer, attorneys at law. Respondents Jon Herkenrath, Randy Kaiser, Todd Mitchell and Jeff Struhar were present for the majority of the hearing, but Herkenrath and Struhar were not present on some hearing dates due to illness.

The Agency called the following witnesses¹ to testify in person: Maria Perez, Rafael Colin, Chad Opitz (direct), Chris Lynch, Madelyn Brown, Jessica Ponaman, Dr. Jon Conte, AP1, and AP2. The Agency called the following witnesses to testify by telephone: Steven Toth, Cynthia Herring, Amy, Ashley, Melanie, Davey, Chad Opitz (rebuttal).

Respondents called the following witnesses to testify in person: Maria Perez, Chad Opitz, AP1, Casey, Jon Herkenrath, Dante, Ursula, James Marquardt, Megan, Moses, Frank Richard Mangrum, Dr. Kevin McGovern, Sarah, Coni, Tony, Bob Stewart, Randy Kaiser, Jennifer, Jeff Struhar, Taylor, and Todd Mitchell. Respondents called the following witnesses to testify by telephone: Amy, Karen, Alexa, Tammy, Angelina Spencer, Tim, Belen, Brittany, Hal, and Leslie.

The forum received into evidence:

- a) Administrative exhibits X1 through X157 (submitted or generated prior to hearing), and X158 through X193 (submitted or generated during or after hearing);
- b) Agency exhibits A1-A19, A21-A32, A33a, A34a, A37-A49, portions of A50 (pp. 1, 4, 16 only), portions of A50a (pp. 5, 6, 7 only), A51-A52, A55, A57-A58, A60-A63, A67, A71-A75, A86-A87, and A90-A93;
- c) Respondents’ exhibits R6-R8, R9, R13-R14, R18-R19, R22-R30, R32, R38, R39-R40, R44, portions of R45 (pp. 18, 109-112, 130-134 only), R46-R48, R49-R58 (for the limited purpose of identifying them as records that Dr. McGovern reviewed), R59, R61, R63-R64, R66-R69, R74-R75, portions of R76 (pp. 144-148, 162 only), R81, R85, R87-R93, R96, R99, R105, R107, portions of R109 (pp. 3 and 4 only), R110-R111, R113-R114, R116, R117, R120, R126 (for the limited purpose of showing that it was part of the Agency’s investigation), R131-R132, R134-R135, R137, R142, R143, R147, R148 (p. 1 only), R149-R151 and R156 (for impeachment purposes only).

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

¹ Pursuant to interim protective orders issued by the ALJ in this case, the aggrieved persons will be referred to throughout this document as AP1 and AP2. Additionally, employees/workers and former employees/workers of Frehoo and other adult entertainment establishments will be referred to by their first names only, with the exception of the named respondents in this case.

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

FINDINGS OF FACT – THE MERITS

Description of Respondents

1) At all times material herein, Respondent Frehoo, Inc. (“Frehoo”) was an Oregon domestic business corporation. Stars Cabaret and Steakhouse was an assumed business name doing business at 4570 SW Lombard, Ave., Beaverton, Oregon, which was owned and operated by Frehoo.³ Frehoo operated as an adult entertainment club for approximately 20 years until it filed for bankruptcy in the summer of 2016. (Amended Answer; Ex. A5; Testimony of Kaiser)

2) Randy Kaiser, Todd Mitchell and Jeff Struhar all own shares of corporations that have ownership interests in Frehoo. Although some other individuals have ownership interests, Kaiser, Mitchell and Struhar are often referred to as the “owners” of Frehoo by people familiar with the club.⁴ (Amended Answer; Testimony of Kaiser; Hearing Record)

3) Kaiser, Mitchell and Struhar have ownership interests in other adult entertainment clubs using the “Stars” business name, including locations in Bend, Salem and Tualatin, Oregon. The other Stars clubs are owned by corporate entities that are separate from Frehoo. Although an owner was assigned primary oversight responsibility for each of the Stars clubs, the three owners also made collective decisions to revise existing policies or adopt new policies at Frehoo. (Ex. A46; Testimony of Kaiser, Colin)

4) Mitchell was the owner who provided management oversight of both Frehoo and the Stars club in Tualatin, and is also the corporate secretary for Frehoo. He holds a bachelor’s degree in business administration from Temple University. Before he went into business with Kaiser and Struhar, he managed large adult entertainment clubs in Colorado for eight years. During the 2012-2014 time period, Mitchell spent approximately 15 hours per week, every other week, on site at Frehoo during the school year. He only spent 5-10 hours per week at the club the other weeks. He spent less time at the club during the summer. He was not involved in hiring the entertainers who performed at the club. (Amended Formal Charges; Amended Answer; Testimony of Colin, Kaiser, Mitchell)

5) Kaiser performed administrative and accounting functions for Frehoo and other Stars clubs, and also addressed legal issues that arose. He was involved in

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

³ Throughout this document, “Frehoo” will be used to refer to both Frehoo, Inc., the corporate entity, and the club called “Stars Cabaret and Steakhouse,” which operated in Beaverton, Oregon. References to “Stars” are meant to refer to all Stars-named clubs, unless otherwise specified.

⁴ Any mention of an “owner” or the “owners” of Frehoo in this Final Order is intended to refer to Kaiser, Mitchell and Struhar, collectively.

procuring licenses, such as the liquor licenses with the OLCC. Kaiser is the owner primarily responsible for overseeing the Stars club in Bend, Oregon. After he moved to Bend in 2003, Kaiser did not have management responsibilities for Frehoo. Kaiser was not a corporate officer of Frehoo, but is listed as Frehoo's registered agent. Kaiser was involved with the other owners in making policy decisions, but did not take on the responsibility for putting policies at Frehoo into place. He received questions about the Frehoo club regarding matters such as accounting entries or legal issues. For example, when BOLI's Wage and Hour Division came to Frehoo to conduct an onsite compliance review on October 1, 2014, the manager on duty contacted Kaiser and, at Kaiser's direction, the manager asked the investigators to wait until Kaiser arrived. During the time period from 2012 to 2015, Kaiser was not often present on the premises of Frehoo. He primarily divided his time between the club in Bend and a Stars business office in Tualatin, traveling back and forth between the two locations each week. (Amended Formal Charges; Exs. A46, A52; Testimony of Kaiser, Perez, Colin)

6) Struhar was the corporate president of Frehoo. His involvement with Frehoo consisted of addressing technical issues, such the number of tables required by OLCC, remodeling and design work. He was the owner in charge of overseeing the Stars Salem location. Struhar conferred with Kaiser and Mitchell "on some level" about "global policy," but did not play any part in the day-to-day operations of Frehoo. (Testimony of Kaiser, Colin, Struhar)

7) Jon Herkenrath started working for Stars in 2010 as a valet. About three months after he was hired, he began performing security duties. He then worked as a part-time or swing shift manager for a period of time. About a year later, in 2012, he became a day manager, serving in that position until 2014. For a period of time, he was moved to the Stars Bridgeport location for about nine months, then returned to Frehoo. In February or March of 2014, Herkenrath was promoted to the position of regional manager. As regional manager, he served as the general manager of both the Beaverton and Bridgeport clubs. He was the regional manager until Frehoo closed in July of 2016. (Testimony of Herkenrath)

Description of Frehoo Club Operations

8) Frehoo was an adult entertainment club that featured female entertainers who performed nude dancing. Alcohol and food were served to the club's customers. The club owners wanted Frehoo to be a premium gentleman's club and attempted to build an "experience" for their patrons. Frehoo sought to attract high-end clientele, such as men with disposable incomes and expense accounts, including CEO's, celebrities, recording artists and professional athletes. Managers greeted customers upon arrival and asked what kind of experience the customers were seeking, which could include things like viewing nude dancers on a stage, watching a dancer who performed with hula hoops, arranging for a private dance, or having an entertainer sit with the customer at a table. (Testimony of Herkenrath, Mitchell, Kaiser)

9) The women who danced at Frehoo were viewed as "professional entertainers" in an "erotic" and "sexually charged" business. (Testimony of Kaiser)

10) The documents provided to women applying to work as a dancer at the club sometimes described the position as a “dancer” and “entertainer.” Dancers/entertainers did the following activities throughout the course of their work:

- Danced on stage for two songs at a time in a rotation set by the DJ. Dancers were expected to remove the clothing from either their top or bottom by the end of the first song, and had to be fully nude at the conclusion of the second song.
- Performed private dances for customers in the VIP lounge area while partially nude or topless.
- If over the age of 21, drank alcoholic drinks, including shots of alcohol, purchased for them by customers.
- Sat down and conversed with customers.
- Entertainers could also be “bought off the floor,” meaning that a customer would pay for a dancer to be removed from the stage dancing rotation to spend the rest of her shift with the customer.

The entertainers who made the most money for the “house” had their own group of customers. Some entertainers used websites, text messages or business cards to provide information to customers about themselves, where they worked and their schedules. (Ex. R64; Testimony of Amy, Herkenrath, Sarah, AP2)

11) There was a separate area for “VIP” (private) dances in which a customer could pay to have an entertainer perform a private dance. In the VIP dance area, there were several chairs separated by black sheer curtains. Lighting in the VIP area was dimmer than in the rest of the club. There was a podium next to the entrance of the VIP area where a security person was usually stationed. The charges for VIP dances were posted on a sign outside the VIP area. (Ex. A50, p. 1; Testimony of Herkenrath, AP2)

12) Entertainers performed using a “stage name” that was different than their real name. (Exs. R61, R64; Testimony of Colin, Megan, Herkenrath, Sarah, Mitchell, Taylor)

13) Frehoo employed a general manager and shift managers. General managers were responsible for everything that happened in the club. All managers carried keys to the club and were told to “operate the club like you own it.” Frehoo also employed or engaged the services of security guards, bartenders, waitresses, cooking staff, DJs, and “door girls” who greeted customers upon entry to the club and checked their identification. “Door girls” were not present during all hours that the club was open, but worked during the club’s busier times. (Testimony of Tim, Herkenrath)

14) Security guards or managers were supposed to walk dancers out to the parking lot at the end of a dancer’s shift so that dancers did not leave the club with a customer. (Testimony of Herkenrath)

15) The diagram attached to this Final Order as Appendix B accurately depicts the layout of the club. (Exs. A51, A90, A93; Testimony of Herkenrath, Megan)

16) Inside the dancer dressing room, there was a door to a small “featured entertainer’s room” (“FE room”). The FE room was locked and only the managers had keys to access it. The FE room was used by featured entertainers visiting the club and also when the women came to the club to sell dancer costumes. (Ex. R67; Testimony of Tim; Coni; Leslie)

17) Frehoo had a sexual harassment policy posted in the dancer dressing room and in other areas of the club which stated:

“Stars Cabaret

“COMPANY POLICY

REGARDING

SEXUAL HARASSMENT

“‘Stars Cabaret does not tolerate any form of discrimination or harassment of its personnel due to race, color, religion, sex, national origin or marital status.’

“If any person feels that he or she is in an uncomfortable position, i.e. having suggestive comments made to he or she [*sic*], or touched in an unwelcome or in appropriate [*sic*] manner, that person has an obligation to report such a situation to the owners of the business.

“The manner to report such offenses is as follows:

“1. Write a letter and mail to PO Box 2249, Beaverton, OR 97075

“2. Telephone one of the following owners:

a. Randy Kaiser - XXX-XXX-XXXX

b. Todd Mitchell - XXX-XXX-XXXX

c. Jeff Struhar - XXX-XXX-XXXX

“If you do not have a personal conversation with one of these owners, you should try another until you actually talked with an owner. Please do not leave messages and assume that the problem has been communicated.

“3. Write a letter or telephone Stars' corporate attorney, Jim Neill, at XXX-XXX-XXXX or c/o Davis Wright Tremaine, * * *, Portland, OR 97201.

“If you sincerely want to make Stars a desirable place where we can all be successful, you must take the initiative to ensure we maintain our standards. Anonymous letters cannot be considered, because if an incident takes place, we, the owners, must investigate and take appropriate action. This policy applies to both employees and independent contractor entertainers.

DATE ISSUED: JULY 25, 2002”

(Ex. A6, p. 17 (emphasis in original); Testimony of Kaiser)

18) The “corporate attorney” identified in the sexual harassment policy as a person to be contacted to report sexual harassment died in 2010. (Testimony of Kaiser)

19) Posters with information and warnings about human trafficking were posted in various areas of the club. (Testimony of Herkenrath)

21)⁵ Frehoo initially implemented written policies in a handbook in 2003, but the Stars businesses stopped applying those after a period of time. However, the written policies, many of which no longer applied, were still handed out in a packet issued to new dancers in 2014. The club had rules that were sometimes verbally explained to dancers when they were hired. Among other things, the rules prohibited prostitution and the touching of dancers by customers. If a customer touched a dancer, the dancer was expected to give the customer a “friendly warning” to stop. Security guards and managers could intervene if the “no touching” rule was violated. Customers could be “86’d” (banned) from the club for violating the rules. (Ex. R64; Testimony of Kaiser, Herkenrath, Colin)

22) A document authenticator is a device that can be used to detect whether a driver’s license or ID is authentic. An authenticator costs about \$2,000. Frehoo did not use a document authenticating device to verify the authenticity of licenses and IDs until November of 2014. Before Frehoo purchased the device, Kaiser was aware that some clubs were using the device. (Ex. A6; Testimony of Kaiser, Colin)

23) Prior to late 2014, Frehoo employed entertainers who were minors between the ages of 18 and 21. The OLCC did not permit minors working as entertainers to access certain areas of the club where people were drinking alcohol. In late 2014, Frehoo stopped hiring minor entertainers. (Testimony of Colin; Kaiser; Herkenrath; Ex. A91)

24) On July 7, 2014, an OLCC inspector received a complaint that a minor entertainer was walking around freely throughout Frehoo when she was not performing. On August 19, 2014, undercover OLCC inspectors observed a 19-year-old minor entertainer sit out in the open inside the club for approximately three to four minutes and noticed that she was allowed to be in a prohibited area when she was not performing. The 19-year-old was issued a citation for being a minor in a prohibited area. Frehoo

⁵ A Finding of Fact #20 was inadvertently omitted.

received a notice of warning for allowing a minor entertainer to be in a prohibited area. (Ex. A91; Testimony of Herkenrath)

Prostitution Involving Frehoo's Former Manager, Steve Toth

25) From the first part of 2011 until November, 2012, Steve Toth served as the general manager of Frehoo. Prior to that time, he worked for other Stars clubs for a number of years performing management and security duties. After he worked at Frehoo, he was transferred to the Stars Bridgeport location to serve as the general manager. (Testimony of Kaiser)

26) Toth was arrested on December 10, 2013. Kaiser first learned of the arrest when he received a morning telephone call from Toth from the Washington County Jail. Toth told Kaiser that he was arrested because he had sex with a woman who had a fake ID. Toth said that the woman came into the club and did not have the right ID. Toth said that he and the woman met again and had sex on the side of the road and in his apartment. Toth also told Kaiser that the police were alleging that there had been sex in the FE room. At the time, Kaiser did not understand that there was a connection between the woman with the fake ID and the allegations of sex in the FE room. Later that day, Kaiser learned more information after receiving a call from a civic business leader and reading news on the internet. He immediately called Mitchell and Struhar, who were on vacation in Hawaii. Prior to Toth's arrest, Frehoo had not received any complaints that Toth was involved in prostitution. (Testimony of Colin, Kaiser)

27) On or about December 11, 2013, a letter was prepared at Kaiser's direction informing Toth that his employment was terminated. (Ex. R63; Testimony of Kaiser)

28) Toth later admitted that he arranged for AP1, a 13-year-old girl, to perform sexual acts for Frehoo's customers in exchange for money in the FE room on Frehoo's premises. Herkenrath saw AP1 in the club with Toth. He was comfortable with AP1's presence in the club and assumed that Toth either knew her age or had checked her ID. Toth pled guilty to sodomy in the second degree, sex abuse in the first degree and compelling prostitution based on his conduct with AP1. He also pled guilty to promoting prostitution after he arranged for three dancers to leave Frehoo's premises with customers. He is serving a 15-year prison sentence for those crimes and is required to register as a sex offender for the rest of his life. (Testimony of Toth; Ex. A17)

29) Attorneys for Frehoo hired a private investigator to investigate the allegations involving Toth. After receiving information from the investigation, Frehoo concluded that there was not a prostitution problem at the club and there was just "some manager that was off the rails." (Testimony of Kaiser)

30) After Toth's misconduct was discovered, Frehoo implemented a policy requiring two managers or employees to examine a new dancer's ID and "sign off" that

they had done that so there would be “more than one person’s word on that.” This new policy was not consistently followed. (Ex. R64; Testimony of Kaiser, Herkenrath)

AP2’s Experience at Frehoo

31) AP2 was born in Russia. Her mother adopted her from a Russian orphanage when she was 11 years old and brought her to the United States. It took her approximately three years, until she was 14 years old, to learn the English language. She speaks with a Russian accent. (Ex. A29; Testimony of AP2, Opitz)

32) At the time AP2 applied to work at Frehoo, she was 15 years old and had been staying in the apartment of a man named Anthony Curry for several weeks. Before meeting Curry, she had run away from a medical facility and had been living with gang members on the streets of Portland. She met Curry while she was waiting at a bus stop. She had no belongings with her except for the clothes she was wearing and \$80 in her pocket. Curry drove by the bus stop twice and then asked her to get in the car. When AP2 first met Curry, he was nice to her and told her that he knew a lot about business. He said he could show her how to make money, and took her to his apartment. Curry provided AP2 with food, clothing and marijuana. Curry forced her to have sex with him and became angry when she said she did not want to have sex. After she was with Curry for about two weeks, he told her about women who danced in nightclubs to make money. He told her that he respected women who made money and that they were “the real queens.” He had been providing AP2 with everything and she felt pressure to make money. Curry trained AP2 to be an exotic dancer and gave AP2 a book that discussed techniques for seducing men. Curry also posted AP2’s photo on several websites advertising for “outcall” dates in which a woman meets a man for sexual intercourse at his location, but AP2 did not ever go on an outcall date. (Exs. A29; Testimony of AP2, Opitz)

33) Curry purchased a counterfeit Oregon identification card for AP2. An identification card is a “standalone” form of identification, meaning that it is accepted by itself without supporting documentation. The ID card included a date of birth of “12-05-92”⁶ and represented that it was issued on “4-17-2013.” The difference between the date of birth and the issue date is less than 21 years after the date of birth, which indicates that the ID card was made for a person who was under 21 years of age (a minor) on the issue date. AP2’s fake ID card differs from an authentic Oregon identification card issued to minors in the following ways:

- The photo of AP2 was on the left side of the ID card, but should have been on the right side.
- There should have been a red border around the photo, but there was not.
- There should have been language in a red border around the photo stating that she was “under 21 until” followed by the date on which she was to turn 21.

⁶ This is not the actual date of birth of AP2.

- There was no space after the comma that followed her last name.
- There was no comma between the name of the city and state.
- It lacked a reflective surface that varied in color when viewed from different angles or with a black light.

At the hearing, Frehoo's former security guard and manager, Dante, testified that there were "definitely little things" on AP2's ID that he would have questioned. (Exs. A33A, A34A; Testimony of Colin, AP2, Stewart, Dante)

34) The first time AP2 attempted to use the fake ID to enter an adult entertainment club, a bouncer tried to "scan" it and said that it did not "go through" because it was a fake ID. (Testimony of AP2)

35) AP2 danced nude at two other adult entertainment clubs before working at Frehoo. She first danced at Jags Clubhouse in North Portland for approximately one week, and then danced at Dolphin II in Beaverton three times. Curry drove her to these clubs for each audition and shift that she worked. AP2 used the fake ID to apply to work at the other clubs. She also used the ID to apply for work at the Sunset Strip club after she stopped working at Frehoo. Curry told AP2 that she should not show the fake ID to anyone unless she was asked because he did not want to risk someone discovering that it was fake. (Testimony of AP2, Opitz)

36) AP2 auditioned at Frehoo on August 14, 2014, and was hired to work as a dancer. (Ex. A45; Testimony of Herkenrath)

37) Before auditioning, AP2 first called Frehoo to ask about the audition process. When she entered the club, there was no one at the door and she walked over to talk to the bartender. The bartender directed her to a manager named "Jon." She presented herself to the club as an experienced dancer. AP2 changed into dancing clothes in the dancer dressing room and then auditioned on stage. She removed her clothing on both the top and the bottom, and was fully nude at the end of the audition. She understood from Curry and her prior dancing experiences that she had to be fully nude at the end of two songs. Customers left tips for AP2 during her audition. (Testimony of AP2)

38) After AP2's audition, another manager (Dave) asked AP2 for her ID and made a copy of it. That was the first time anyone at Frehoo had asked to see her ID. Dave also gave AP2 papers to fill out. He did not review the rules listed in the paperwork with her. She quickly signed the documents. (Ex. R64; Testimony of AP2)

39) Aside from the time Manager Dave checked her ID after she auditioned, AP2 was only asked for her ID on two other occasions at Frehoo: (1) when she ordered a shot of alcohol from a bartender during one of her shifts and (2) once by a manager named Casey. Frehoo's general manager, Herkenrath, never reviewed AP2's ID. (Testimony of AP2, Casey, Herkenrath)

40) On the first night that AP2 worked after her audition, a security guard showed her around the club, but did not explain any rules to her. She learned how to perform from Curry and by watching what other dancers did. (Testimony of AP2)

41) AP2 performed nude dancing at Frehoo approximately seven times from August 14-22, 2014. She performed using the stage name "Isis." (Ex. A45; Testimony of AP2, Herkenrath)

42) During AP2's shifts at Frehoo, she dressed in "stripper clothes" consisting of underwear and a bra, or lingerie. She wore high heels that were almost seven inches tall. Most of AP2's shifts lasted for eight or nine hours. She worked one night for about 12 hours when the club was very busy hosting several bachelor parties. She was the last dancer to leave for the night on a couple of occasions. At times, AP2 went to the dressing room to take a breath and rest. (Testimony of AP2)

43) AP2 danced nude on stage during each shift she worked at Frehoo. She did not want to be on stage and was uncomfortable. She saw customers looking at her and felt like they were thinking disgusting, sexual things about her. She also saw a "curly haired" manager and a "bald bouncer" watch her dance, which made her feel awkward. She observed other dancers touching their body and bending down to show their "private parts." AP2 imitated some of the things she witnessed the other dancers doing, including touching her breasts, buttocks and the side of her neck when she dances. She had to swallow her pride while doing this and felt that it was really hard. She felt awkward and uncomfortable when she made contact with the staff and bartenders. (Testimony of AP2)

44) AP2 also performed VIP dances during each shift. Each VIP dance lasted for the length of one song. On a busy night, she performed about 10 VIP dances, and about five or six VIP dances on a slower night. She made more money if she performed more VIP dances. (Testimony of AP2)

45) The men who paid AP2 to perform VIP dances were bigger and older than her, and were consuming alcohol. Some customers touched her and tried to get her to sit on their laps. Some tried to get their hands inside her underwear and tried to get her to touch them inside of their pants. She tried to stop the men from doing these things by telling them that it is not allowed and to let her just do her dance. It was hardest to deal with "drunk" or "tipsy" customers. She felt disgusted during the VIP dances, and had to ignore her feelings to get through the dances. In spite of the conduct she experienced during VIP dances, she felt that the VIP dances were better than dancing on stage because she did not have to be nude and take her clothes off in front of so many people. (Testimony of AP2)

46) AP2 "smoked weed" (marijuana) before each shift she worked at Frehoo to help her get through the experience. (Testimony of AP2)

47) During her shifts, AP2 also "worked the floor" in the main table area by meeting with customers to get them to buy her a drink and to get them to pay for a VIP

dance. One customer, a man in his 60's, gave her \$50 to sit on his lap. She did this for about one minute and was uncomfortable. She told him, "No, let me just sit next to you." On different occasions, this same man gave her money for just being close to him. When she received tips while working on the floor, she put the money in her bra or underwear. (Testimony of AP2)

48) AP2 worked one busy evening when Frehoo hosted bachelor parties. During a bachelor party, she saw lots of money "flying everywhere," lots of drunk people and lots of dancers who ordered drinks, danced, and were "going crazy." She felt that about half of the men were drunk and did not know how much they were spending. Each bachelor would sit in a chair on stage. Four or five entertainers danced closed to the bachelor, pulled his necktie, hugged him, rubbed his hair, and had him put money inside their clothing. AP2 did not participate in the dances with bachelors and did not want to be there. (Testimony of AP2)

49) Working at Frehoo was a challenge for AP2. She knew that she had to be nude and act seductive in front of random people, including "creepy people" who she felt violated her rights and grabbed her. When she was under the influence of marijuana or alcohol, it was easier to push aside her emotions. She felt like a "sex robot" doing favors and dances. She swallowed her pride. (Testimony of AP2)

50) Curry picked up and dropped off AP2 in his car in the Frehoo parking lot each time that she worked. Curry told AP2 that she was at the club to make money, and that she should keep to herself and not socialize. He told her to focus on the customers and make money. He told her that she should make \$800-900 per night. She came close to that number, but was not ever able to make that much money. AP2 put the money she made at Frehoo in a wallet. When she got back to Curry's apartment, he told her that he would hold the money for her. (Testimony of AP2)

51) AP2 believed that performing at Frehoo was something she was required to do to please Curry. She hated it, but thought it was the only way to please Curry. She walked out the apartment door many times to try to leave Curry. She wanted to call her mother but did not know how to start the conversation. When she tried to leave, Curry followed her out the door and convinced her to stay. He told her that everything would be okay and that she could make it through it. (Testimony of AP2)

52) AP2 did not complain about the conduct she experienced at Frehoo because she did not believe it would help. She did not call for security to help her during the VIP dances because she thought she would not be asked to perform VIP dances if she complained. (Testimony of AP2)

Discovery that AP2 was a Missing Child

53) Shortly after AP2 began working at Frehoo, a bartender named Amy noticed a missing child posting on Facebook. Amy recognized the missing child as the dancer "Isis" and felt sick to her stomach. When Amy came into work that day, she

immediately showed the Facebook posting to her manager, Dave, and to Melanie, who agreed that the missing child was Isis. Amy also called Mitchell. (Testimony of Amy)

54) Mitchell called Herkenrath and asked him to confirm whether the missing child on the website worked at Frehoo, and Herkenrath confirmed that she did. Mitchell instructed Herkenrath to call Det. Opitz. (Testimony of Mitchell)

55) Det. Opitz received a call from Herkenrath on August 25, 2014. Herkenrath told him that a missing child on a website was “possibly dancing” at the club. Herkenrath directed Opitz to the missing child website, and Opitz noted that there was a 15-year-old girl missing from the Portland area. Opitz asked Herkenrath for a copy of the photograph of AP2’s ID and he picked up copies of AP2’s paperwork from the club on August 26, 2014. (Testimony of Opitz)

56) Det. Opitz attempted to contact AP2 on her cell phone. He connected with her on August 30, 2014, pretended to be a manager at Frehoo and asked her to come in to work a shift. (Testimony of Opitz)

57) AP2 stopped performing at Frehoo after she started receiving the messages from Det. Opitz asking her to come into work. Curry thought the messages were weird and accused AP2 of having sex with the men at the club. He told her she was not going to go back there. AP2 later learned the text messages were from Det. Opitz. (Testimony of AP2)

58) On September 5, 2014, Det. Opitz spoke to Tony from the Sunset Strip, another adult entertainment club in the Beaverton area. Tony told Det. Opitz that a dancer named Isis had auditioned and would be back the next day. (Testimony of Opitz)

59) On September 6, 2014, Det. Opitz and other Beaverton police detectives arrested Curry as he was dropping off AP2 at Sunset Strip. AP2 was later reunited with her mother. (Testimony of Opitz, AP2)

60) After AP2 was back at home with her mother, she was ashamed to tell her mother that she had danced nude in front of customers. She still has dreams and flashbacks about taking her clothes off and being nude, and having customers touch her. AP2 finds it hard to live life as a regular teenager. She does not feel like she can go on normal dates with boys and often wonders if they want to “grab” her and take advantage of her. She finds it hard to build relationships with people. (Testimony of AP2)

Stars' Involvement with the COAST organization

61) Sex trafficking⁷ is a growing problem in the United States. (Testimony of Spencer)

62) Club Operators Against Sex Trafficking ("COAST") was established in 2010. COAST is an umbrella organization of ACE National, a trade organization for the adult entertainment club industry. COAST arranges for programs throughout the country that provide training by federal agents on how to recognize indicators of sex trafficking. The trainings include discussions of what constitutes human trafficking under federal law. With respect to minors under the age of 18, there does not need to be proof of force, fraud or coercion. The trainings also address the differences between real and fake IDs. (Testimony of Spencer)

63) Struhar was contacted by a co-founder of COAST in August of 2013. After some conversations and meetings, Kaiser contacted Angelina Spencer, one of the co-founders of COAST, on September 6, 2013, and told her that he was interested in having a COAST training in the Portland area. Kaiser and Spencer communicated more than a dozen times after that to attempt to set up a COAST program in Portland. There were some delays in the process when a federal agent in Portland moved office buildings and due to federal worker furloughs during a government shutdown, as well as due to the discovery of AP2 in Frehoo. The first training was held in Portland in October of 2014. Kaiser paid the expenses for the training. Stars and other clubs were represented at the meeting. A second COAST training was held in Portland in October of 2015. At the time of the hearing, Kaiser and Spencer were in the process of scheduling another Portland event.

In an email dated December 12, 2013, discussing Toth's arrest, Spencer asked Kaiser "what type of age verification procedures did you have in place?" Kaiser did not answer this question when he responded to the email. In an email from Spencer dated September 10, 2014, following the discovery of AP2, Spencer suggested that Frehoo "move forward * * * with age verification in your clubs * * * and work toward cleaning up this mess with a good plan." (Ex. A75; Testimony of Kaiser; Spencer)

Credibility Findings⁸

64) AP2 was generally a credible witness. She was attentive when listening to questions and was forthcoming about the difficulties she has encountered in her life, as

⁷ The forum takes official notice under OAR 839-050-0320 that, among other things, sex trafficking involves the illegal sexual exploitation of another person for financial purposes. See, e.g. ORS 163.266 (describing the crime of "trafficking in persons"); see also Black's Law Dictionary 1126 (10th ed. 2014) (defining "human trafficking")

⁸ The forum notes that witnesses testified that rumors "fly pretty fast" through the workplace. See, e.g. Testimony of Brittany. The forum has given little weight to testimony about rumors and events that were not directly witnessed, and instead bases the conclusions in this Final Order on the testimony of credible eyewitnesses. Additionally, credibility findings were not made for witnesses whose testimony related primarily to the claims of AP1 and that the ALJ determined was inadmissible or unnecessary for purposes of the claims regarding AP2.

well as emotionally difficult situations she experienced before and after working at Frehoo. Aside from appearing nervous at times, her demeanor did not change significantly when she was cross examined by Respondents' counsel.

On one occasion, AP2's testimony at hearing differed from her signed and sworn written interrogatory answers in that her interrogatory responses stated that a bouncer intervened or stepped in when a customer touched her inappropriately, but she testified at hearing that no one assisted her. She explained her different answers by stating that she was given many papers to sign and did not read them closely enough before she signed them. Accordingly, the forum did not credit her testimony on this issue. To the extent AP2's testimony was slightly different than interview summaries prepared by detectives or investigators, the forum noted that she did not prepare the summaries, nor did she review and approve the contents of those summaries. The forum also did not find significant discrepancies as to relevant issues of fact when comparing AP2's hearing testimony with the interview summaries prepared by detectives or investigators. (Testimony of AP2; Exs. R25, R29)

65) The forum found the following witnesses to be credible: Perez (BOLI Wage and Hour Compliance Specialist), Colin (BOLI Civil Rights Investigator⁹), Herring (Beaverton police detective), Lynch (Portland Operations Manager for BOLI's Civil Rights Division), Brown (Beaverton police detective), Ponaman (Intake Manager for BOLI's Civil Rights Division), Karen (Frehoo cocktail waitress), Coni (former owner of costume business), Leslie (owner of costume business), Taylor (dancer), and Struhar (Frehoo owner). However, numerous witnesses testified that they did not think it was possible that criminal activities could have occurred on the premises. This testimony was credited as opinion testimony and was considered by the forum. However, the opinion testimony was often outweighed by credible testimony from witnesses who observed or experienced the criminal conduct. For example, testimony from witnesses who did not believe prostitution could have taken place in the FE room was outweighed by credible evidence that it in fact occurred. (Testimony of Opitz, AP1, Toth)

66) Steve Toth's admission that he arranged for AP1 to engage in prostitution activities out of Frehoo's FE room was credible because it was consistent with AP1's credible testimony and resulted in his felony convictions. Additionally, his testimony about how Frehoo's business generally operated and the fee structure was consistent with that of other credible witnesses. However, in almost all other respects, Toth was not a credible witness because he showed strong personal bias against Frehoo and its owners. Toth also admitted that he attempted to obtain money from Frehoo in exchange for an agreement to not communicate with BOLI. Accordingly, his testimony was not given any weight whenever it conflicted with credible evidence. (Ex. R99, Testimony of Toth)

67) Witness Ashley testified by telephone on behalf of the Agency. Beginning in 2012, she worked at Stars as a dancer on two different occasions. Ashley had an

⁹ Colin has also served in other positions for BOLI, including work as a Training Development Specialist and in an out-of-class assignment as an Administrative Prosecutor. His work on this case was primarily in the capacity of his role as a Civil Rights Investigator.

obvious bias against Frehoo because she was terminated by Jon Herkenrath. Additionally, the details in her testimony (such as mentioning a manager named “Jay”) were at odds with information provided by other credible witnesses. As well, she testified about a woman who danced with the name of “Jazmyn” before AP1 worked there and used the name “Jazmyn.” Accordingly, it is not clear which performer named “Jazmyn” Ashley was describing in her testimony. Based on the inconsistencies between the testimony of Ashley when compared to testimony from more credible witnesses, the forum concludes that her testimony had little evidentiary value. (Testimony of Ashley)

68) The forum did not find Melanie to be a credible witness in light of other credible testimony and evidence that Melanie was not honest or truthful. (Ex. R147; Testimony of Taylor)

69) Davey was generally a credible witness in describing the layout and atmosphere of the club, and was candid about admitting some of his personal struggles. However, his testimony that one of the dancers was a prostitute was not credited because he did not actually observe prostitution activities and instead based his statements on rumors he heard from others. (Testimony of Davey)

70) Bartender Amy’s testimony describing the layout of the club, about finding a missing child posting on Facebook and about notifying Dave and Todd Mitchell was credible. (Testimony of Amy)

71) The testimony of Det. Opitz was credible and the forum has credited his testimony in its entirety, except for his testimony about the thinness/thickness of AP2’s fake ID that differed from his testimony at Curry’s criminal trial. (Testimony of Opitz)

72) Casey was generally credible, but he had a tendency to exaggerate details in favor of Respondents. At the time of the hearing, he was employed at the Stars’ Bridgeport location. His testimony sounded rehearsed and suggested a natural bias in favor of Respondents. On direct examination by Respondents’ counsel, Casey acted with confidence and certainty when he testified that AP2’s fake ID looked “real.” He further stated that he was familiar with various forms of identification and could remember what the ID’s of “all the girls” looked like. However, on cross examination, his demeanor changed and he could not recall details regarding various dancer ID’s. He also could not recall the hair color of one of the regular dancers and did not remember whether AP2 spoke with an accent. Accordingly, the forum did not credit his testimony that AP2’s identification appeared to be “real.” (Testimony of Casey)

73) AP1 credibly testified about the layout of the club and that Toth arranged for her to engage in prostitution in the FE room.¹⁰ (Testimony of AP1)

¹⁰ It was not necessary to evaluate the remainder of AP1’s testimony for credibility purposes as the claims involving her resolved after the hearing concluded. See Procedural Finding of Fact #69.

74) Tammy credibly testified that she had never been in a romantic relationship with Kaiser and that he had never waived dance fees on her behalf. (Testimony of Tammy)

75) Herkenrath was not a credible witness for several reasons. He frequently left out information or shaded the facts to make himself appear in a better light. Although he appeared comfortable and friendly when questioned by Respondents' attorney, he fidgeted during cross examination when confronted with questions that exposed the inconsistencies in his testimony and prior statements.

Respondents attempted to portray Herkenrath as a hero for discovering that AP2 was a missing child and reporting this to police. However, Amy, a bartender, was the person who actually noticed a missing child post about AP2 on Facebook and brought it to Herkenrath's attention. Herkenrath only called the police after discussing it with another manager and Mitchell.

Additionally, Herkenrath was not forthcoming and cooperative with the Beaverton police investigating the sex trafficking of AP1 and AP2. Although he claimed that he told an officer that he had seen AP1 at the club, there was no evidence that any officer was aware of that fact and that was a significant fact that an officer would have noted. Det. Opitz testified that this information would have been helpful at the criminal trial of Moreno-Hernandez regarding the prostitution of AP1 on Frehoo's premises. When asked by BOLI investigators if he had ever seen AP1 in the club, instead of simply answering "yes," Herkenrath responded that he had not seen her "in a working capacity." Although Herkenrath confirmed that AP2 had worked at Frehoo when he spoke to Mitchell, he told Det. Opitz that a missing child was "possibly" working there. When Det. Opitz asked for the club's video surveillance which might show AP2's presence at the club, Herkenrath provided a grainy and blurry photograph instead of the actual video footage to the police. At hearing, he testified that he was not asked for video. However, it is illogical that he would not have understood that the actual video footage would have been more useful to a police investigation than the poor quality photograph he provided to the police.

Herkenrath also claimed that AP2 looked and acted like an adult when she auditioned and worked at the club, but he referred to her as a "little girl."

Furthermore, Herkenrath exaggerated when describing the club's enforcement of rules, describing rules as "black and white" and saying that there was "zero tolerance" for prostitution. In contrast, numerous witnesses described that warnings were given to customers who broke club rules, instead of removing them from the club. Customer Wheeler was allowed to return after he had been 86'd (banned from the club). As well, a dancer was rehired after being fired for potential prostitution activities. Finally, Toth was not fired by Mitchell when he allowed an employee to leave with a customer, Wheeler. Contrary to Herkenrath's testimony, credible evidence demonstrated that the rules at the club were not strictly enforced. In conclusion, the forum has given no weight to Herkenrath's testimony except when it was corroborated by other credible evidence. (Testimony of Herkenrath, Amy, Opitz, Mitchell, Jennifer)

76) Dante (former security guard and manager) credibly testified about how the club generally operated during his employment (early 2013-July 2014) and as to what the rules were when he worked there. He also testified credibly after reviewing a copy of AP2's ID that there were "definitely little things" on the ID that he would have "been questioning." (Testimony of Dante)

77) Ursula, a bartender at Frehoo, was generally credible when describing the club's operations and atmosphere, and that portion of her testimony was credited by the forum. However, with respect to Ursula's testimony that AP2 appeared to be older, the forum finds Ursula had an incentive to say that because she has an OLCC license and served AP2 a shot of alcohol. Additionally, Ursula had a personal bias in favor of Frehoo in that she described the owners and employees as being like a "family" to her. (Testimony of Ursula)

78) James Marquardt, a former OLCC employee, was called by Respondent to testify regarding his experience reviewing ID's for OLCC and to discuss the training he provided to OLCC permittees.

His testimony addressed the standards used for checking ID's to ensure that alcohol was not served to minors. However, his testimony did not establish that he had expertise as to the standard for checking IDs in the adult entertainment business to protect minors from sex trafficking and sex abuse. As well, the OLCC does not have authority over whether a business may hire a minor. Rather, the OLCC is responsible for determining if minors working in establishments are confined to the separate areas that minors are permitted to be in.

Additionally, Marquardt was hired by Respondents to testify on their behalf, giving him an inherent bias to provide testimony that supported their case. His expertise was further called into question when he could not articulate what to look for to determine if an ID was forged during his cross examination. Based on the foregoing reasons, his testimony was not credited when it conflicted with more credible evidence. (Testimony of Marquardt)

79) The testimony of Megan was credible as to the general operations of the club, but she did not have specific knowledge of what AP2 actually experienced. (Testimony of Megan; Ex. R13)

80) Moses testified credibly as to how the club generally operated and what he personally observed and witnessed. (Testimony of Moses; Ex. R90)

81) Mangrum, a private investigator hired by Frehoo, was generally a credible witness, although he was unable to recall some details about the prostitution "stings" he conducted. (Testimony of Mangrum)

82) Belen, a bartender, was a credible witness, but she worked from 2010 to 2013, so would not have had the opportunity to observe the club's operations during the time AP2 worked there. (Testimony of Belen)

83) Spencer is the founder of COAST who interacted with Kaiser to arrange Portland trainings on the topic of sex trafficking. She had an obvious bias in that her goal was to promote a positive image of the adult entertainment industry and to promote the work of COAST as an organization. However, the forum finds that she credibly described her communications with Kaiser to arrange COAST trainings. (Testimony of Spencer)

84) Dancer Sarah was generally a credible witness as to the atmosphere and environment at Frehoo. However, throughout her testimony she added unsolicited editorial comments to make a point that she was proud of working for Frehoo and wanted to show that she performed honorable work. Her unprompted interjections demonstrated an inherent bias in favor of Frehoo. Accordingly, those comments were not credited by the forum. (Testimony of Sarah)

85) Brittany worked as a dancer and door girl for Frehoo in 2012. Accordingly, she did not have an opportunity to observe the conditions in the workplace when AP2 worked there. Brittany's testimony was not credited when it conflicted with credible evidence relevant to the time period that AP2 performed at Frehoo. (Testimony of Brittany)

86) Hal was a manager at Frehoo during 2011 and 2012. Because Hal did not have an opportunity to observe the conditions in the workplace when AP2 worked there, his testimony was not credited when it conflicted with credible evidence relevant to the time period that AP2 performed at Frehoo. (Testimony of Hal)

87) Bob Stewart credibly testified as to what he observed when he reviewed AP2's ID on behalf of Respondents in that his testimony was generally consistent with the observations of Colin, who reviewed the ID on behalf of the Agency. However, Stewart was treated as a fact witness, not as an expert witness. (Testimony of Stewart)

88) Manager Tim testified that dancers "routinely" received hiring paperwork that they completely filled out, signed and dated. However, this testimony conflicted with hiring documents that were incomplete and unsigned. Tim also claimed that the written rules were consistently enforced but that testimony conflicted with the testimony of other witnesses. In particular, Kaiser testified that many of the written rules were out of date and not enforced. (Testimony of Lynch, Tim, Kaiser)

89) Both the Agency and Respondents offered expert witnesses on the extent of the harm suffered by AP2. Neither of those witnesses had full access to information that would be relevant to rendering a credible opinion. The Agency's expert, Dr. Jon Conte, had not been provided with documents that he said "could be useful," including sworn testimony from the criminal trial and the summaries of BOLI interviews. Respondents' expert, Dr. Kevin McGovern, conducted a more comprehensive document review, but did not have an opportunity to speak with AP2 personally. Given that each expert lacked access to information that they agreed could be useful, their testimony had little evidentiary value and was given minimal weight by the forum. (Testimony of Conte, McGovern)

90) Randy Kaiser was a credible witness except in two respects.

First, Kaiser's expressions of concern for the welfare of sex trafficking victims by referencing club policies and his involvement with COAST training was undercut by his statement that he would "think twice" before reporting that there was a minor in the club to the police. His credibility on this issue was further weakened when he said that "reporting comes at a price" and that Frehoo was a "victim of a fraud."

Second, Kaiser's testimony that he "never thought or even dreamed that there could be a problem of prostitution" at Frehoo was inconsistent with the fact that he had arranged for private investigators to conduct undercover "stings" to determine if prostitution was occurring at the club. There were also posters on the wall throughout Frehoo discussing the topics of human trafficking and prostitution, which also suggests at least some awareness of the possibility that these activities could occur in the club. (Testimony of Kaiser, Herkenrath)

91) Todd Mitchell was credible except in his insistence that Toth did not engage AP1 in prostitution activities at Frehoo. The forum did not believe this testimony because of Mitchell's awareness of the evidence to the contrary, including Toth's criminal conviction for committing this conduct. (Testimony of Mitchell, Toth)

92) Witness Jennifer (dancer name Tru) was not a credible witness. At the hearing, she contradicted prior statements she made to Det. Opitz regarding a dancer named Jewell and sexual acts she claimed to have witnessed other dancers performing in exchange for money. Additionally, with respect to the incident when Jennifer left Frehoo's premises with Wheeler, every witness described the incident differently. The forum concludes that there is no credible version of what actually occurred with the exception of the following facts which are generally agreed upon by all witnesses to the incident:

- One evening, Jennifer left Frehoo with Wheeler before the end of her scheduled shift as a "door girl."
- Toth was aware of this, and permitted Jennifer to leave with Wheeler.
- The incident occurred during the time when Toth worked as the general manager at Frehoo.
- Immediately after the incident, Jennifer told Mitchell that after she left the club with Wheeler, Wheeler "whipped out his penis and asked for oral sex."
- Wheeler was "86'd" (banned) from Frehoo and could not come to the club for a period of time.

- Although Toth allowed Jennifer to leave with a customer before her shift ended, Mitchell did not terminate his employment. Instead, Toth was transferred to a management shift at the Stars Bridgeport location.

(Testimony of Jennifer, Opitz, Mitchell, Toth)

93) Witness Tony is the kitchen/daytime manager at the Sunset Strip club. He testified that he accepted AP2's fake identification at the Sunset Strip and also asserted that he overheard a police officer say that AP2's ID was "one of the best" fake ID's he had ever seen. However, Tony struggled to recall his interaction with AP2 and could not provide any identifying information about the police officer who allegedly commented about the ID. Additionally, while testifying, he did not appear to be paying attention or listening carefully to the questions. Accordingly, his testimony had only minimal evidentiary value and has been given little weight compared to the testimony of more credible witnesses.

94) The Agency attempted to introduce into evidence the audio recording of BOLI's interview of Nathan Wheeler, a frequent customer of Frehoo and the owner of another adult entertainment club in the Portland area. The ALJ listened to a substantial portion of the audio of the recording and determined that Wheeler was not credible for several reasons. First, the tone of Wheeler's voice and his demeanor (including the liberal use of profanity and laughter) appeared to be more akin to bragging and exaggeration of his sexual exploitations, rather than someone who seriously listened to the investigators' questions and attempted to answer honestly. Second, his statements concerning the circumstances of him leaving Stars with dancer "Tru" contradicted the statements of other witnesses. Third, he said that he had a hangover on the day he was interviewed. Fourth, he had been 86'd (banned) from Frehoo by Mitchell, giving him an inherent bias against Frehoo and Mitchell. Finally, Respondents' counsel was unable to cross examine him because he did not appear to testify at the hearing. Any statements made by Wheeler were not credited unless they were consistent with other credible evidence. (Ex. A28; Testimony of Mitchell)

CONCLUSIONS OF LAW

1) At all times material herein, Frehoo was an "employer" as defined in ORS 659A.001(4).

2) At all times material herein, Frehoo, Herkenrath, Kaiser, Mitchell and Struhar were individuals and "person[s]" under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

3) Frehoo subjected AP2 to sexual harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0021, OAR 839-005-0030(1)(a)(A), OAR 839-005-0030(1)(b) and OAR 839-005-0030(7).

4) Herkenrath, Kaiser, Mitchell, and Struhar aided and abetted Frehoo in this unlawful employment practice in violation of ORS 659A.030(1)(g).

5) The Deputy 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 Deputy 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 orders to cease and desist continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace are an appropriate exercise of that authority. Additionally, the Deputy Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award compensatory damages to the aggrieved persons resulting from Respondents' unlawful practices. The sum of money awarded assessed against Respondents in the Order below is an appropriate exercise of that authority.

OPINION

INTRODUCTION

Frehoo hired a 15-year-old girl to perform sexually suggestive nude dances to entertain its customers – conduct that she was legally incapable of consenting to under Oregon law. Frehoo attempts to avoid liability by arguing that AP2 deceived Respondents and that Frehoo was the “victim of a fraud.” However, AP2 was the victim, not Frehoo. When AP2 walked into Frehoo, she was a child under pressure from Curry, a sex trafficker, to perform nude dances at adult clubs and make money. Frehoo created a sexually charged entertainment business and its owners were aware of the potential for sex trafficking in adult clubs, yet they failed to employ basic measures to ensure that only consenting adults were hired as dancers.

In its Amended Formal Charges, the Agency alleges that AP2 was subjected to sexual harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0030(1)(a), and OAR 839-005-0030(1)(b). The Agency further alleges that Respondents Colburn, Heinzman-Myers, Herkenrath, Kaiser, Mitchell and Struhar committed unlawful employment practices in violation of ORS 659A.030(1)(g) by aiding and abetting Frehoo in the commission of all unlawful employment practices found herein.

SEXUAL HARASSMENT

OAR 839-005-0030(1)(b) defines hostile work environment sexual harassment as:

“Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.”

The conduct must be sex-based. OAR 839-005-0030(1).

Based on the above, the Agency's prima facie case in a hostile environment case consists of the following elements: (1) Frehoo was an employer subject to ORS 659A.001 to 659A.030; (2) Frehoo employed AP2; (3) AP2 is a member of a protected class (sex); (4) AP2 was subjected to unwanted conduct because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with AP2's work performance or creating a hostile, intimidating or offensive work environment for AP2; and (6) AP2 was harmed by the unwelcome conduct. See, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 100 (2010).

Employment Status of AP2

Frehoo admits that it is an employer. For purposes of this case, Respondents do not dispute that AP2 was employed by Frehoo as a dancer. (Ex. X93)

Because of Sex

Frehoo hires women to perform sexually charged nude dances for male customers. The conduct AP2 experienced was because of her sex (female).

Unwelcome Conduct

AP2 was a minor at the time she performed at Frehoo. Under Oregon law, a person under the age of 18 is "incapable of consenting to a sexual act." ORS 163.315(1)(a). As well, it is illegal to use a person who is less than 18 years of age in a display of sexually explicit conduct. ORS 163.670(1); 163.665(1). The definition of "sexually explicit conduct" includes "actual or simulated * * * [l]ewd exhibit of sexual or other intimate parts." ORS 163.665 (3)(f). Oregon also prohibits exhibiting an obscene performance to a minor. ORS 167.075(1). Therefore, as a matter of law, AP2 was incapable of consenting to the sexual acts and exotic dancing she performed for Frehoo's customers. Furthermore, AP2 credibly testified that this conduct was unwelcome. (See Findings of Fact – The Merits, ##43, 45-49) Accordingly, the Agency sustained its burden of proving that the conduct was unwelcome.

Sufficiently Severe or Pervasive

The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2); *In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 276 (2013). Under this standard, the forum examines the conduct AP2 experienced from the perspective of a reasonable 15-year-old girl in those circumstances. The forum concludes that a reasonable young woman of that age would have found the performance of nude dancing for older men to be sufficiently severe to create a hostile, intimidating and offensive working environment, and AP2 credibly testified that she perceived it in that manner. In particular, she credibly testified about the hostility and intimidation she experienced when she had to perform nude on stage and during private dances for men. She also explained how she was intimidated,

humiliated and demeaned when the men touched her without her consent during private dances.

Harm to AP2

As described in greater detail below, AP2 was harmed by the harassment she experienced at Frehoo. AP2 suffered mental and physical suffering the entire time she worked there, and her life continues to be impacted by the harassment she experienced at Frehoo.

Conclusion

The Agency has proved all of the elements of a prima facie case for a hostile work environment sexual harassment case.

LIABILITY OF FREHOO FOR HARASSMENT OF AP2

The Agency contends that Frehoo is liable for the sexual harassment of AP2 under OAR 839-005-0030(5) (harassment by supervisor, no tangible employment action) and OAR 839-005-0030(7) (harassment by non-employees).¹¹ The forum analyzes each of those theories of liability below.¹²

A. Harassment by Non-Employees

Under Frehoo's business model, female dancers such as AP2 performed sexually suggestive nude dances for the entertainment of its customers. Frehoo is liable for the sexual harassment committed by non-employees if Frehoo or one of its agents "knew or should have known of the conduct unless [Frehoo] took immediate and appropriate corrective action. In reviewing such cases the [forum] will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees." OAR 839-005-0030(7).

Knew or Should Have Known

As indicated above, Frehoo earned revenue by hiring female entertainers who agreed to engage in conduct of a sexual nature. Due to AP2's age and her inability to consent, this conduct was unwelcome. Therefore, the key inquiry for this portion of the analysis is whether Frehoo "knew or should have known" she was only 15 years old and, thus, lacked the ability to consent. There was no evidence that anyone at Frehoo actually "knew" that AP2 was underage until the bartender, Amy, showed the missing child Facebook posting with AP2's picture to Herkenrath. Therefore, Frehoo was not aware that the nude dancing and other sexual conduct she experienced from customers

¹¹ See Procedural Finding of Fact # 63.

¹² In the Proposed Order, the ALJ concluded that Respondents did not violate OAR 839-005-0030(5). For the reasons set forth below, this Final Order reverses that decision. Since the ALJ's analysis of OAR 839-005-0030(7) was extensive and includes some of the same elements as a claim for OAR 839-005-0030(5), the claim under OAR 839-005-0030(7) will be addressed first to avoid unnecessary repetition.

was “unwelcome.” Accordingly, the forum must determine if Frehoo “should have known” that it was employing a 15 year old girl to dance nude on stage and perform sexually suggestive private dances for male customers.

“‘Should have known’ includes ‘constructive knowledge’ and ‘constructive notice.’” *Murrayhill Thriftway, Inc.*, 20 BOLI at 153 n.13. These terms were defined by the forum in *In the Matter of Wing Fong*, 16 BOLI 280, 292 (1998). “Constructive knowledge” was defined as “if one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of such a fact; e.g. matters of public record.” *Id.* (quoting Black’s Law Dictionary 314 (6th ed. 1990)). “Constructive notice” was defined as:

“Such notice as is implied or imputed by law * * *. Notice with which a person is charged by reason of the notorious nature of the thing to be noticed, as contrasted with actual notice of such thing. That which the law regards as sufficient to give notice and is regarded as a substitute for actual notice.”

Id. The forum further stated that an employer is liable when “upon reasonably diligent inquiry,” it “should have known” of the harassment. *Id.* (*internal quotations omitted*).

At the time AP2 auditioned to dance as an entertainer for Frehoo in August of 2014, at least one of the owners (Kaiser) knew of the prevalence of sex trafficking in the United States through his interactions with Spencer of COAST, an organization affiliated with owners of adult entertainment clubs. Posters with warnings about human trafficking were hanging on the walls throughout the club. Frehoo also had knowledge that its former manager, Toth, had arranged for a 13-year-old girl to perform acts of prostitution on Frehoo’s premises with its customers.

In this case, AP2 used a false last name and the fake ID given to her by Curry to apply to work at Frehoo. AP2’s fake ID had many markings on it that were different from what would appear on a proper Oregon identification card. For example, although the birthdate and issue date reflected that the ID was issued to a minor, the placement of the photo, background color and omission of “under 21” language were inconsistent with an ID issued to an Oregon minor. There were also problems with the spacing between words, and the ID lacked the reflective surface that appears on legitimate Oregon IDs. Dante, a former security guard and manager, testified that there were “definitely little things” on AP2’s fake ID that he would have questioned. Moreover, the use of an authenticating machine would have also exposed that the fake ID was not real.¹³ Significantly, when AP2 used the fake ID at one club, a bouncer tried to “scan” it and it did not “go through.” Had Frehoo’s employees reviewed the ID carefully or if

¹³ The forum has previously noted that an employer has an obligation to use current technology to prevent sexual harassment. See, e.g. *In the Matter of Robb Wochnick*, 25 BOLI 265, 284 (2004) (when employees received voluminous offensive emails, “an employer’s principal obligation is to use whatever current technology is available to block patently inappropriate [email] and reduce the volume of offensive junk mail”). See also *Freitag v. Ayers*, 468 F3d 528, 540-41 (2006) (finding that a prison failed to respond adequately to “pervasive” inmate sex abuse directed towards female corrections officers when, among other things, it did not install equipment used by other prisons as corrective measures).

Frehoo used an authentication machine, it would have been clear that AP2 could not prove that she was at least 18 years old. In other words, “upon reasonably diligent inquiry,” Frehoo “should have known” that AP2 could not consent to the sexual conduct she experienced at Frehoo. Frehoo’s entertainers were subjected to conduct that in most workplaces would be unwelcome sexual harassment, yet it did not take necessary steps to make sure that it was hiring women who were old enough to consent to such conduct. Therefore, the forum concludes that Frehoo “should have known” of the sexual harassment of AP2.

Corrective Action to Prevent Harassment of Underage Dancers Such as AP2

An employer is not responsible for harassment that it “should have known” about if it took “immediate and appropriate corrective action.” OAR 839-005-0030(7). Frehoo contends that after the sexual abuse of AP1 on Frehoo’s premises was discovered, it terminated Toth’s employment and implemented a policy requiring two employees to “sign off” that they had verified the ID of new dancers. Frehoo had a form in the packet given to new hires for managers to sign, indicating that they had checked identification. Notably, the copy of this form in the file of AP2 and other dancers does not contain signatures showing that this actually occurred. As well, AP2’s ID was only checked by one manager *after* she auditioned. Additionally, although she danced for at least six shifts after her audition, her ID was only checked again by a bouncer and bartender. The evidence established that Frehoo did not consistently implement the policy to have two employees check a person’s ID. Accordingly, that was not an “immediate and appropriate corrective action” following the discovery that Toth had subjected 13-year-old AP1 to acts of prostitution on Frehoo’s premises.

Respondents argued that its sexual harassment policy was a means of protecting its entertainers from sexual harassment. The forum finds Frehoo’s policy to be inadequate to prevent sexual harassment for the following reasons:

- Entertainers were expected to tell customers who touched them inappropriately that the customer should stop doing so.
- The written policy was issued on July 25, 2002, and was never updated.
- There was no evidence that Frehoo provided sexual harassment training to its managers, employees and entertainers. See, e.g. *Madray v. Publix Supermarkets, Inc.*, 208 F3d 1290, 1298 (11th Cir 2000). (“A policy is ‘defective’ if those responsible for its enforcement lack training and knowledge sufficient to recognize, prevent and correct workplace discrimination.”); *Clark v. United Parcel Serv., Inc.*, 400 F3d 341, 350 (6th Cir 2005) (an effective policy includes training regarding the policy).¹⁴

¹⁴ Although federal law similar to Oregon’s civil rights laws is not binding on the forum, federal decisions can be instructive in construing and applying similar state law. See *In the Matter of Kenneth Wallstrom*, 32 BOLI 63, 92 (2012).

- The written policy directed individuals to make complaints to a post office box, Frehoo's owners (none of whom were regularly onsite¹⁵) and Frehoo's former attorney (deceased since 2010). In addition, although the cell phone numbers of Kaiser, Mitchell and Struhar were listed on the policy, the policy stated that individuals reporting harassment "should not leave messages and assume that the problem has been communicated." See, e.g. *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1298 (11th Cir. 2000) (finding a policy adequate in part because "designated, appropriate company representatives were accessible to * * * store employees"); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir 1998) (policy inadequate when employees were directed to make complaints to an official who was "located in a separate facility" and was not available at night or on weekends).
- Given that Respondents had never received a complaint of sexual harassment, there is no evidence that the written policy was actually effective in "promptly correcting" any harassment which may have occurred.

Moreover, Frehoo cannot avoid liability due to AP2's lack of a complaint. Notably, a teenager does not have the same abilities or confidence as an adult to make a complaint of sexual harassment. See, e.g. *E.E.O.C. v. V & J Foods, Inc.*, 507 F.3d 575, 578 (7th Cir 2007) (recognizing the difference between experienced adult employees and the "understanding of the average teenager"); *E.E.O.C. v. KarenKim, Inc.*, 698 F.3d 92, 101 n.3 (2d Cir 2012). Given that AP2 was 15 years old at the time she worked at Frehoo, it was not unreasonable for her to fail to make a complaint under Frehoo's harassment policy.

In conclusion, Respondents did not take "immediate and appropriate corrective action" to prevent the hiring and sexual harassment of underage dancers. Accordingly, the Agency has sustained its burden of proving that Frehoo is liable for the sexual harassment of AP2 by Frehoo's customers.

B. Harassment by a Supervisor

OAR 839-005-0030(5) applies when there was "sexual harassment by a supervisor with immediate or successively higher authority" over the employee. Frehoo's managers required AP2 to dance nude in front of Frehoo supervisors, employees and customers as a condition of her employment. She also felt uncomfortable and awkward when a curly haired manager stared at her while she danced. Accordingly, the Agency has established that she was harassed by Frehoo's supervisors. Frehoo is liable for supervisory harassment under OAR 839-005-0030(5) if it knew or should have known of the harassment.

There is a presumption that Frehoo "should have known of the harassment" by a supervisor unless the Frehoo can demonstrate:

¹⁵ In any given week, Mitchell was physically present on Frehoo's premises an average of 15-20 hours per week, at most. Kaiser and Struhar provided management oversight in Bend and Salem, respectively, and only occasionally visited the club.

“(A) That [Frehoo] exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

“(B) That [AP2] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.”

OAR 839-005-0030(5)(b); *see also In the Matter of Murrayhill Thriftway, Inc.*, 20 BOLI 130, 153 (2000) (“There is a presumption that the employer ‘should have known,’ unless the employer can prove [the] two-pronged affirmative defense by a preponderance of the evidence”). As discussed in the previous section, Frehoo did not take reasonable care to prevent the harassment of underage women and, even if Frehoo had done so, it was not unreasonable for AP2, a 15-year-old girl, to fail to complain. Accordingly, Frehoo did not sustain its burden to prove the elements of the affirmative defense and it is also liable under OAR 839-005-0030(5) for the sexual harassment of AP2.

LIABILITY OF INDIVIDUAL RESPONDENTS FOR AIDING AND ABETTING

ORS 659A.030(1)(g) provides that it is an unlawful employment practice “[f]or any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so.” Aiding and abetting, in the context of an unlawful employment practice, means “to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.” *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 37 (2012), *citing In the Matter of Sapp’s Realty, Inc.*, 4 BOLI 232, 277 (1985). Because the legislature used three separate words in the statute (“help”, “assist,” and “facilitate”), the forum will examine and give effect to each word. *Wyers v. Am. Med. Response Nw., Inc.*, 360 Or 211, 221, 377 P3d 570 (2016), *citing* ORS 174.010. There is no evidence that the individual Respondents actively “help[ed]” or “assist[ed]” in the sexual harassment of AP2. Accordingly, the forum must determine whether they “facilitate[d]” the commission of unlawful sexual harassment. The most applicable definition of “facilitate” is: “To make the occurrence of (something) easier; to render less difficult.” *Black’s Law Dictionary* 708 (10th ed 2009).

Colburn and Heinzman-Myers

Respondents Colburn and Heinzman-Myers were previously dismissed from this matter in the ALJ’s interim order of November 8, 2016, which granted a portion of Respondents’ motion for summary judgment. (See Procedural Finding of Fact #51, *affirming* the ALJ’s summary judgment ruling dismissing Colburn and Heinzman-Myers as parties).

Herkenrath

Herkenrath was physically present on Frehoo’s premises when AP2 came in to audition and during other shifts that she worked. At that time, he served as the general manager of the club and admitted that general managers were responsible for anything

that happened in the club. Despite this responsibility, he never once checked AP2's ID nor confirmed that any other person carefully reviewed her ID. Given the nature of Respondents' business, verifying the age of a prospective nude dancer is essentially the only means of making sure a woman is capable of consenting to engage in public sexual conduct. Accordingly, as Frehoo's general manager responsible for the club's operations, Herkenrath made it "easier" and "less difficult" for the harassment of AP2 to occur and, thus, he facilitated unlawful sexual harassment. Accordingly, the Agency sustained its burden to prove that Herkenrath aided and abetted the harassment of AP2 by Frehoo's customers.

Kaiser, Mitchell and Struhar

Because Kaiser, Mitchell and Struhar were uniformly referred to as the "owners" of Frehoo, their liability as aiders and abettors will first be discussed collectively, then individually. Frehoo's business model was premised upon hiring women to work as nude dancers in an "erotic" and "sexually charged" business. (Finding of Fact – The Merits # 9) However, after creating this business model and with knowledge of the risks of harm to underage women, the owners took a hands-off approach, failing to undertake measures that could have prevented minors from working at the club. More specifically, prior to AP2's employment with Frehoo, the owners knew that their former manager Toth had engaged the services of a 13-year-old girl to perform sex acts for customers on the premises in the previous year. In addition, the interactions that Kaiser and Struhar had with the COAST organization and the sex trafficking posters throughout the club demonstrate that they were aware of sex trafficking in relation to the adult entertainment industry in general. In spite of the owners' general awareness of sex trafficking and their specific knowledge of such events on Frehoo's premises, the owners delegated the responsibility for verifying the age of dancers to their employees and did not check to see if that was actually happening. Furthermore, although Kaiser was aware of the use of age verification devices in other adult entertainment clubs, the owners did not purchase this equipment to use at Frehoo. Through these failures, the owners created an environment in which AP2, a sex trafficking victim, could enter the club and be subjected to sexual harassment. By creating a sexually charged environment with minimal safety precautions to prevent sexual harassment to minors, the owners collectively facilitated the harassment of AP2 and, thus, are liable as aiders and abettors.

Kaiser

Kaiser oversaw the operations of the Bend Stars club. He also handled legal and accounting issues for all of the Stars clubs. There was no evidence that Kaiser saw AP2 dance or was present at Frehoo during her employment and he understood that two employees were supposed to check a person's ID upon entrance to the club. However he took no action to make sure this new policy was actually followed. Furthermore, his lack of awareness as to the paperwork provided to new dancers and his admission that the paperwork was out-of-date further demonstrates his inattention to the operation of Frehoo's sexually charged business. For these additional reasons, Kaiser is liable as an aider and abettor.

Mitchell

Mitchell was the owner responsible for overseeing the operations of Frehoo. However, at the time of AP2's employment at the club, he was only on the premises approximately 15-20 hours per week, at most Mitchell also did not see AP2 dance or witness her being present on Frehoo's premises. However, like Kaiser, he participated in creating the environment at Frehoo which put AP2 at risk, then ignored that risk by failing to make sure the employees were following through to check dancer applicant ID's. Accordingly, he also "facilitated" the harassment of AP2 and the Agency sustained its burden of proving that Mitchell aided and abetted the sexual harassment of AP2.

Struhar

Struhar was the owner responsible for overseeing the operations of the Salem Stars club. There was no evidence that he was on site during the times that AP2 was on Frehoo's premises or that he was aware of her presence at the club. However, Struhar conferred with Kaiser and Mitchell "on some level" about "global policy." Additionally, his role as President of Frehoo and his involvement in arranging prostitution stings show that he also participated in creating the environment at Frehoo with an awareness of the potential of criminal sex activity involving dancers, yet took insufficient action to prevent that from happening. Accordingly, the Agency sustained its burden of proving that Struhar aided and abetted the sexual harassment of AP2.

DAMAGES

The Formal Charges seek damages for "emotional and physical suffering" in the amount of "at least \$4,000,000" for each of the two aggrieved persons. Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering sustained. *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 76 (2015). See also *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 263, 592 P2d 564, 570 (1979), *rev den* 287 Or 129 (1979). The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *Leo's BBQ*, 34 BOLI at 76.

In determining an award for emotional and physical 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. An aggrieved person'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 94, 141(2012), *citing In the Matter of From the Wilderness*, 30 BOLI 227, 290 (2009).

Through AP2's credible testimony, the Agency proved that AP2 experienced emotional and mental suffering as a result of the sexual harassment by Frehoo's customers. During the time AP2 was performing at Frehoo, she was only 15 years old. While she danced fully nude on stage, she believed that the customers were thinking

disgusting, sexual things about her. She felt awkward and uncomfortable interacting with the staff and did not want to be there. While performing private dances, she had to defend herself from inappropriate touching by older men who were under the influence of alcohol. Some of the men tried to get their hands inside her underwear and wanted her to touch them inside of their pants. She found it necessary to consume marijuana and alcohol to help push aside her emotions and get through the experience. She felt like a “sex robot.”

After the police apprehended Curry and AP2 was reunited with her mother, she was ashamed to tell her mother that she had danced nude in front of customers. When she first returned home, she saw a therapist for about three months, but was uncomfortable talking to a stranger about her feelings and what happened. She still has dreams and flashbacks about taking her clothes off and being nude in front of people, and about having customers touch her. AP2 finds it hard to live life as a regular teenager. She does not feel normal on dates with boys and often wonders if they want to “grab” her and take advantage of her.

In determining the appropriate amount of mental and physical suffering damages, “this forum has long held that Respondents must take Complainants ‘as they find them.’” *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 37 (2014), *appeal pending*. The actual amount depends on the facts presented by each aggrieved person. See, e.g., *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 127-28 (2015), *appeal pending* (one Complainant awarded \$60,000 and second Complainant awarded \$75,000 for public accommodation discrimination based on their sexual orientation); *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94 (2012) (Complainant subjected to harassment based on her religious belief 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 \$50,000 and \$100,000 each); *In the Matter of Charles Edward Minor*, 31 BOLI 88, 105 (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).

Although AP2 was not harassed at Frehoo over a number of months or years, the forum finds that the harm suffered by AP2 is more severe than in any previous case presented to this forum due to her young age and the public, sexually explicit, and exploitative nature of the harassment. The Agency and Respondents submitted briefing showing a wide range of amounts awarded to sexual harassment victims, including awards spanning from a couple hundred thousand dollars to \$1 million. (See Procedural Finding of Fact #65). The Agency’s briefing also discussed amounts

awarded to individuals who were sexually abused as children which exceeded \$1,000,000. *Id.*

Taking all of these factors into consideration, the forum concludes that \$1,000,000 is an appropriate award to compensate AP2 for her emotional and physical suffering. This amount is awarded to AP2 due to the harm she suffered as a result of the harassment at Frehoo, and is not based on any harm that she may have suffered as a result of other traumatic experiences in her life.

ADDITIONAL RELIEF REQUESTED BY THE AGENCY

In its Amended Formal Charges, the Agency asked that Respondents be ordered to cease and desist from continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace. The Agency also requested that Respondents be enjoined from violating sex discrimination and sexual harassment laws. BOLI's Deputy 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[.]”

The forum finds the Agency's requested cease and desist order to be appropriate relief in this case.

AGENCY'S EXCEPTIONS

The Agency filed exceptions to the Proposed Findings of Fact – The Merits, Proposed Opinion, and Proposed Findings of Fact – Procedural, which are addressed below.

Agency Exceptions to Proposed Findings of Fact – The Merits

The Agency first requested that additional facts be included in the Order and, secondly, raised exceptions to specific findings made by the ALJ.

A. Additional Findings of Fact¹⁶ Requested by the Agency

The Agency presented a list of 11 facts separated by bullet points that the Agency contends should be inserted into the Final Order. The numbers listed below correspond to the order in which the bullet points were presented in the Agency's Exceptions.

1. The requested additional facts duplicate those contained in Finding of Fact # 5, and the forum declines to add the Agency's suggested language.

2. Finding of Fact #3 has been supplemented to reflect that Kaiser, Mitchell and Struhar also collectively made decisions about policies at Frehoo.

3. The requested additional facts duplicate those contained in Finding of Fact # 88 which states that "credible evidence demonstrated that the rules were not strictly enforced." The forum declines to add the Agency's suggested language.

4. The forum declines to add the Agency's requested language regarding the testimony of Amy, the bartender. Amy's testimony did not demonstrate that she was certain about the timing of some events. For example, when Amy was asked when she saw the missing child Facebook posting, she responded, "It was within -- it was within a day or two. I mean, she was in there. I feel like it was within a day or two of AP2 being in there." The forum declines to make a finding based on this equivocal testimony.

5. The forum also declines to adopt the language requested by the Agency in Bullet Point 5 as it is dependent upon Amy's uncertain testimony regarding the timing of events and Respondents' unreliable paperwork. Amy testified that the police came to Frehoo on the "same day" she made a report to management about the missing child Facebook posting. The Agency requests that the forum rely on Respondents' daily logs to conclude that Amy worked additional shifts with AP2 after her report. However, given the inconsistencies in the accuracy of Respondents' paperwork, the forum is unable to make a conclusion as to the exact date when Amy discovered the Facebook posting and reported it to management.

6. Finding of Fact # 28 has been supplemented to clarify that Toth's guilty plea for promoting prostitution involved three dancers at Frehoo and the remainder of his crimes involved his conduct towards AP1.

7. Findings of Fact ## 28 and 73 establish that AP1 was the victim of Toth's crime of compelling prostitution in the FE room on Frehoo's premises. The forum declines to add the Agency's requested language.

8. Some of the information the Agency requests in this bullet point is contained in Finding of Fact # 75. For the sake of completeness, continuity and context, Finding of Fact # 28 is amended to note that when Herkenrath saw AP1 in the club with

¹⁶ To be concise, references to "Findings of Fact – The Merits" will simply state "Findings of Fact." When procedural findings of fact are referenced, it will state "Findings of Fact – Procedural."

Toth, he was comfortable with her being there and assumed that Toth either knew her age or had checked her ID.

9. The requested additional facts are repetitive of those contained in Finding of Fact # 26. The forum declines to add the Agency's suggested language.

10. The requested additional facts are repetitive of those contained in Findings of Fact ## 39 and 77. The forum declines to add the Agency's suggested language.

11. Finding of Fact # 5 has been supplemented to clarify that, "at Kaiser's direction," Frehoo's manager requested that BOLI investigators wait until Kaiser arrived before completing an onsite review.

B. The Agency's Exceptions to Proposed Findings of Fact

The Agency also raised exceptions to specific Proposed Findings of Fact made by the ALJ in the Proposed Order. The numbers listed below correspond to the Proposed Findings of Fact.

5) The Agency first takes issue with the statement that Kaiser "did not have responsibility for implementing policies at Frehoo." However, Kaiser credibly testified that he did not take on "any responsibility for implementation of policies" at Frehoo. To "implement" means "to carry out: accomplish, fulfill * * * esp: to give practical effect to and ensure of actual fulfillment by concrete measures." *Webster's Third New Int'l Dictionary* 1134 (unabridged ed 2002). The record is clear that Kaiser did not "give practical effect to" policies at Frehoo and "ensure * * * by concrete measures" that policies such as the "two-person ID check" were actually carried out and accomplished. The definition of "implement" is consistent with the remainder of Kaiser's testimony and with that of Frehoo's other owners in that Kaiser helped enact policies for Frehoo, but he himself did not take measures to put those policies into place. Aside from communicating to someone at Frehoo that there was a new policy, he did not take on "any responsibility for implementing policies." Nevertheless, to avoid any confusion in the factual record, the word "implementing" has been removed and the Finding of Fact has been modified to clarify Kaiser's role with respect to policy revisions at Frehoo.

With respect to the second part of the Agency's exception, this Finding of Fact has been modified to indicate that Kaiser directed Frehoo's manager to request that BOLI investigators wait until Kaiser arrived before completing an onsite review.

14) This Finding of Fact has been modified to clarify the reasons for walking dancers out to their cars. The phrase "were not permitted" was removed because, although there was testimony that there was a "rule" against dancers and employees leaving with customers, that rule was not consistently enforced. (Finding of Fact #28)

23) This Finding of Fact was modified to clarify that the OLCC does not permit minors to access certain areas of the club where alcohol is served.

26) The forum declines to modify this Finding of Fact in response to the Agency's exception. Mitchell and Kaiser were informed that on one occasion that Toth allowed Tru to leave the club with Wheeler and that she subsequently reported that she was upset when Wheeler asked her for a sexual favor. Toth's conduct in allowing Tru to leave was against the club's stated policy. However, the forum is unable to draw an inference that Tru's complaint about Wheeler was a complaint that "Toth was involved in prostitution."

The Agency's Exceptions to Credibility Findings

The Agency's exceptions to the Credibility Findings are denied because the Findings are supported by substantial evidence on the record. See *Wallstrom, Kenneth*, 32 BOLI 63, 92-93 (2012) ("exceptions to the ALJ's credibility findings are denied because those findings are supported by substantial evidence in the record"); *Gordy's Truck Stop, LLC.*, 28 BOLI 200, 216 (2007) ("an ALJ's credibility findings are accorded substantial deference and absent convincing reasons for rejecting those findings, they are not disturbed").

The Agency's Exceptions to the Proposed Opinion

The Agency first contends that Frehoo should be found liable under OAR 839-005-0030(5) for sexual harassment by a supervisor. In addition, the Agency asserts that Kaiser, Mitchell and Struhar should be found liable as aiders and abettors under ORS 659A.030(1)(g). For the reasons discussed in the Opinion section above, the forum agrees with the Agency and the Exceptions to the Proposed Opinion are granted.

The Agency's Exceptions to Proposed Findings of Fact - Procedural

The Agency's exceptions to the Findings of Fact – Procedural are denied.

RESPONDENTS' EXCEPTIONS

Respondents filed exceptions to the Proposed Findings of Fact – The Merits, Proposed Conclusions of Law/Opinion, and Proposed Findings of Fact – Procedural, which are addressed below.

Respondents' Exceptions to Proposed Findings of Fact – The Merits

Respondents raised exceptions to specific Proposed Findings of Fact contained in the Proposed Order. The letters and numbers below correspond to the letters and numbers used in Respondents' Exceptions.

I.A. Respondents' Exception I.A. is denied because the requested language is not material to the forum's analysis of the claims asserted on behalf of AP2.

I.B. The forum grants Respondents' Exception I.B. Finding of Fact #23 has been amended to cite to Herkenrath's testimony.

I.C. The forum grants Respondents' Exception I.C. Finding of Fact #22 has been amended to remove the phrase "in the Portland area."

I.D. Respondents' Exception I.D. is denied because Finding of Fact # 24 is pertinent to Frehoo's enforcement of rules pertaining to minors.

I.E. Respondents' Exception I.E. is denied because the requested language is not material to the forum's analysis of the resolution of the claims of AP2.

I.F. Respondents' Exception I.F. is denied. Kaiser knew that prostitution occurred inside the club after Toth's arrest and conviction. Kaiser's denial of that fact is not credible. See Findings of Fact ## 26, 28, 29.

I.G. Respondents' Exception I.G. is denied. The requested new language does not accurately reflect the record and does not add information pertinent to the forum's analysis.

I.H. Respondents' Exception I.H. is denied. The requested new language does not add information pertinent to the forum's analysis.

I.I. Respondents' Exception I.I. is granted in part to: (1) replace "93" with "92" as the year of the date of birth on AP2's fake ID; (2) replace the word "background" with "border;" and (3) include additional explanation about the issue date on the fake ID. The remainder of the exception is denied as it either inconsistent with credible evidence on the record or requests that the forum add information that is not pertinent to the forum's analysis of the claims at issue.

I.J. The forum denies Respondents' Exception I.J. AP2 testified that Curry argued with the bouncer who scanned her ID and said that it did not go through, and that it was a fake ID. After Curry complained and asked to see the manager, the manager told the bouncer, "Okay. Just let them come in." The fact that a manager at another club allowed AP2 to enter that club when her ID was rejected by a machine scanner has no bearing as to whether she could legally be hired as a nude dancer at Frehoo.

I.K. The forum denies Respondents' Exception I.K. The requested language is repetitious of language in Finding of Fact # 35 stating that AP2 used the fake ID and was hired by other clubs.

I.L. The forum denies Respondents' Exception I.L. The requested language is repetitious of language in Finding of Fact # 37 stating that AP2 "presented herself to the club as an experienced dancer." Additionally, although witnesses testified that they did not know AP2 was underage, the forum is unable to conclude that "no one at Stars" knew her actual age.

I.M. The forum denies Respondents' Exception I.M. The requested language is repetitious of language in Finding of Fact # 37 stating that AP2 "presented herself to the club as an experienced dancer."

I.N. The forum denies Respondents' Exception I.N. The sentences Respondents seek to strike are supported by AP2's credible testimony about how she felt while working at Frehoo, not her outward appearance.

I.O. The forum denies Respondents' Exception I.O. as Finding of Fact # 48 describes the conditions AP2 was exposed to while working at Frehoo and it states that she did not participate in the bachelor party dances.

I.P. The forum denies Respondents' Exception I.P. Although witnesses testified that they were not aware of her relationship with Curry, the forum is unable to conclude that "[n]o one working at Stars was aware" of her situation.

I.Q. The forum denies Respondents' Exception I.Q. AP2 credibly testified: "And I knew that there wouldn't be anyone to really help me. It was, like, my battle to fight* * * I just didn't see -- I didn't find any purpose on telling it because I didn't feel like it would be any -- any help or any different." Respondents misunderstand the forum's credibility finding (Finding of Fact # 64) regarding the inconsistency between the interrogatory response and hearing testimony. Finding of Fact # 64 described AP2's inconsistent statements as to whether someone intervened to help her when a customer touched her inappropriately; that Finding did not address why AP2 did not make a complaint.

I.R. The forum denies Respondents' Exception I.R. There was conflicting testimony as to how attentive and responsive security and management personnel were to requests for assistance with customers.

I.S. The forum denies Respondents' Exception I.S. As previously stated when discussing the Agency's exceptions, the record is not clear as to the date Amy discovered the Facebook posting and reported it to management.

I.T. The forum denies Respondents' Exception I.T. The record is not clear as to the date Amy reported the Facebook posting and, thus, the forum is unable to conclude whether that is the same date Herkenrath called Det. Opitz.

I.U. The forum denies Respondents' Exception I.U. as the requested language does not relate to the harm AP2 suffered based on her experiences at Frehoo. Indeed, Respondents' suggest that AP2 is better off having been subjected to the humiliating experience of dancing nude and being sexually harassed while working for Frehoo. The forum declines to make that conclusion.

I.V. The forum denies Respondents' Exception I.V. for the same reasons Exception I.U. was denied.

Respondents' Exceptions to Proposed Conclusions of Law/Proposed Opinion

The forum denies all of Respondents' exceptions to the Proposed Conclusions of Law and Proposed Opinion for the reasons discussed in the Opinion section above, with one exception. The phrase "the sex trafficking and harassment of AP1" has been

removed and replaced with the words: “that Toth had subjected 13-year-old AP1 to acts of prostitution on Frehoo’s premises.”

Respondents’ Exceptions to Proposed Credibility Findings

Respondents’ exceptions to the Credibility Findings are denied because the Findings are supported by substantial evidence on the record. See *Wallstrom*, 32 BOLI at 92-93 (2012); *Gordy’s Truck Stop, LLC*, 28 BOLI at 216 (2007).

Respondents’ Exceptions to Proposed Damages and Additional Relief

A. Manner of Payment

Respondents object to the portion of Proposed Order section which contains instructions for the method of payment. Since that section does not violate the order of the bankruptcy court, this exception is denied.

B. Allocation of Damages

Respondents contend that ORS chapter 659A does not authorize joint and several liability and, therefore, the forum should allocate damages based on contribution to harm. This exception is denied. The forum’s long term precedent establishes that aiders and abettors are jointly and severally liable. See, e.g., *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015); *Engel, Dr. Andrew, DMD, PC*, 32 BOLI 94, 137 (2012); *Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 218 (1991).

C. Cease and Desist Order against Frehoo

Respondents argue that Frehoo is not operational and, thus, the forum should not issue a cease and desist order against it. The forum has previously declined to award nonmonetary relief when the evidence established that such remedies “would be a futile exercise of the forum’s authority” because an employer “is no longer doing business in Oregon” and “there is no indication in the record that [the employer] has any intention of resuming business in Oregon in the future.” *In the Matter of Maltby Biocontrol, Inc.*, 2014 BOLI 121, 157 (2014). Unlike the situation in *Maltby*, the record in this matter does not conclusively establish that Frehoo has “no intention of resuming business in Oregon in the future.” Therefore, this exception is denied.

D. Cease and Desist Order against Herkenrath

Respondents similarly object to a cease and desist order against Herkenrath for the same reasons as they objected to the cease and desist order against Frehoo. This exception is denied for the same reasons as the previous exception was denied.

E. BOLI's Authority to Award Emotional Distress Damages

Respondents contend that BOLI lacks the authority to award emotional distress damages. In short, Respondents assert that the phrase “actual damages” was inserted into ORS 659A.850(4)(a)(B) in 2007 to apply to housing discrimination cases only, and was not intended to apply to cases involving employment discrimination. The forum disagrees with Respondents’ position for several reasons.

First, Respondents’ argument is inconsistent with a plain reading of the statute, which does not differentiate between employment discrimination and housing discrimination cases. The remedies in ORS 659A.850(4)(a)(B) apply to “any respondent found to have engaged in *any* unlawful practice alleged in the complaint.” (Emphasis added). “‘Unlawful practice’ means *any* unlawful employment practice or any other practice specifically denominated as an unlawful practice in [ORS chapter 659A].” (Emphasis added) “[L]egislative history cannot substitute for, or contradict the text of, [a] statute.” *White v. Jubitz Corp.*, 347 Or 212, 219 P3d 566 (2009); see also *State v. Gaines*, 346 Or 160, 173, 206 P.3d 1042 (2009) (“When the text of a statute is truly capable of having only one meaning, no weight can be given to legislative history that suggests—or even confirms—that legislators intended something different.”); see also *State v. Tyson*, 243 Or App 94, 99, 259 P3d 64, 66, *rev den*, 351 Or 401 (2011). Given the clear language in the statute, Respondents’ interpretation of legislative history cannot overcome the authorization of an award of “actual” damages.

Second, even if legislative history were to be considered, it does not advance Respondents’ argument. Respondents erroneously assert that the statute was “originally enacted in 2001.” However, Respondents’ position ignores the fact that the statute at issue was part of 2001 revisions reorganizing most of *former* ORS chapter 659 into the *current* ORS chapter 659A. This was not an original enactment. “[L]egislative history is most useful when it is able to uncover the manifest general legislative intent behind an enactment.” *Matter of Comp. of Muliro*, 359 Or 736, 753, 380 P3d 270 (2016) (internal quotations omitted). The revisions at issue were part of House Bill (HB) 5352 (2001) – an overall restructuring of Oregon’s civil rights statutes. Ex. F to Judiciary Subcommittee on Civil Law, HB 2532, February 5, 2001 (written testimony of former BOLI commissioner Jack Roberts) The Oregon Law Commission (OLC) proposed HB 5352 to reorganize and consolidate the civil rights statutes enforced by the Oregon Bureau of Labor and Industries into one chapter – ORS chapter 659A. *Id.* It aimed to put Oregon’s civil rights laws “into more logical order, address unclear or inconsistent language relating to enforcement procedures, and make the statutes easier for the reader to understand and use.” Ex. G to Judiciary Subcommittee on Civil Law, HB 2532 (Oregon Law Commission’s Report on the Civil Rights Statutes, 11/17/200). The OLC “endeavored to fix the organization problems” that existed in the civil rights laws “without changing the substance.” *Id.*

Although the overall purpose of the statutory revisions was to reorganize the civil rights statutes without changing the substance, there were some changes of substance made. For example, the statute prohibiting discrimination against workers applying for workers’ compensation benefits was amended to indicate that the “section applies only

to employers who employ six or more persons.” Compare ORS 659.410 (1999) to 659A.040(1),(2) (2001). However, there is no indication in the legislative history that the legislature intended to change the statute involving remedies to remove the ability to award actual damages. It has long been understood that BOLI’s Commissioner has the authority to award damages to a person who has been aggrieved by an unlawful employment practice. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 524 (1971) (concluding that former ORS 659.010(2)¹⁷ gave BOLI’s Commissioner the right to award damages for mental suffering); *Fred Meyer, Inc.*, 39 Or App at 260 (upholding *Williams* and noting that the legislature had amended the statute after the *Williams* decision but did not exclude emotional distress damages as a permissible remedy). See also *Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980) (affirming award of damages for mental anguish, humiliation and frustration); *Schipporeit v. Roberts*, 93 Or App 12, 15 (1988) (confirming that BOLI’s Commissioner had the authority to award damages, including damages for mental distress); *aff’d*, 308 Or 199, 778 P2d 953 (1989). Therefore, this exception is denied.

F. Respondents’ Right to a Jury Trial

Respondents assert that an award for emotional distress damages would deprive Respondents of a right to a jury trial under Article I, section 17 of Oregon’s Constitution. This exception is denied for the reasons set forth in Finding of Fact – Procedural # 29.

G. Amount of Damages

Respondents disagree with the amount of damages, arguing that the award is excessive. The forum denies this exception for the reasons set forth in the Opinion section. The forum also disagrees with Respondents’ argument that the award for damages is somehow related to other harm AP2 suffered in her life based on the conduct of other individuals not associated with Frehoo. Given AP2’s young age of 15 and the significant harm she suffered due to the sexual harassment at Frehoo (including dancing nude on stage and being groped by older male customers), \$1,000,000 is an appropriate award of emotional distress damages for the harm caused by Respondents. OAR 839-005-0030(5).

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(b), ORS 659A.030(1)(g), OAR 839-005-0021, OAR 839-005-0030(1)(a)(A), OAR 839-005-0030(1)(b), OAR 839-005-0030(5) and OAR 839-005-0030(7) by Respondents **Frehoo, Inc., Jon Herkenrath, Randy Kaiser, Todd Mitchell and Jeff Struhar**, and as

¹⁷ At the time of the decision in *Williams v. Joyce*, the pertinent part of ORS 659.010(2) stated:

“(2) ‘Cease and desist order’ means an order * * * issued to eliminate the effects of any unlawful practice found, addressed to a respondent requiring him to:

“(a) Perform an act * * * reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated * * *.”

payment of the damages awarded, the Deputy Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Frehoo, Inc., Jon Herkenrath, Randy Kaiser, Todd Mitchell and Jeff Struhar** 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 AP2 in the amount of:

1) ONE MILLION DOLLARS (\$1,000,000.00), representing compensatory damages for emotional and physical suffering experienced by AP2 as a result of Respondents' unlawful employment practices found herein; plus,

2) Interest at the legal rate on the sum of ONE MILLION DOLLARS (\$1,000,000.00), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Deputy Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Frehoo Inc., Jon Herkenrath, Randy Kaiser, Todd Mitchell and Jeff Struhar** to cease and desist from violating laws pertaining to discrimination because of sex and sexual harassment in the workplace.

C. The charges of aiding and abetting against Respondents Pamela Colburn and Lisa Heinzman-Myers are hereby dismissed.

APPENDIX A

FINDINGS OF FACT – PROCEDURAL

1) On July 27, 2015, Brad Avakian, Commissioner of the Oregon Bureau of Labor and Industries, filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging that Frehoo, Inc. dba Stars Cabaret & Steak House employed two female individuals under the age of 16 and that the conditions of employment for the minors constituted sexual harassment under OAR 839-005-0030, in violation of ORS 659A.030(1)(b). (Ex. A1)

2) The Commissioner's complaint was amended on January 4, 2016, to add the following additional parties as Respondents:

High Life, LLC

IHAT, Inc.

JMS Holdings, Inc.

NIMBY, LLC

MJ10, Inc.

NPC Concepts, LLC

NPC Properties, LLC

RGK Holdings, Inc. fka Phoenix Holdings, Inc.

SCS2, Inc. DBA Stars Cabaret ... At The Capitol

SCTO, Inc. DBA Stars Cabaret ..Bridgeport

SHM Holdings, Inc.

Weston Court Properties, LLC

W.T.H., Inc. DBA Stars Cabaret ... In The Cascades

Additionally, the following individuals were named as aiders and abettors, citing "ORS 659A.030(1)(b)(g)":

Pamela Colburn

Lisa Heinzman-Myers

Jonathan Herkenrath

Randy Kaiser

Todd Mitchell

Jeff Struhar

(Ex. A3)

3) On February 3, 2016, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence of an unlawful employment practice (sex harassment), in violation of ORS 659A.030(1)(b) and an unlawful employment practice (aiding and abetting of unlawful sex harassment), in violation of ORS 659A.030(1)(g) with respect to both female minors identified in the Commissioner's complaint. (Ex. A8)

4) On March 29, 2016, the Agency submitted a Request for Hearing to the forum. (Ex. X1)

5) On March 31, 2016, the Agency issued Formal Charges. The caption in this case listed Frehoo, Inc. dba Stars Cabaret & Steak House ("Frehoo") as the only corporate Respondent. Following the identification of Frehoo as a party, the entities named in the SED were listed, each preceded by the acronym "aka." The individuals named as aiders and abettors in the SED were also identified as Respondents.

The Formal Charges alleged that Respondents discriminated against both aggrieved persons¹⁸ in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former* and *current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030. The Formal Charges also alleged that all of the individual Respondents "aided, abetted, incited, compelled and/or coerced acts forbidden under ORS chapter 659A, specifically the unlawful practices alleged here, and [are] individually liable for violations alleged herein as an aider and abettor pursuant to ORS 659A.030(1)(g)." The Formal Charges sought "[d]amages for emotional and physical suffering for each aggrieved person in the amount of at least \$4,000,000." The Formal Charges did not include the names of the individuals for whom damages were being sought. (Ex. X2)

6) On March 31, 2016, the forum issued a Notice of Hearing stating the time and place of the hearing as August 2, 2016, beginning at 9:30 a.m., at BOLI's Portland, Oregon office. Together with the Notice of Hearing, the forum sent a copy of the Formal Charges, 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 hearing rules, OAR 839-050-000 to 839-050-0445. (Ex. X2, X2a-X2f)

¹⁸ An "aggrieved person" is "a person on whose behalf the complaint is filed" by the Commissioner. OAR 839-050-0020(5)(b).

7) The Agency filed a motion for protective order on April 5, 2016, seeking to protect “Personal Identifying Information” (“PII”) of the Aggrieved Persons. A prehearing telephone conference was held on April 13, 2016, to discuss the Agency’s motion for protective order. During the conference, all parties agreed to the following:

- The Agency’s Motion for Protective Order should be granted, and the definition of PII contained in footnote 1 of the Agency’s motion was appropriate.
- The sample form of protective order emailed by Respondents’ attorney on April 11, 2016, was acceptable, subject to appropriate revisions to adapt the order to this forum and to the specifics of this case.
- Should Respondents’ counsel need to disclose the aggrieved persons’ PII, pursuant to a factual investigation and/or discovery process in this case, Respondents’ counsel will retain written acknowledgements signed by each and every individual to whom a disclosure of said personal identifying information was made. The written acknowledgment will reflect that the individual has read the protective order and agrees to abide by its terms.
- A draft of the Protective Order was provided to the parties. The Agency requested revisions to the document. After the Agency conferred with Respondents’ attorney, a revised document was emailed to the ALJ and the requested changes were incorporated into a Protective Order.

The interim Protective Order was issued on April 27, 2016, which contained the following definition of PII:

“Any written document or electronic data that does, or purports to, provide information concerning: the aggrieved person’s name, address or telephone number; the aggrieved person’s driving privileges; the aggrieved person’s Social Security number or tax identification number; the aggrieved person’s citizenship status or alien identification number; the aggrieved person’s current employment status, employer or place of employment; the identification number assigned to the aggrieved person by the person’s employer; the name of the aggrieved person’s parent or legal guardian; any identifying information of the aggrieved person’s depository account at a ‘financial institution’ or ‘trust company,’ as those terms are defined in ORS 706.008, or a credit card account; the aggrieved person’s signature or a copy of the aggrieved person’s signature; the aggrieved person’s electronic mail name, electronic mail signature, electronic mail address or electronic mail account; any photographs of the aggrieved person; or the aggrieved person’s date of birth.”

(Exs. X3, X5, X9)

8) On April 18, 2016, Respondents filed a document titled Acceptance of Service. (Ex. X6)

9) On April 20, 2016, all Respondents jointly filed an answer through Courtney Angeli, attorney at law. Respondents raised numerous affirmative defenses, including:

“* * * * *

“5. There was no negligence by Stars or any of Respondents on which to premise any theory of liability. Following the discovery of Toth’s unauthorized, criminal conduct, Stars engaged in heightened efforts to ensure that minors did not access the premises. Immediately upon learning of the allegations related to Aggrieved Person #1, Stars’ ownership demanded that two separate club employees examine any new applicant information. In addition, upon entry onto the premises on any given day, a dancer was required to show identification, which was recorded by door personnel.

“* * * * *

“8. As to Aggrieved Person #2, who danced at Stars in Beaverton fewer than six days, to the extent the claim is that she was harassed by a supervisor, none of Respondents is liable because (1) there was no tangible employment action taken against her; (2) Stars was unaware of Aggrieved Person #2’s age or any offensiveness of the environment to her in light of her age; (3) Stars was reasonably diligent in ensuring that underage dancers did not perform at Stars clubs and the Beaverton club specifically; (4) Stars took immediate and appropriate corrective action by promptly reporting Aggrieved Person #2 to authorities as soon as it learned of her potentially being underage; and/or (5) Aggrieved Person #2 unreasonably failed to take advantage of preventive opportunities for addressing the conduct, in that she knowingly misrepresented her age and presented false identification in violation of Oregon law to secure the opportunity to dance at Stars, and in that she never reported to anyone at Stars that she was subject to unwelcome conduct. OAR 839-0050-0030(5).

“9. As to Aggrieved Person #2, who danced at Stars in Beaverton fewer than six days, to the extent the claim is that she was harassed by coworkers or agents of Stars, none of Respondents are liable because they did not know nor should they have known of any sexually harassing conduct and, as soon as Stars had reason to believe that Aggrieved Person #2 was underage and might potentially be offended or presumptively find any sexual conduct ‘unwelcome,’ Stars notified authorities and excluded her from any further entry on the premises. OAR 839-0050-0030(6).

“10. As to Aggrieved Person #2, who danced at Stars in Beaverton fewer than six days, to the extent the claim is that she was harassed by non-employees /patrons, none of Respondents are liable because they did not know nor should they have known of any sexually harassing conduct and, as soon as Stars knew that Aggrieved Person #2 was underage and might potentially be offended or presumptively find any sexual conduct ‘unwelcome,’ Stars notified authorities and excluded her from any further entry on the premises. OAR 839-0050-0030(7).

“* * * * *

“12. Respondents are not liable to Aggrieved Person #2 because no action by an employer was directed at her ‘because of sex,’ and thus the basic requirements of ORS 659A.030(1)(a) are not satisfied. The theory of liability seems to be that Stars took insufficient steps to prevent minors from accessing the premises, and that the presence of a minor on the premises of a gentlemen’s club is, by itself, an exposure of the individual to sexual harassment. This, however, is a theory about employer conduct that is based on age, not sex. The fact that the environment and nature of the entertainment is sexual does not mean that it is inherently a hostile working environment, particularly as such entertainment activities are Constitutionally protected in Oregon.

“13. Respondents are not liable to Aggrieved Person #2 because her alleged exposure to the conditions of dancing at Stars was not unwelcome nor was it subjectively offensive: She knowingly misrepresented her age and used false identification to obtain access to the premises, did not object to the premises or any conduct therein, and, on information and belief, sought and obtained access to similar establishments prior to and after applying to be an adult entertainer at Stars.

“14. Any unwelcome conduct experienced by Aggrieved Person #2 during the six or so days she danced at Stars was not sufficiently severe or pervasive to constitute a hostile working environment.

“15. Stars is not liable to Aggrieved Person #2 for any damages she sustained because she took action that caused her to experience such conduct and/or her damages should be eliminated or reduced for her failure to mitigate the harm, both by presenting false identification to evade the mechanisms intended to prevent her entry on the premises, and by failing to report to anyone at Stars that she experienced unwelcome conduct or behavior. Respondents further deny that any of them, or any conduct for which they are vicariously liable, caused the amount of damages alleged.”

(Ex. X7)

10) On April 28, 2016, the ALJ issued an interim order which stated:

“It has come to my attention that Respondents sent copies of the following documents to me by email and hand delivery, but those documents were not sent to the attention of BOLI’s Contested Case Coordinator:

- Respondents’ Request for Informal Discovery, Unopposed Motion Requesting 60-Day Hearing Set Over, and Proposing a Case Scheduling Conference;
- Answer and Defenses to Formal Charges and Notice of Hearing; and

- Motion to Dismiss.

“The Agency filed a Motion for Default on April 26, 2016, which asserts that the Answer was not timely filed. The deadline for filing a response to that motion is May 3, 2016. I will issue a ruling on the Agency’s motion after the response is filed, or the response time has passed, whichever occurs first.

“Because a ruling on the Motion for Default might also impact whether Respondents’ motions are considered to be on file with the forum, I will not be ruling on those motions at this time. The administrative law judge is unable to issue a ruling on motions unless they are filed with the forum. OAR 839-050-0040(1); OAR 839-050-0020(15).

“The parties are reminded to direct all filings to the following address:

Bureau of Labor and Industries

ATTN: Contested Case Coordinator

1045 State Office Building,

800 N.E. Oregon Street, Portland, OR 97232-2162

IT IS SO ORDERED”

(Ex. X10)

11) The Agency filed a Motion for Default on April 26, 2016, asserting that Respondents were in default because an Answer was not filed with BOLI’s Contested Case Coordinator by the due date of April 20, 2016. Respondents filed a response to the Agency’s motion on April 29, 2016, and asserted that the Answer was submitted for filing on time at the correct address, although the envelope contained the name of the assigned ALJ instead of the Contested Case Coordinator. The forum issued an interim order regarding the Agency’s motion on May 2, 2016, which stated, in pertinent part:

“‘[A] document is filed with the Forum either on the date the Forum receives the document, or on the date postmarked on the properly addressed document, whichever is earlier.’ OAR 839-050-0040(1). “‘Forum’ means the Administrative Law Judge assigned to preside over the contested case proceeding and the Commissioner or Deputy Commissioner who signs the final order.’ OAR 839-050-0020(15). The rule goes on to state that the address of the Forum is: ‘Bureau of Labor and Industries, ATTN: Contested Case Coordinator, 1045 State Office Building, 800 N.E. Oregon Street, Portland, OR 97232-2162.’

“The envelope containing the Answer was sent to the correct street address and included the name of the assigned ALJ (a person who is included in the definition of the ‘Forum’), but did not include the words ‘Contested Case Coordinator.’ Nevertheless, the envelope containing the Answer was stamped:

'RECEIVED BY
CONTESTED CASE
COORDINATOR
April 20, 2016
BUREAU OF LABOR
AND INDUSTRIES'

"Under these circumstances, the Forum 'receive[d]' the Answer on that date and it was timely filed. Therefore, the Agency's motion is DENIED. The Answer will be placed in the Forum's file and the record will reflect that it was filed on April 20, 2016."

(Exs. X8, X13, X14)

12) After Respondents filed documents with BOLI's Contested Case Coordinator duplicating documents previously sent to the attention of the ALJ, an interim order was issued on May 4, 2016, which stated as follows:

"To avoid any potential confusion regarding the date of filing, this interim order notifies the parties that the filing date of the following documents was April 29, 2016:

- Respondents' Request for Informal Discovery, Unopposed Motion Requesting 60-Day Hearing Set Over, and Proposing a Case Scheduling Conference
- Respondents' Motion to Dismiss.

"April 29, 2016, is the date that should be used for calculating the time for responding to these motions."

(Ex. X15)

13) On May 6, 2016, 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. X19, X20)

14) The Agency filed a request for clarification of the ALJ's Interim Order re Agency's Motion for Default on May 4, 2016. Respondents submitted a filing in

opposition to the request for clarification on May 5, 2016. On May 10, 2016, an interim order was issued which stated, in pertinent part:

“* * * The Agency requested clarification as follows:

‘The Agency requests that the Forum [provide] clarification and guidance on filings addressed and mailed directly to an ALJ, and advise whether its ruling in *Green Thumb* has been over-turned or remains good law. The Agency also further requests that the Forum provide clarification as to whether a document is “received” by the Forum when actually received by the Administrative Law Judge (or Commissioner or Deputy Commissioner), despite an administrative law judge’s order expressly dictating otherwise, or whether a document is ‘received’ by the Forum only when stamped “Received by Contested Case Coordinator.”’

Agency Request for Clarification, pp. 8-9. Respondents submitted a response to the Agency’s request on May 5, 2016. The following addresses the questions raised by the Agency.

“1. The Ruling in *Green Thumb* Has Not Been Overruled and Remains Good Law, But it Does Not Apply to the Facts at Issue in the Agency’s Motion for Default.

“The *Green Thumb* case was not cited in the interim order ruling on the Agency’s motion for default because it does not apply to this situation. In an effort to be brief, the interim order did not include a lengthy discussion of the ways in which *Green Thumb* contrasts with the situation in this case. Upon review of the Agency’s request, it seems that it would be helpful to elaborate on the differences between the situation in *Green Thumb* and this case. Thus, a description of how this case differs from *Green Thumb* is discussed below.

“First, the procedure for filing the document at issue in *Green Thumb* (Exceptions to the Proposed Order) is governed by OAR 839-050-0380. That administrative rule does not apply to the filing of Respondent’s Answer in this case.

“Second, the ruling in *Green Thumb* concerned whether the Agency had demonstrated ‘good cause’ for an extension of time to file their Exceptions after the due date had passed. The interim order in this case examined whether the Answer was filed with the Forum under OAR 839-050-0040 and OAR 839-050-0020(15), not whether Respondents should be afforded an extension of time under OAR 839-050-0050.

“Third, the Agency attempted to file the document in *Green Thumb* by mail, but it was (1) marked with insufficient postage, (2) ‘not mailed to the address where exceptions must be mailed,’ and (3) not received by the Contested Case Coordinator on the due date. By contrast, Respondents’ Answer in this case was submitted by hand delivery and (1) arrived at the correct

physical address on the due date, (2) was addressed to the ALJ, who is included in the definition of the 'Forum,' and (3) a stamp on the envelope and on the document itself stated that it was 'received' by the Contested Case Coordinator on the due date. Additionally, the envelope containing the Acceptance of Service was marked in the same manner as the envelope containing the Answer, and it was previously accepted for filing. The combination of these unique factors¹⁹ demonstrated that the Answer was filed on time with the Forum in accordance with the requirements of OAR 839-050-0040 and OAR 839-050-0020(15).

"Finally, in *Green Thumb*, the 'written directions' that were not followed were contained in the 'Exceptions Notice' which advised the parties of the requirements of 'ORS chapter 183 and OAR 839-050-0380.' There is no indication that additional instructions were added by the ALJ beyond the already applicable legal requirements. Similarly, the Notice of Hearing in this case referenced the applicable rules and advised the participants of their rights, as required by ORS 183.413 and 183.415. In this case, there was no order issued by the ALJ which contained 'instructions' which differed from the applicable rules. Moreover, the Notice of Hearing states that the Answer 'must be mailed or hand-delivered to the Contested Case Coordinator' and it is undisputed that the Contested Case Coordinator actually received the document, as evidenced by the 'received' stamp on the envelope and the Answer itself, as opposed to the Exceptions in *Green Thumb* which were not received. Based on the specific set of circumstances and the wording of the applicable rules (which differed from the rule at issue in *Green Thumb*), the Answer in this case was 'filed with the Forum' on the due date. For this reason also, the ruling in the *Green Thumb* case did not affect the timeliness of the Answer in this case.

"Put simply, *Green Thumb* involved a different type of document, different administrative rules²⁰ and different facts than those at issue in the Agency's Motion for Default. Thus, although the ruling in *Green Thumb* remains good law, it does not apply to the situation in this case and, therefore, the motion for default was denied.

"2. The Remainder of the Agency's Questions are Not at Issue in this Case.

"The ruling on the Agency's Motion for Default applied the relevant legal authority to the specific facts at issue in that motion. The Agency's Request for Clarification raises a number of questions that do not apply to the facts of this case, and seem to be hypothetical situations that may or may not arise in the

¹⁹ Neither this ruling, nor the interim order ruling on the Agency's Motion for Default, is intended to set a precedent establishing that a document is timely filed when only one of these factors exists. As explained below, the ALJ is unable to issue a ruling on a hypothetical set of events.

²⁰ Notably, the rule for filing exceptions specifically requires the document to be filed "with the administrative law judge *through the Contested Case Coordinator*." OAR 839-050-0380(4)(emphasis added). Similarly, motions must be submitted to the ALJ "through the Contested Case Coordinator." OAR 839-050-0150. The rules do not contain similar language regarding the filing on an Answer and the ALJ is unable to insert language that has been omitted. See ORS 174.010.

future.²¹ It is understandable that the Agency would like clarity on those matters. However, the ALJ's role is limited to the 'consideration of all issues *properly before the presiding officer in the case and the correct application of law to those facts.*' ORS 183.417(8) (emphasis added). Therefore, the ALJ is unable to issue a ruling on matters not at issue in this case.

"Conclusion"

"For all the foregoing reasons, the Agency's Request for Clarification is GRANTED IN PART, and DENIED IN PART as reflected in the discussion above."

(Exs. X16, X17, X21)

15) On May 12, 2016, a prehearing conference was held at the request of the parties to discuss the case schedule. An interim order was issued on May 16, 2016, regarding rulings made during the conference, which stated, in pertinent part:

"* * * After receiving input from the parties, the following rulings were made regarding the case schedule:

- Unless a different time period is provided below or in a subsequent interim order, all parties shall have 14 days to respond to all motions. This includes any motions currently pending at this time.
- All discovery must be exchanged and any discovery motions must be filed by **July 29, 2016**. The parties are encouraged to file motions earlier than this date if it becomes clear that they are unable to reach an agreement on particular issues.
- All dispositive motions, including motions for summary judgment and/or motions to dismiss, must be filed no later than **September 16, 2016**.
- Responses to dispositive motions must be filed by **October 7, 2016**.
- Case summaries must be filed by **October 25, 2016**.
- The hearing in this matter is set to begin on **Tuesday, November 8, 2016 at 9:00 a.m.** The hearing will be in recess on Friday, November 11, 2016, due to the Veteran's Day holiday, and will resume **Monday, November 14, 2016**, until it concludes.
- The hearing will be held at the **Office of Administrative Hearings, located at 7995 S.W. Mohawk Street, Entrance B, Tualatin, Oregon**. Additionally,

²¹ It is understandable that the parties would like some clarity regarding these questions raised by the Agency. However, when situations are not directly addressed in BOLI's contested case rules, Final Orders or other applicable legal authority, they can only be addressed on a case-by-case basis by applying the existing rules to the facts of the case.

the forum will use a court reporter to make the official record of the hearing.²²

(Exs. X11, X23)

16) On May 11, 2016, Respondents filed a motion to dismiss, remove or transfer. Respondents also filed a “second” motion to dismiss, remove or transfer on May 24, 2016. The Agency responded to the motions on May 25, 2016. An interim order ruling on Respondents’ motions was issued on May 31, 2016, which stated as follows:

“INTRODUCTION

“On May 11, 2016, Respondents filed a Motion to Dismiss, Remove or Transfer. Respondents filed a Second Motion to Dismiss, Remove or Transfer on May 24, 2016. In both motions, Respondents assert that Commissioner Avakian is not an impartial decision maker because he is the Complainant in this matter and has made public statements about the case. Respondents also argue that BOLI’s prosecutorial and adjudicative roles were not adequately separated when the Contested Case Coordinator signed a declaration relied upon in the Agency’s Motion for Default. For those reasons, Respondents contend that the matter should be dismissed or, alternatively, the case should be removed or transferred to circuit court.

“The Agency filed a response to both motions on May 25, 2016. First, the Agency states that the Deputy Commissioner, not BOLI’s Commissioner, will be issuing the Final Order in this matter. Second, the Agency argues that the actions of the Contested Case Coordinator do not violate due process. Finally, the Agency contends that there is no legal authority to transfer or remove the case to circuit court.

“DISCUSSION

“The matters raised in Respondents’ motions all revolve around concerns that there should be an unbiased decision maker and that there are inadequate procedural due process protections. Procedural due process requires a decision maker to be free of actual bias; Respondents have the burden of demonstrating an actual 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).

“Most of Respondents’ arguments expressed concern about the fairness of the Commissioner acting as both the Complainant and the person who would be issuing the Final Order in this matter. In response, the Agency states that the Deputy Commissioner, not Commissioner Avakian, issues Final Orders when a Commissioner’s Complaint has been filed. (Ex. 1 to Agency’s Resp.); *In the Matter*

²² The ALJ may also make an electronic recording of the hearing, but the court reporter’s transcript will be the official record.

of *Blachana*, LLC, 32 BOLI 211 (2012) (BOLI's Commissioner filed the complaint under ORS 659A.825(1)(b), then delegated the ultimate decision-making authority in the case to the Deputy Commissioner, who signed and issued the Final Order). There is no evidence on the record to suggest that the Deputy Commissioner has an actual bias towards Respondents.

"Respondents also argue that BOLI's prosecutorial and adjudicative roles were not adequately separated when the Contested Case Coordinator signed a declaration in support of the Agency's Motion for Default, which was ultimately denied in an interim order.²³ Respondents express concerns that the Contested Case Coordinator 'strongly *and misleadingly* implied that [she] had never personally received Respondent's Answer, when in reality, *she had*.'²⁴ (Respondent's Motion, p. 5, emphasis in original) Regardless of whether Respondents' characterization of the Contested Case Coordinator's actions is correct or not, there is no evidence that she acted with an actual bias towards Respondents when signing the declaration. Moreover, the Contested Case Coordinator is not a decision maker in this matter.

"Accordingly, Respondents have not met their burden in establishing that the decision maker in this case has an actual bias towards them. Therefore, both of their motions are DENIED."

(Exs. X22, X24, X 25, X26)

17) On June 7, 2016, Respondents filed a motion seeking an extension of time until June 20, 2016, to respond to request for informal discovery received from Complainant. Respondents needed the additional time to obtain responses from several individual Respondents who reside out-of-state. The Agency did not object. On June 8, 2016, the ALJ issued an interim order granting Respondent's request for extension of time. Respondents filed a second unopposed motion seeking additional time to respond to Complainant's request on June 14, 2016, which was granted in an interim order dated June 15, 2016. (Exs. X28 - X31)

18) On June 23, 2016, Respondents filed a Motion for 60-Day Hearing Set Over because one of their attorneys had a trial date that conflicted with the hearing and due to the need for more time to review the volume of discovery that was produced to Respondents by the Agency. The Agency timely filed an objection to the motion on July 5, 2016, asserting that Respondents' stated reasons did not constitute "good cause" for a postponement. Respondents filed a "supplemental motion" on July 6, 2016, arguing that the Agency's discovery responses were inadequate. On July 7, 2016, the ALJ issued an interim order ruling on Respondents' motion which stated, in pertinent part:

²³ Respondents assert that the Contested Case Coordinator is a "witness" in this case because she signed a declaration in support of the Agency's motion for default. However, the Agency's motion for default was denied and is no longer at issue.

²⁴ Actually, the Contested Case Coordinator stamped "received" on an envelope addressed to the ALJ, not the Contested Case Coordinator.

“INTRODUCTION

“This matter was initially set for hearing to begin on August 2, 2016. On April 29, 2016, Respondents filed an unopposed motion to postpone the hearing by 60 days. A prehearing conference was held on May 12, 2016, to address the postponement motion and other matters. Chief Administrative Prosecutor Jenn Gaddis and Administrative Prosecutor Cristin Casey appeared on behalf of the Agency. Attorneys Anthony Reiner and Joel Shapiro appeared on behalf of Aggrieved Person # 1 and Aggrieved Person # 2. Attorneys Courtney Angeli and Matt Scherer appeared on behalf of Respondents.

During the prehearing conference, the participants discussed the amount of discovery, as well as conflicts with their work and personal schedules which could impact their availability for a hearing in this case. Respondents’ counsel indicated that they had recently received approximately 17,000 pages of material from the Agency. All of the scheduling conflicts were taken into consideration and the hearing was rescheduled to begin on November 8, 2016. All parties indicated that this date was acceptable and the only mention of a potential issue with the date was that it was Election Day.

“* * *

“DISCUSSION

“Pursuant to OAR 839-050-0150(5), a party who seeks to postpone the hearing must demonstrate ‘good cause’ to move the hearing date. The following factors are to be considered when making this determination:

- (A) Whether previous postponements have been granted;
- (B) The timeliness of the request;
- (C) Whether a participant has previously indicated it was prepared to proceed;
- (D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and
- (E) The date the hearing was originally scheduled to commence.

OAR 839-050-0150(5)(a).

“The forum applies the above-referenced factors to this case as follows:

- (A) The hearing in this matter was previously postponed once.
- (B) The current postponement request is being made several months in advance of the November 8, 2016, hearing date.

(C) Everyone who attended the prehearing conference held on May 12, 2016 -- including counsel for Respondents -- stated that they were prepared to proceed with a hearing on November 8, 2016.

(D) There may be reasonable alternatives to address Respondents' concerns about discovery short of postponing the hearing, e.g. extending the current discovery deadline. It is unclear whether the parties have thoroughly explored other options.

(E) The hearing was originally scheduled for August 2, 2016. Respondents' request that the hearing be postponed until January 2017 is five months after the original hearing date.

The following ruling takes these considerations into account.

"First, the trial conflict of Matthew Scherer, one of Respondents' attorneys, does not constitute 'good cause' to move the hearing date. It appears that the conflicting trial date was set prior to the prehearing conference held on May 12, 2016, and Respondents were given the opportunity to discuss all potential scheduling conflicts at that time. In their supplemental motion, Respondents state that the conflicting trial date 'had not been placed on Mr. Scherer's calendar at the time of the prehearing conference.' Even if that is the case, the date conflict was not brought to the forum's attention until the second postponement motion was filed June 23, 2016. Therefore, Respondents have not demonstrated 'good cause' for a postponement for this reason.

"Second, there is insufficient information on the record at this time to support a showing of 'good cause' to postpone the hearing due to the volume of discovery and/or discovery disputes. The volume of discovery was discussed at the prehearing conference and the parties also indicated that they anticipated filing discovery motions. These factors were taken into consideration when scheduling case deadlines and the hearing date. Respondents' motion and supplemental motion reference discovery disputes and their efforts to hire additional personnel to manage the discovery. However, it is unclear whether these issues could have been anticipated at the time of the prehearing conference. Importantly, an analysis of 'good cause' involves a showing of 'an excusable mistake or a circumstance over which the participant had no control.' OAR 839-050-0020(16). Respondents have not sustained their burden of proof in showing that there is 'good cause' to reset the hearing due to an 'excusable mistake' or new circumstances 'over which [Respondents] had no control.'

"Respondents have the ability to file a discovery motion and/or a motion to extend the discovery deadline if they believe that the Agency's discovery responses are inadequate. Those options have not yet been explored and the record is incomplete as to those potential issues. The record before the forum at this time does not demonstrate 'good cause' to reschedule the hearing.

Respondents' motion and supplemental motion are DENIED."

(Exs. X32 – X35)

19) On July 20, 2016, the ALJ issued an interim order granting Respondents' motion filed on July 19, 2016, seeking an extension of time to respond to requests for informal discovery received from Complainant, which was not opposed by the Agency. (Exs. X39, X40)

20) On July 15, 2016, the Agency submitted a Motion to Compel Respondents to Conform Their Interrogatories to OAR 839-050-0200(6), asserting that "it remains unclear to the Agency how many interrogatories Respondents have actually served." On July 18, 2016, Respondents filed a Motion to Stay Briefing on Agency's Motion to Compel, arguing that Respondents believed the issues in dispute were capable of resolution. On July 29, 2016, Respondents submitted a timely response to the Agency's Motion to Compel. The ALJ issued an interim order ruling on the Agency's motion on August 3, 2017, which stated, in pertinent part:

"DISCUSSION AND RULING

"OAR 839-050-0200 states: 'The administrative law judge has the discretion to order discovery by a participant in an appropriate case.' At the outset, it is worth noting that the motion filed by the Agency does not request that the ALJ issue an order requiring Respondents to produce discovery. Rather, it appears more like a protective order pursuant to OAR 839-050-0150(8) in which the ALJ makes a predetermination as to whether information should be produced. It is not clear that the ALJ has the authority to make a ruling along the lines of what the Agency requests, essentially ruling in advance as to whether the informal discovery sent to the Agency by Respondents meets the requirements of OAR 839-050-0200(6).

"Instead, BOLI's rules provide for the parties to 'informally' exchange discovery without the involvement of the ALJ, and then to move for a motion to compel 'formal' discovery. See 839-050-0200(1), (8). Since Respondents have not yet filed a motion asking the forum to require the Agency to provide 'formal' discovery, the parties are in the 'informal' phase of discovery. Thus, there is nothing for the forum to rule on at this point. Accordingly, the Agency's motion to compel is DENIED.

"Since Respondents filed a timely response to the Agency's motion, their motion to stay briefing is moot and is, therefore, DENIED.

"OBSERVATIONS AND SUGGESTIONS

"In order to assist the parties in moving forward with discovery, it appears that the parties could benefit from some observations, which are made solely for

the purpose of assisting the parties and do not constitute an order to provide discovery.

“Because Respondents did not initially number their interrogatories and some appear to contain compound questions, it is understandable that there is some confusion between the parties. BOLI’s rules do not specifically require interrogatories to be numbered, but that can be useful in determining how many have been issued.

“The response filed by Respondents is helpful in understanding Respondents’ perspective as to how many interrogatories were promulgated by Respondents. All parties seem to agree that 175 interrogatories may be issued by Respondents. Respondents present alternative calculations of the amount of interrogatories they have promulgated as either 94 (using Respondents’ method of calculation) or 138 (the Agency’s method). The record before the forum at this time does not include a similar calculation from the Agency which disputes that offered by Respondents. Even if one assumes that the interrogatories in Respondents’ first and second requests for informal discovery contained discrete subparts (which does appear to be the case), then there were 138 issued prior to Respondents’ third request for informal discovery. Accordingly, it is difficult to understand the Agency’s refusal to answer additional interrogatories. Nevertheless, since Respondents have not filed a motion to compel, the forum will not issue an order requiring the Agency to respond. *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 97(2012) (declining to order that discovery be provided when respondents had not filed a motion for discovery order). The forum suggests the parties do the following:

- The parties should begin with the assumption that 138 interrogatories were issued in Respondents’ first and second informal requests. The first interrogatory in the third request appears to be the 139th interrogatory. (Unless briefing on a future motion to compel persuasively demonstrates that 138 is the incorrect number of interrogatories in the first and second informal request, the forum will assume that the third informal request began with interrogatory 139.)
- At any time prior to the discovery motion deadline, Respondents may file a motion to compel the Agency to respond if they believe they have not received adequate responses. If necessary, Respondents may also file a motion requesting permission to issue additional interrogatories.
- In responding to a motion to compel filed by Respondents, the Agency should be prepared to offer an explanation as to why Respondents’ calculations as to the number of interrogatories are incorrect. The Agency should also offer its own alternative calculation so that the forum has a more specific understanding as to why the Agency disagrees with Respondents’ version.

- The parties should keep in mind that when the forum is ruling on motions requesting depositions, the forum must determine whether ‘other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.’ OAR 839-050-0200(3). Accordingly, Respondents’ ability to obtain information from interrogatories will likely be a factor in ruling on those motions.

The observations and suggestions above should not be considered a ruling from the forum, but are merely offered to assist the parties in moving forward. If it would be helpful, the ALJ can be available for another telephone conference to discuss the matter.”

(Exs. X37, X38, X44, X47)

21) During a prehearing telephone conference held on July 18, 2016, the parties and the ALJ discussed potential modifications to the existing case deadlines. After the conference, the parties indicated by email that they had reached an agreement to modify the case schedule as follows:

07/25/16	All informal discovery requests exchanged
08/08/16	All responses to informal discovery requests due
08/15/16	Motions to Compel filed
08/22/16	Responses to Motions to Compel filed

The ALJ issued an interim order on July 27, 2016, adopting the revised schedule. (Ex. X42)

22) On August 22, 2016, the ALJ issued an interim order amending the interim order issued on August 2, 2016, which ruled on Respondents’ Motion to Dismiss, filed on April 29, 2016. The Agency responded to the motion on May 5, 2016. On July 12, 2016, Respondents filed a supplemental memorandum in support of their motion to dismiss. The Amended Interim Order re Respondents’ Motion to Dismiss stated, in pertinent part:

“DISCUSSION

“* * * * *

“B. Motion to Dismiss Individual Respondents Named as Aiders and Abettors

“Respondents also move to dismiss all of the individuals named as aiders and abettors, arguing that the Formal Charges do not allege facts which indicate how those Respondents aided or abetted the alleged harassment of the aggrieved persons. In support of their argument, Respondents rely on cases

interpreting Oregon's Rules of Civil Procedure, which do not apply to this administrative proceeding. Instead, OAR 839-050-0060(1)(b) contains the standard for the sufficiency of a charging document and requires that a charging document contain a 'short and concise statement of the matters that constitute the violation.' See *a/so* ORS 183.415(3)(d) (adequate notice of an agency action must include a 'short and plain statement of the matters asserted or charged'). Respondents have not argued that the allegations in the Formal Charges fail to meet the applicable standard.²⁵

"Therefore, Respondent's motion to dismiss all of the individuals named as aiders and abettors is DENIED."

(Exs. X12, X18, X36, X47, X62, X74)

23) An interim order was issued on August 5, 2016, granting Respondents' Motion to File Exhibit Under Seal and for a Protective Order, which was filed on August 3, 2016. The motion indicated that Exhibit D to Respondents' Motion to Dismiss, Abate, Substitute and/or Postpone contains Personal Identifying Information as defined in the forum's Interim Protective Order issued April 27, 2016. Specifically, Respondents indicated that Exhibit D contains the names and copies of signatures of the Aggrieved Persons. The Agency did not oppose the motion. The forum found that Respondents' description of the information in Exhibit D was Personal Identifying Information as defined in the forum's Interim Protective Order issued April 27, 2016. Accordingly, Respondents received permission to file Exhibit D under seal. (Exs. X49, X51)

24) On August 8, 2016, an interim order was issued granting the Agency's Motion for Protective Order Concerning Confidential Oregon Employment Department Records, filed July 22, 2016, asserting that it intended to disclose documents Bates numbered 019547-019830 ("OED Documents"). The Agency asserted that the documents were confidential and exempt from disclosure pursuant to ORS 657.665(1). Respondents did not oppose the motion. The ALJ's interim order stated, in pertinent part:

"The forum has reviewed [*in camera*] the OED Documents submitted by the Agency and agrees that the OED Documents are confidential under ORS 657.665(1). Since there is not a discovery motion pending, the forum is not issuing an interim order requiring that the OED Documents be produced. If/when the OED Documents are produced, Respondents are prohibited from making the OED Documents available or disseminating OED Documents to anyone other than Respondents' legal counsel in this matter. At the conclusion of this matter, all documents or electronic data containing OED Documents, whether or not found relevant or admitted into evidence (including all copies of OED

²⁵ As with all BOLI contested cases, the participants may address whether the Formal Charges meet the standard set forth in OAR 839-050-0060(1)(b) and ORS 183.415(3)(d) before a Final Order is issued. See, e.g. *In the Matter of Hamilton, Grant and Leslie dba MacGregors*, 33 BOLI 209, 217 (2014) (examining whether there was adequate notice in the charging document when determining whether prejudgment interest could be awarded).

Documents) are to be sealed within the records of this matter, returned to the Agency, or destroyed.”

(Exs. X41, X54)

25) On August 9, 2016, Respondents filed two motions: (1) a Motion to Seal and Designate as “Confidential” Exhibit D to Respondents’ Response in Opposition to Agency Motion to Compel Respondents to Conform Their Interrogatories to OAR 839-050-0200(6); and (2) Motion to File Motion to Compel and Accompanying Exhibits Under Seal and Designate as “Confidential.” The motions indicated that these documents contain Personal Identifying Information as defined in the forum’s Interim Protective Order issued April 27, 2016. The ALJ issued an interim order on August 11, 2016, which stated, in pertinent part:

“Although the Agency’s time for responding to these motions has not passed, it appears that it will be beneficial to the parties to have a ruling issued on this matter now so that documents can be served and filed. The Agency may still file responses to these motions and this ruling may be revisited, if necessary.

“The forum finds that Respondents’ description of the information in the motions filed by Respondents on August 9, 2016, appears to be Personal Identifying Information as defined in the forum’s Interim Protective Order issued April 27, 2016. Accordingly, Respondents have permission to file these documents under seal and serve the same on the Agency subject to the Interim Protective Order.

“Any documents submitted for filing under seal should be placed in a separate envelope with a label that prominently states: CONFIDENTIAL – TO BE FILED UNDER SEAL.”

“Respondents’ motion is GRANTED.”

(Ex. X63)

26) On August 16, 2016, the forum issued an interim order ruling on Respondents’ motion to depose Det. Opitz, which was filed on July 29, 2016. The Agency filed a response opposing the motion on August 5, 2016. Both parties provided information to the forum on August 9, 2016, in response to the interim order of August 8, 2016. The forum’s interim order stated, in pertinent part:

“In a BOLI Contested Case proceeding, the ALJ’s authority to issue an interim order allowing depositions is limited and is not as extensive as that provided in civil rules of procedure governing trial court proceedings. See, e.g., ORCP 39A (‘any party may take the testimony of any person, including a party, by deposition upon oral examination’); FRCP 30(a)(1) (‘A party may, by oral questions, depose any person, including a party, without leave of court,’ subject to certain exceptions). BOLI’s administrative rule, OAR 839-050-0200(3), 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.’

“Respondents assert that they would suffer substantial prejudice if they are unable to depose Det. Opitz because (1) he was ‘deeply involved in the investigations related to both of the Aggrieved Persons’; (2) Respondents expect that he will testify at the hearing; and (3) Respondents will not have the opportunity to question him prior to the hearing and, because he is not a party, ‘Respondents are unable to discover this information through interrogatories or requests for admission.’ [They] also assert that they ‘must have an adequate opportunity before hearing to thoroughly question him about his recollection of the events, much of which will not appear in documents subject to subpoena.’

“In response to the interim order of August 8, 2016, Respondents indicated that several efforts were made to speak to Det. Opitz informally. Although Det. Opitz appeared to be willing to speak to Respondents informally, the Beaverton City Attorney’s office said that they would rather have any discussion with Det. Opitz take place pursuant to a subpoena and a deposition.

“In response to the interim order of August 8, 2016, the Agency provided the following regarding Det. Opitz:

- Police reports authored by Det. Opitz re Aggrieved Person # 1 (Bates Nos. 017115-017144, 017251-017253, 017279-017285, 017292-017297)
- Police reports authored by Det. Opitz re Aggrieved Person # 2 (Bates Nos. 017173-017181)
- Police reports authored by others describing Det. Opitz’s investigation activities
- Transcript of Trial Testimony of Det. Opitz in Moreno-Hernandez Trial (re Aggrieved Person # 1) (Bates Nos. 017769-017931)
- Courtroom Log for the Trial of Moreno-Hernandez (re Aggrieved Person # 1), reflecting that Det. Opitz testified under oath as follows:
 - From 10:57 a.m. – 11:59 a.m. on September 11, 2014 (Bates No. 000050)
 - From 1:23 p.m. – 1:46 p.m. on September 11, 2014 (Bates Nos. 000050-000051)
 - From 1:53 p.m. – 3:07 p.m. on September 11, 2014 (Bates Nos. 000051-000053)

- From 3:19 p.m. - 3:35 p.m. on September 11, 2014 (Bates No. 000053)
- Audio Recording of Det. Opitz's testimony in the trial of Moreno-Hernandez (re Aggrieved Person # 1) (Bates Nos. . 000281-000323)
- Transcript of Trial Testimony of Det. Opitz in Anthony Curry Trial (re Aggrieved Person # 2) (Bates Nos. 018314-018377)
- Courtroom Log for the Trial of Anthony Curry (re Aggrieved Person # 2), reflecting that Det. Opitz testified under oath as follows:
 - From 10:16 a.m. - 11:23 a.m. on June 2, 2015 (Bates No. 000394)
 - From 3:30 [p.m.] - 4:55 p.m. on June 4, 2013 (Bates Nos. 000388-000389)
 - From 9:23 a.m. - 10:38 a.m. on June 5, 2015 (Bates Nos. 000391-000392)
- Audio Recording of Det. Opitz's testimony in the trial of Anthony Curry (re Aggrieved Person # 2) (Bates Nos. . 415-429, 597-615, 623-639)
- There are also references to videotaped interviews that Opitz participated in, although it is not clear if Respondents were provided with a copy of those interviews.

“A recent BOLI Final Order addressed a Respondents’ motion to depose a witness who was not a complainant or aggrieved person. See *In the Matter of Klein, Melissa and Aaron dba Sweetcakes by Melissa* (‘Sweetcakes’), 34 BOLI 102 (2015), *appeal pending*. In *Sweetcakes*, the forum found that Respondents did not demonstrate the need to depose the witness (Cheryl McPherson), stating:

‘* * * 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.’

Id. at 151. There do not appear to be any BOLI Final Orders authorizing the deposition of a non-party witness.

“As illustrated above, the information provided to Respondents in this case (police reports and sworn testimony of Det. Opitz regarding both Aggrieved Persons) was extensive and likely significantly more detailed than the ‘usual investigative notes’ discussed in *Sweetcakes*. Respondents have not articulated

any specific information that is missing from the police reports and trial testimony that they need to obtain from Det. Opitz. Given the policy set forth in OAR 839-050-0200(3) disfavoring depositions and the precedent set in the *Sweetcakes* case, the forum is unable to conclude that Respondents will be 'substantially prejudiced' if they cannot depose Det. Opitz.

"Respondents' motion is DENIED."

(Exs. X46, X52, X53, X70)

27) On August 22, 2016, the forum issued an interim order ruling on Respondents' motion to depose AP1 and AP2, which was filed on July 29, 2016. The Agency filed a response opposing the motion on August 5, 2016. Both parties provided information to the forum on August 9, 2016, in response to the interim order of August 8, 2016. The forum's interim order stated, in pertinent part:

"In a BOLI contested case proceeding, the ALJ's authority to issue an interim order allowing depositions is limited and is not as extensive as that provided in civil rules of procedure governing trial court proceedings. See, e.g., ORCP 39A ('any party may take the testimony of any person, including a party, by deposition upon oral examination'); FRCP 30(a)(1) ('A party may, by oral questions, depose any person, including a party, without leave of court,' subject to certain exceptions). BOLI's administrative rule, OAR 839-050-0200(3), 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.'

"Respondents assert that they would suffer substantial prejudice if they are unable to depose the Aggrieved Persons because the amount of damages requested for each Aggrieved Person (\$4 million) 'necessarily implies the existence of harm that goes far beyond that suffered by most victims of employment discrimination.' Respondents describe the information they would need to obtain as follows:

'Respondents must have an adequate opportunity before hearing to fully ascertain not only the nature of the Aggrieved Persons' alleged experiences at Stars Cabaret & Steak House, but also how those experiences might have interacted with other contributing sources of physical and emotional harm that may have been present in their lives. To do this effectively, Respondents must have the opportunity to thoroughly question each Aggrieved Person about not only the events alleged in the Formal Charges, but also other potential events that may have affected the Aggrieved Person' physical and emotional state, whether by contributing to the alleged harm they suffered or by mitigating the

damages they incurred. Such events may have occurred not only during the time periods alleged in the Formal Charges, but also before and after those periods, and Respondents will be unable to fully assess the nature of the Aggrieved Persons' damages without such an opportunity.'

"As indicated above, in order for respondents to demonstrate the need to take a deposition, they must show 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.' OAR 839-050-0200(3). The forum has previously noted that Respondents 'must first attempt to gain the information via sworn statements through interrogatories.' *In the Matter of Blachana, LLC*, 32 BOLI 220, 224 (2013), *affirmed Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806, 359 P3d 574 (2015). In *Blachana*, the forum stated that the respondents could renew their motion to depose witnesses '[i]f the Agency is uncooperative in responding to interrogatories or if Respondents can demonstrate that the information it has obtained from the interrogatories will substantially prejudice Respondents in the absence of a deposition * * * .' *Id.*

"Based on BOLI's rule and the *Blachana* precedent, it was necessary to determine what discovery had been requested and exchanged on the issue of the Aggrieved Persons' damages. Accordingly, an interim order was issued on August 8, 2016, asking Respondents to provide the forum with a 'copy of all interrogatories and requests for admission that Respondents issued which address the issue of damages, along with the Agency's answers to those interrogatories and requests for admission.' In response, Respondents provided copies of Interrogatory Nos. 21, 22, 31-52, 57 and 135, along with the Agency's responses. Respondents also provided copies of Request for Admission Nos. 1, 2, 22, 46, 83 and Requests for Production Nos. 17 and 18, along with the Agency's responses to those requests.

"The interim order of August 8, 2016, also invited the Agency to submit copies of police reports and transcripts that had been provided to Respondents in discovery. In response to the forum's request, the Agency provided the following documents:

- Police reports authored by Det. Opitz re Aggrieved Person # 1 (Bates Nos. 017115-017144, 017251-017253, 017279-017285, 017292-017297)
- Police reports authored by others describing Det. Opitz's investigation activities
- Transcript of Testimony of Aggrieved Person # 1 in Moreno-Hernandez Trial (Bates Nos. 017561-017608)
- Courtroom Log for the Trial of Moreno-Hernandez reflecting that Aggrieved Person # 1 testified under oath as follows:

- From 1:49 p.m. – 2:11 p.m. on September 10, 2014 (Bates No. 000044)
 - From 2:27 p.m. – 2:59 p.m. on September 10, 2014 (Bates Nos. 000045)
- Audio Recording of the testimony [of] Aggrieved Person # 1 in the trial of Moreno-Hernandez (Bates Nos. 000232-000244)
- Police reports authored by Det. Opitz re Aggrieved Person # 2 (Bates Nos. 017173-017181)
- Transcript of Trial Testimony of re Aggrieved Person # 2 in Anthony Curry Trial (Bates Nos. 018912-019035)
- Courtroom Log for the Trial of Anthony Curry reflecting that Aggrieved Person # 2 testified under oath as follows:
 - From 10:09 a.m. – 10:58 a.m. on June 4, 2015 (Bates No. 000385)
 - From 11:12 a.m. – 11:57 a.m. on June 4, 2015 (Bates Nos. . 000385-000386)
 - From 1:45 p.m. – 2:36 p.m. on June 4, 2015 (Bates Nos. 000386-000387)
- Audio Recording of the testimony of Aggrieved Person # 2 in the trial of Anthony Curry (Bates Nos. 000556-000576, 000578-000587)
- There are also references a videotaped REDACTED interview of Aggrieved Person # 2, although it is not clear if Respondents were provided with a copy of that interview.
- The documents also suggest that Respondents were provided with copies of medical records of the Aggrieved Persons.

“The information provided by the Agency is quite extensive and includes testimony and statements from both of the Aggrieved Persons about events that took place at the Beaverton Stars which are the subject of the Formal Charges. These documents also contain detailed, descriptive statements from each Aggrieved Party about their whereabouts and activities during the time period immediately before and after they were at the Beaverton Stars location. The amount of information provided in these documents is more detailed than what is usually exchanged in a BOLI civil rights case. Nevertheless, the forum recognizes that Respondents likely have a need for additional relevant information that was not covered in the criminal investigations and trials. Of the discovery requested by Respondents on the issue of damages, the Agency provided substantive answers (either in written narrative responses or by

referring to documents produced in discovery) to Interrogatory Nos. 21, 22, 31-35, 37-41, and 43-51, but objected on the grounds of ‘overbreadth and relevance’ to Interrogatory Nos. 36 and 42, and objected to Interrogatory No57 on the basis of relevance.²⁶ The Agency also objected to Interrogatory Nos. 47, 52 and 135 on the grounds that they were ‘overbroad,’ along with other objections. The Agency answered Request for Admission Nos. 1, 22, 46 and 83, and indicated that it had provided all information within its possession in response to Requests for Production Nos. 17 and 18.

“Respondents have adequately demonstrated that, before requesting depositions, they first attempted to obtain discovery through the use of interrogatories. Accordingly, the forum must determine if (1) the Agency was ‘uncooperative’ in its responses or (2) ‘if Respondents can demonstrate that the information it has obtained from the interrogatories will substantially prejudice Respondents in the absence of a deposition.’ *Blachana*, 32 BOLI at 224.

“ANALYSIS OF THE AGENCY’S LEVEL OF COOPERATION”

“The Agency responded to virtually all of the requests about damages, aside from the objections noted above. The interrogatories with objections and the responses to those interrogatories were:

‘Interrogatory²⁷ 36: With respect to each condition of Aggrieved Person #1 state any other causes of emotional distress in the Aggrieved Person’s life.’

‘The Agency objects to this interrogatory, on the basis of overbreadth and relevance.’

‘Interrogatory 42: With respect to each condition of Aggrieved Person #2 state any other causes of emotional distress in the Aggrieved Person’s life.’

‘The Agency objects to this interrogatory, on the basis of overbreadth and relevance.’

‘Interrogatory 47: Identify any person whom believed [sic] to have knowledge or information concerning each type of element of damages and relief for which the Agency intends to seek relief at the trial of this case, and state separately which respect [sic] to each such person any and all facts, knowledge and information each such person is believed to have, on behalf of Aggrieved Person #1.’

²⁶ The observations in this ruling are made solely for the purpose of ruling on Respondents’ motion requesting depositions. When ruling on the pending motions to compel filed August 15, 2016, the forum may conclude that additional discovery needs to be provided.

²⁷ The quoted language is taken from the Agency’s responses provided to the forum by Respondents, and possibly may differ from the exact wording of Respondents’ original interrogatories.

'The Agency objects to this interrogatory as overbroad. To the extent that the Agency can accurately respond: all persons with knowledge of the case, that the Agency has been able to identify, are contained within the previously provided discovery. To the extent that Respondents are requesting the Agency's potential witness list in this matter, the Agency has not begun constructing such a list at this time. At such time as the list is finalized, ordered to be provided to a case summary, the Agency will provide its witness list.'

'Interrogatory 52: Identify any person whom believed [sic] to have knowledge or information concerning each type of element of damages and relief for which the Agency intends to seek relief at the trial of this case, and state separately which respect [sic] to each such person any and all facts, knowledge and information each such person is believed to have, on behalf of Aggrieved Person #2.'

'The Agency objects to this interrogatory as overbroad. To the extent that the Agency can accurately respond: all persons with knowledge of the case, that the Agency has been able to identify, are contained within the previously provided discovery. To the extent that Respondents are requesting the Agency's potential witness list in this matter, the Agency has not begun constructing such a list at this time. At such time as the list is finalized, ordered to be provided to a case summary, the Agency will provide its witness list.'

'Interrogatory 57: Did Aggrieved Person #1 receive restitution from Steven Toth pursuant to O.R.S. § 137.106? If so, provide all information relevant to such restitution.'

'The Agency objects to this interrogatory, on the basis of relevance. Any restitution ordered in connection to the criminal liability of Respondents' manager Steve Toth, for his crimes against Aggrieved Person #1, is irrelevant to the liability of Respondents or damages sought for their unlawful conduct against Aggrieved Person #1.'

'Interrogatory 135: Describe all verbal communications between either of the Aggrieved Persons and any employee of the Agency – including the Commissioner – between 2012 and the present regarding or referring to the possibility that the Aggrieved Persons would file and civil or administrative action. The description should include the date, persons present, and the substance of the conversation.'

'The Agency objects to this interrogatory as to form because it contains multiple subparts.'

'(a) Aggrieved Person #1: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant'

to the factual matters alleged in this case. The agency objects to this request to the extent it requests information subject to work-product and/or attorney-client information.

‘(b) Aggrieved Person #2: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant to the factual matters alleged in this case. The agency objects to this request to the extent it requests information subject to work-product and/or attorney-client information.’

“Almost all of the objections to these interrogatories include an objection on the basis of relevance. ‘Any discovery request must be reasonably likely to produce information that is generally relevant to the case.’ OAR 839-050-0200(7).

“Interrogatory Nos. 36 and 42 request information about other causes of emotional distress. The forum has previously found that medical records close in time to the events in the case ‘contained information generally relevant to the issue of Complainant’s entitlement to damages for emotional, mental, and physical suffering.’ *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 97 (2012). Accordingly, Respondents are entitled to information about other potential causes of emotional distress in the time period near the events in this case. For purposes of this case and due to the ages of the Aggrieved Persons, the forum finds that Respondents are entitled to responses within the time period of one year prior to the events in the Formal Charges up until present day.

“Interrogatory Nos. 47 and 52 ask for the names of witnesses to the damages sought by Aggrieved Person #2. ‘Discovery may include but is not limited to * * * [d]isclosure of names and addresses of witnesses expected to testify at the hearing.’ OAR 839-050-0200(2)(a). Accordingly, Respondents are entitled to this information and should not have to wait until the Agency files its case summary two weeks prior to the hearing.

“Interrogatory No. 57 requests information about whether Aggrieved Person # 1 received restitution from Steven Toth, the former employee at Stars who was convicted of crimes relating to his conduct involving Aggrieved Person # 1. Accordingly, because Toth’s conviction may relate to his conduct while acting as an employee at the Beaverton Stars, the requested information satisfies the relevancy standard set forth in OAR 839-050-0200(7).

“The Agency’s objections to Interrogatory No. 135 are consistent with the forum’s precedent establishing that communications with the Agency’s staff about the prosecution of a case are privileged. See *In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 265 (2013) (notes made by the case presenter²⁸ were privileged under the work product doctrine); *In the Matter of Logan*

²⁸ Currently, administrative prosecutors perform the duties that used to be carried out by case presenters.

International, Ltd., 26 BOLI 254, 257-58 (2005) (the Agency did not have to produce interviews specifically conducted by the case presenter). Thus, Respondents are not entitled to this information.

“As discussed above, Respondents were entitled to receive some information that the Agency refused to provide. **Accordingly, the Agency is instructed to provide responses to Interrogatory Nos. 36, 42,²⁹ 47 and 52 no later than August 30, 2016.** If the Agency fails to provide those responses, Respondents may request a telephone conference to address the matter and, if necessary, this ruling will be revisited.

“ANALYSIS OF WHETHER THERE IS SUBSTANTIAL PREJUDICE

“Respondents also assert that they will be substantially prejudiced if they are not able to question the Aggrieved Persons about their damages in a deposition, relying on the case of *Melissa and Aaron Klein dba Sweetcakes by Melissa* (‘*Sweetcakes*’), 34 BOLI 102 (2015), *appeal pending*. In *Sweetcakes*, the Agency had identified ‘178 types of alleged harm’ in response to the respondents’ interrogatories. *Id.* at 195. The ALJ made the following ruling regarding the respondents’ request to depose the complainants:

‘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.’

Id. at 196 (emphasis added). By contrast, in this case there is a ‘practical way’ for the Agency to provide information about the alleged harm by answering the interrogatories discussed above. Additionally, Respondents have already received documents with testimony and statements describing how the Aggrieved Persons were living and their activities immediately before and after their work at the Beaverton Stars. Accordingly, if the Agency supplements their interrogatory answers as instructed above, Respondents should not be substantially prejudiced if they are unable to depose the Aggrieved Persons.

²⁹ Answers to Interrogatories 36 and 42 can be restricted to the time period of one year prior to the events described in the Formal Charges up until the present day.

“Given the policy set forth in OAR 839-050-0200(3) disfavoring depositions and BOLI’s precedential cases, the forum is unable to conclude that Respondents will be ‘substantially prejudiced’ if they cannot depose Aggrieved Person # 1 and Aggrieved Person # 2.

“With the exception of the instruction to supplement the answers to Interrogatories 36, 42, 47 and 52 set forth above, Respondents’ motion is DENIED.”

(Exs. X45, X52, X53, X73)

28) On August 10, 2016, Respondents filed a document titled Motions to Reconsider the Denial of Respondents’ Motions to Dismiss so the Tribunal May Apply the Correct Legal Standards. The filing consisted of two motions: (1) a motion requesting reconsideration of the forum’s interim order of August 1, 2016; and (2) a motion requesting reconsideration of the forum’s interim order of May 31, 2016. The Agency submitted a timely response to the motions on August 24, 2016. On August 25, 2016, an interim order was issued which stated as follows, in pertinent part:

“MOTION NO. 1 RE INTERIM ORDER ISSUED AUGUST 1, 2016

“Respondents first assert that the interim order of August 1, 2016, incorrectly cites to a portion of the case of *OR-OSHA v. CBI Servs., Inc.*, 356 Or 577, 341 P3d 701 (2014), which discusses the interpretation of a delegative statutory term, not an inexact term. On August 22, 2016, the forum issued an Amended Interim Order replacing the *OR-OSHA* citations with references to *Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 411, 144 P3d 918 (2006), which states that an agency’s interpretation of inexact terms is to be reviewed ‘to ensure that it is consistent with the legislature’s intent.’ The forum also notes that the correct standard was used and discussed in the Interim Order of August 1, 2016, as follows:

“‘To determine the meaning which should be given to this inexact phrase, this forum must ascertain what the Legislature meant by using it.’ *In the Matter of Mini-Mart Foodstores, Inc., an Oregon Corporation, Respondent*, 3 BOLI 262, 274 (1983). See also *J.R. Simplot*, 340 Or at 198 (an interpretation of an inexact term is reviewed “to determine whether the agency’s action effectuated the legislative policy, as evidenced by the text and context of the statute.”).’

The interim order of August 1, 2016, examined legislative intent to ascertain the meaning of the statute. Since the applicable administrative rule is consistent with that intent, no further modifications to the Interim Order of August 1, 2016, are necessary.

“Second, Respondents also assert that the Interim Order of August 1, 2015, is inconsistent with the Final Order in the case of *In the Matter of Maltby*

Biocontrol, Inc., 33 BOLI 121 (2014). As Respondents point out, one of the complaints in *Maltby* was filed by Oregon's Attorney General. The administrative rule at issue in this case (OAR 839-003-0100(2)) applies to complaints filed by the Commissioner, not the Attorney General. Accordingly, the forum's ruling does not conflict with the *Maltby* decision.

"Third, Respondents assert that the phrase 'in the same manner as' is an exact term, not an inexact term. However, none of the cases cited by Respondents indicate that it is an exact term, meaning that it has 'relatively precise meaning.' *Springfield Educ. Ass'n v. Springfield Sch. Dist. No. 19*, 290 Or 217, 223, 621 P2d 547, 558 (1980). For the reasons set forth in the Interim Order of August 1, 2016, the forum declines to change its ruling that the statute contains an 'inexact' term.

"The remainder of Respondents' arguments essentially request that the forum reconsider the analysis of the applicable statutes and regulation. For the reasons explained in detail in the interim order of August 1, 2016 and the amended interim order of August 22, 2016, the forum declines to change its ruling.

"Motion No. 1 is DENIED.

"MOTION NO. 2 RE INTERIM ORDER ISSUED MAY 31, 2016

"Motion No. 2 asks the forum to reconsider the Interim Order of May 31, 2016, denying Respondents' motion to dismiss, transfer or remove this matter due to the risk of 'bias and prejudgment.' The vast majority of this motion appears to question the Agency's evidence that the Deputy Commissioner will be issuing the Final Order in this case. However, the arguments are merely speculative and the forum declines to revisit its analysis in the interim order of May 31, 2016.

"The only new evidence put forth by Respondents is in the form of an email from the Deputy Commissioner to members of BOLI's staff with the subject line 'Additional coverage regarding Stars/pimps.' Ex. A to Respondent Motion, p. 1. The email has links to two news articles from oregonlive.com summarizing criminal proceedings for individuals convicted of crimes based on their conduct involving the Aggrieved Persons.

"Procedural due process requires a decision maker to be free of actual bias; Respondents have the burden of demonstrating an actual 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). The forwarded news articles indicate that some of the criminal conduct occurred at one of Respondents' establishments, but do not discuss further details related to the Formal Charges. The email forwarding these articles does not establish that the Deputy Commissioner is 'personally

biased against' Respondents. See *Samuel v. Bd. of Chiropractic Examiners*, 77 Or App 53, 60, 712 P2d 132, 137 (1985), *rev den*, 300 Or 704 (1986), and *rev den*, 302 Or 36 (1986).

"Accordingly, the motion is also DENIED.

"NOTICE TO THE PARTIES

"The forum notes that both the Agency and Respondents have each submitted ancillary documents with titles such as 'supplemental' motion, motion for 'clarification,' or motion to 'reconsider.' Although the forum has made substantive rulings on some of these motions, those filings are not specifically covered in BOLI's contested case rules and have started to impact the efficiency of the contested case process. Absent unusual circumstances, the forum does not intend to entertain these extraneous motions in the future and will issue interim orders denying such motions before the opposing party responds. If the parties disagree with a ruling made in an interim order, they will have the opportunity to address that by filing exceptions after the Proposed Order is issued pursuant to OAR 839-050-0380."

(Exs. X62, X79, X80)

29) On August 3, 2016, Respondents filed a document titled Motion to Dismiss, Abate, or Substitute Parties and/or Postpone the Action. The Agency filed a timely response opposing the motion on August 17, 2016. All of the arguments raised in Respondents' motions relate to civil complaints filed in Washington County Circuit Court on July 7, 2016, on behalf of AP1 and AP2. Each Complaint for Damages was filed by a guardian ad litem on behalf of each aggrieved person. On August 25, 2016, the ALJ issued an interim order which stated, in pertinent part:

"MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

"Respondents contend that BOLI's jurisdiction over the matters alleged in the Formal Charges 'ceased when the Aggrieved Persons filed their civil actions in Washington County.' Their motion is based on several provisions of ORS chapter 659A and various other legal and public policy doctrines.

"A. ORS 659A.820(3)

"Respondents first cite to ORS 659A.820(3)(a) which states that 'a complaint may not be filed under *this section* if a civil action has been commenced in state or federal court alleging the same matters.' (Emphasis added). Immediately prior to the subpart cited by Respondents, the statute makes clear that it pertains to '[a]ny person claiming to be aggrieved by an alleged unlawful practice.' ORS 659A.820(2). It does not apply to complaints filed by the Commissioner, which are governed separately by ORS 659A.825.

Accordingly, because the complainant in this case is the Commissioner, ORS 659A.820 does not apply and this argument requires no further analysis.³⁰

“B. ORS 659A.870(1)”

“Respondents next assert that ORS 659A.820(3)(a) should be extended to apply to Commissioner’s complaints, relying on ORS 659A.870(1). That statute specifically refers to ‘the right of the person to file a complaint with the Commissioner * * * under ORS 659A.820 with respect to the matters alleged in the civil action.’ ORS 659A.870(1). The statute specifically mentions ORS 659A.820 (BOLI complaints filed by aggrieved persons) without reference to ORS 659A.825 (BOLI complaints filed by the Commissioner). Notably, when the legislature wanted to refer to both ORS 659A.820 and 659A.825 together, it did so. See, e.g., ORS 659A.835(1) (‘after the filing of any complaint under ORS 659A.820 or 659A.825, the Commissioner * * * may investigate the complaint’); ORS 659A.835(2) (‘The Commissioner shall commence an investigation of any complaint filed under ORS 659A.820 or 659A.825 * * *’); ORS 659A.855(2)(a) (if a complaint ‘is filed under ORS 659A.820 or 659A.825’ alleging housing law violations, the commissioner may assess specified civil penalties). The forum will not insert ORS 659A.825 into 659A.830(1) when the legislature omitted it. ORS 174.010.

“Accordingly, the forum finds Respondents’ argument is without merit and declines to extend the reach of ORS 659A.820(3)(a).

“C. ORS 659A.830(1)”

“Respondents next rely on ORS 659A.830(1), asserting that ‘the legislature intended for a BOLI administrative action to cease upon the filing of a civil action ‘alleging the same matters’ *even if the administrative action was filed before the civil action.*’ (Emphasis in original). The portion of ORS 659A.830(1) relied on by Respondents states:

‘[A]ll authority of the Commissioner of the Bureau of Labor and Industries to conduct investigations or other proceedings to resolve a complaint filed under ORS 659A.820 ceases upon the filing of a civil action by the complainant alleging the same matters that are the basis of the complaint under ORS 659A.820.’

As previously stated, the legislature clearly referred to both ORS 659A.820 and 659A.825 when it intended to do so. However, it did not include ORS 659A.825 in ORS 659A.830(1). Therefore, as previously stated, the forum will not insert ORS 659A.825 into ORS 659A.830(1) when it has been omitted.

³⁰ Because this provision does not apply to ORS 659A.825, it is not necessary to examine whether the Washington County cases “alleg[e] the same matters” as the Formal Charges.

“D. Legislative Policy of ORS Chapter 659A

“Respondents also argue that ‘dismissal is still appropriate because the relevant provisions in ORS Chapter 659A paint a clear picture of legislative policy: The legislature did not wish for civil and BOLI proceedings to proceed simultaneously.’ The forum agrees that the legislature appeared to have that intention with respect to claims filed by aggrieved persons under ORS 659A.820. However, as previously stated, ORS 659A.825 is conspicuously absent from all of the statutes which seek to prevent BOLI administrative proceedings and court cases from proceeding simultaneously.

“E. ‘Public Policy and a Host of Legal Doctrines’

“Respondents contend that allowing this case to ‘continue would violate public policy and a host of legal doctrines developed to prevent duplicative litigation and multiple recoveries.’ Importantly, Respondents’ motion to dismiss is based on an alleged lack of subject matter jurisdiction, which is grounds for dismissal under OAR 839-050-0150(1)(a). It is questionable as to whether these legal theories actually deprive the forum of subject matter jurisdiction and, thus, for that reason the motion may not be well taken. Notwithstanding the procedural basis for the motion, the theories discussed in Respondents’ motion do not support dismissal for the reasons described below.

“1. Res Judicata

“‘[C]laim preclusion’ as that term is typically used, formerly known as *res judicata*, prohibits a party from relitigating a cause of action against the same defendant involving the same factual transaction as was litigated in the previous adjudication, *if there has been a final judgment in the first action.*’ *Krisor v. Lake Cty. Fair Bd.*, 256 Or App 190, 193, 302 P3d 455, 457 (2013), *rev den*, 354 Or 61 (2013) (emphasis added), quoting *Drews v. EBI Companies*, 310 Or 134, 139-40, 795 P2d 531 (1990). Because no final judgment has been entered involving the parties in this case, this doctrine does not apply.³¹

“2. Election of Remedies

“The Oregon Supreme Court has recently explained the doctrine of election of remedies as follows:

‘* * * The doctrine of election between inconsistent remedies does not require an election before the entry of judgment. A party need only choose between or among inconsistent remedies, not inconsistent claims or theories of recovery. ORCP 16 C; *see also Colonial Leasing Co. v. Tracy*, 276 Or 1193, 1196–97, 557 P.2d 639 (1976) (“Ordinarily an election is not made until a judicial proceeding has gone to judgment on

³¹ Because there has been no final judgment, it is not necessary to examine the other elements needed to establish claim preclusion.

the merits.”). Accordingly, subject to the limiting principles discussed above, when it comes to an election of remedies, *the choice is for the claimant to make, not the defendant or the court.*’

Evergreen W. Bus. Ctr., LLC v. Emmert, 354 Or 790, 805–06, 323 P3d 250 (2014) (emphasis added). Since the doctrine only applies to a choice a claimant may need to make *before* judgment has been entered, it does not bar the current case from proceeding.³²

“3. Prohibition Against Multiple Recoveries

“The theory of preventing multiple recoveries is a policy decision which is sometimes adopted by the legislature, and sometimes it is not. See, e.g. *White v. Jubitz Corp.*, 347 Or 212, 223, 219 P3d 566, 572 (2009) (when interpreting ORS 31.580, the court concluded that ‘the legislature did not preclude “double recovery” of collateral source benefits’). When such a provision is not included in the statute, it will not be inserted. ORS 174.010.

“4. Another Action Pending

“Respondents assert that there is a requirement to dismiss an action ‘when another action is pending involving the same or substantially the same parties, subject matter, and remedies.’ However, the cases cited by Respondents do not support their contention that this doctrine ‘requires’ dismissal of an administrative proceeding. On the contrary, the Oregon Court of Appeals has supported the continuation of administrative proceedings when there is related litigation, noting:

‘The [Insurance] Division has primary responsibility for enforcing the Insurance Code, a duty which prompted the present proceeding. Any type of violation which involves two or more entities is likely to result in associated litigation between them, which in turn is likely to encompass issues which are before the Division in an administrative proceeding. In some instances, the party seeking recovery may rely on the very statute upon which administrative disciplinary action is predicated. *To hold that the Division had to delay its consideration of the disciplinary matter pending the outcome of related litigation would frustrate its enforcement efforts.* The existence of a prior court determination that a statute was or was not violated could complicate the agency’s task significantly. Logically, it makes more sense to stay the litigation pending interpretation of a statute by the agency with expertise in the area, which is charged by law with construing, expressing and enforcing legislative policy. We conclude that there was no abuse of discretion in denying the stay in this case.’

³² Because the doctrine does not apply, it is not necessary to examine the Agency’s argument that the Formal Charges and the July 2016 lawsuit “involve neither the same parties, nor the same claims.”

Bonneville Auto. Ins. Co. v. Ins. Div., Dep't of Commerce, 53 Or App 440, 448, 632 P2d 796, 801 (1981). See also *Sawyer v. Real Estate Agency*, 268 Or App 42, 55, 342 P3d 104, 112 (2014) (upholding administrative law judge's denial of motion to stay proceedings to revoke real estate license while criminal charges were pending). Therefore, this argument also does not support the dismissal of the Formal Charges.

"5. Avoiding Inconsistent Judgments

"Respondents also contend that there is a risk of inconsistent judgments if the Washington County civil lawsuits are amended to add employment claims on behalf of the Aggrieved Persons. That has not yet occurred. Moreover, any actions in the trial court are outside of the jurisdiction of this forum and would need to be raised in that venue. Accordingly, this argument also does not warrant dismissal of the Formal Charges.

"6. Exhaustion of Administrative Remedies

"The Oregon Supreme Court has recently described this legal theory as follows: 'The doctrine of exhaustion of administrative remedies generally provides that "[j]udicial review is only available after the procedure for relief within the administrative body itself has been followed without success.'" *Miller v. City of Portland*, 356 Or 402, 418, 338 P3d 685, 694 (2014), quoting *Mullenau v. Dept. of Revenue*, 293 Or 536, 539, 651 P2d 724 (1982). Since the doctrine applies to 'judicial review' by a court, not administrative contested case proceedings, it is not grounds for dismissing the Formal Charges in this case.

"7. Conclusion

"Since the various legal theories discussed above do not support dismissal, the motion to dismiss is DENIED.

"MOTION TO ABATE

"As previously stated, the Oregon Court of Appeals has held that administrative proceedings need not be stayed pending related court proceedings. See, e.g. *Sawyer*, 268 Or App at 62 (ALJ did not err in denying petitioner's motion to stay the proceedings while a criminal case was pending); *Bonneville Auto. Ins. Co.*, 53 Or App at 448 (finding no abuse of discretion in denial of motion to stay Insurance Division case).

"Accordingly, this motion is also DENIED.

"MOTION TO SUBSTITUTE PARTIES

"Respondents also request that the forum remove the Commissioner as the complainant in this case and add the Aggrieved Persons pursuant to OAR 839-050-0170(1) and (5). In support of this argument, Respondents point to

various legal theories, such as ‘real parties in interest’ and the right to due process, but provide no legal briefing to show how those theories might require the forum to substitute parties.

“Respondents also assert that they have a right to a jury trial under Article I, § 17 of the Oregon Constitution, citing to the recent case of *Horton v. OHSU*, 359 Or 168, ___ P3d ___ (2016). Article I, § 17 of the Oregon Constitution states:

‘In all civil cases the right of Trial by Jury shall remain inviolate.’

In *Horton*, the Oregon Supreme Court addressed the issue of a cap on damages and overruled precedent which ‘impose[d] a substantive limit on the legislature’s authority to define the elements of a claim or the extent of damages available for a claim.’ *Id.* at ___, *38. However, more applicable to this case, the court affirmed cases that ‘establish that Article I, section 17 guarantees litigants a procedural right to have a jury rather than a judge decide those common-law claims and defenses that customarily were tried to a jury when Oregon adopted its constitution in 1857, as well as those claims and defense that are “of like nature.”’ In other words, if a cause of action allowed for a jury trial at the time the Oregon Constitution was adopted in 1857, then a person filing the same cause of action in court today also has a right to a jury trial.

“However, there is no constitutional entitlement to a jury trial as to the claims under ORS chapter 659A alleged in the Formal Charges, as there was not a right to a jury trial for such claims in 1857. See, e.g., *Wincer v. Ind. Paper Stock Co.*, 48 Or App 859, 863, 618 P.2d 15 (1980). See also *In the Matter of Emerald Steel Fabricators, Inc.*, 27 BOLI 242, 245 (2006),³³ citing *Cornelison v. Seabold*, 254 Or 401, 404-05 (1969); *Williams v. Joyce*, 4 Or App 482, 501 (1971); *Fred Meyer, Inc. v. Bureau of Labor of Labor and Industries*, 39 Or App 253 (1979); *City of Portland v. Bureau of Labor and Industries*, 61 Or App 182, 193 (1982).

“Accordingly the motion to substitute is also DENIED.

“MOTION TO POSTPONE

“Respondents also move to postpone the case, essentially relying on most of the arguments made in support of their other motions.

“For the same reason discussed in ruling on the motions above, the motion to postpone is also DENIED.”

(Exs. X50, X71, X81)

³³ This Final Order was reversed on other grounds in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or 159, 230 P3d 518 (2010).

30) The Agency filed a Motion to Compel discovery on August 15, 2016. Respondents responded to the motion on August 22, 2016. On September 7, 2016, an interim order was issued ruling on the motion which stated, in pertinent part:

“LEGAL STANDARD

‘Any discovery request must be reasonably likely to produce information that is generally relevant to the case.’ OAR 839-050-0200(7). In determining whether a request is ‘reasonably likely to produce information that is generally relevant to the case,’ it is important to take note of the claims and defenses in the case.

“Discrimination/Sexual Harassment

“The Formal Charges allege that ‘Respondents’ discriminated against both Aggrieved Persons in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030. ORS 659A.030(1)(b) states, in pertinent part, that it is an unlawful employment practice ‘[f]or an employer, because of an individual’s * * * sex * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment.’ OAR 839-005-0021 states:

‘(1) Employers are not required to treat all employees exactly the same, but are prohibited from using sex as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.

‘(2) Discrimination because of sex includes sexual harassment, discrimination based on pregnancy, childbirth and medical conditions and occurrences related to pregnancy and childbirth.’

OAR 839-005-0030 states:

‘Sexual Harassment in Employment

‘(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:

‘(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:

‘(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

'(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

'(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.

'(2) The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

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

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

'(a) Terminating employment, including constructive discharge;

'(b) Failing to hire;

'(c) Failing to promote; or

'(d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.

'(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

'(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

'(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

‘(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

‘(B) That the aggrieved person unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

‘(6) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by the employer's employees or agents who do not have immediate or successively higher authority over the aggrieved person when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

‘(7) Harassment by Non-Employees: An employer is liable for sexual harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.

‘(8) Withdrawn Consent: An employer is liable for sexual harassment of an individual by the employer's supervisory or non-supervisory employees, agents or non-employees, even if the acts complained of were of a kind previously consented to by the aggrieved person, if the employer knew or should have known that the aggrieved person had withdrawn consent to the offensive conduct.

‘(9) When employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, the employer is liable for unlawful sex discrimination against other individuals who were qualified for but denied that opportunity or benefit.’

“Aiding and Abetting

“The Formal Charges allege that all of the individual Respondents ‘aided, abetted, incited, compelled and/or coerced acts forbidden under ORS chapter 659A, specifically the unlawful practices alleged here, and [are] individually liable for violations alleged herein as an aider and abettor pursuant to ORS 659A.030(1)(g).’

“ORS 659A.030(1)(g) provides that it is an unlawful employment practice ‘[f]or any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under this chapter or to attempt to do so.’ ‘Person’ includes ‘individuals.’ ORS 659A.001(9)(a). ‘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 Maltby Biocontrol, Inc*, 33 BOLI 121, 151 (2014) (internal citations omitted).

“ANALYSIS OF THE AGENCY’S MOTION

“Agency’s First Informal Request for Discovery

“INTERROGATORIES FOR RESPONDENT FREHOO, INC.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 3: Describe any and all circumstances in which a person under the age of 18 was or may have been on any premises, owned or operated by Respondents, between 2012 and the present.

‘RESPONSE: Frehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information about the presence of underage individuals at properties or business other than the one (Stars Cabaret & Steak House) in which BOLI claims Aggrieved Person #1 or #2 worked, it is not reasonably likely to produce information that is generally relevant to the case. Second, the request calls for Frehoo to speculate about how a minor “may have been” on the premises of Stars Cabaret & Steak House, which is not reasonably likely to produce information that is generally relevant to the case. Third, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevance to the case. Subject to and without waiving these objections, Frehoo incorporates by reference its responses to Interrogatory No. 2, above, and Interrogatory No. 9, below.’

“Analysis and Ruling:

“In its motion, the Agency asserts that this information is relevant because any minors present at or employed in ‘Respondents’ places of business’ may have also been subjected to sexual harassment in the workplace. Respondents make two primary arguments in response. First, they assert that discovery regarding ‘minors’ and age-related questions are irrelevant to the allegations of sex discrimination. Second, they object to discovery about any Stars-related entities other than Freehoo/Beaverton,³⁴ which is the only corporate Respondent named in the case.

“The Aggrieved Persons were minors at the time of the events alleged in the Formal Charges, and their status as minors is a focus of the Agency’s

³⁴ In this document, “Freehoo/Beaverton” refers to Respondent Freehoo, Inc. dba Stars Cabaret & Steak House, Inc., which conducted business in Beaverton, Oregon.

allegations. Accordingly, this question is relevant for that reason. However, the interrogatory was directed only to Freehoo and there are no other corporate entities or establishments named in this case. Accordingly, Freehoo/Beaverton is directed to answer this interrogatory, but may limit its response to Freehoo/Beaverton.

“B. INTERROGATORIES FOR RESPONDENT PAMELA COLBURN

“Discovery Requested and Objection:

‘INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?’

‘RESPONSE: Respondent Colburn objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Colburn who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further.’

“Analysis and Ruling:

“Colburn is identified in the Formal Charges as an owner of Freehoo/Beaverton. More specifically, the Agency indicates in its motion that Colburn owns shares of corporations that own Freehoo/Beaverton. With the exception of Herkenrath, who is identified as a ‘manager’ at Freehoo/Beaverton and Stars-Bridgeport, it appears that the other individual Respondents are also owners of either Freehoo/Beaverton or another Stars-branded entity.

“Respondents argue that this request seeks highly personal, irrelevant information. The Agency asserts that this information is relevant to show a systematic practice of sexual harassment in the workplace and because there has been evidence of ‘Respondent-owners having romantic relationships with employees.’ Since all of the named individual Respondents are either owners or a manager, it is not clear how a romantic or sexual relationship between these individuals is pertinent to this case, which involves alleged harassment of the Aggrieved Persons, who performed as dancers. Accordingly, the Agency’s request for this information is DENIED.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual’s role in Respondents’ business.’

‘RESPONSE: Respondent Colburn objects to this request as overbroad, failing to describe the information sought without sufficient specificity to allow for a meaningful response, and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. Respondent Colburn has never met Aggrieved Person #1 or #2, and there is no allegation that she had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Colburn—who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further.’

“Analysis and Ruling:

“Respondents’ objection that the request is overbroad is well taken. However, if an individual Respondent had a sexual relationship with a dancer at Freehoo/Beaverton during the time periods of the events in the case, that may be evidence of the workplace culture at Freehoo/Beaverton. Thus, it is reasonably likely to produce information that is generally relevant to the allegations of aiding and abetting in that it may show if a Respondent ‘helped, assisted, or facilitated the commission of an unlawful employment practice, promoted the accomplishment thereof, helped in advancing or bringing it about, or encouraging, counsel or inciting as to its commission.’ *Maltby*, 33 BOLI at 151.

“Accordingly, Colburn³⁵ is directed to answer whether she had a romantic or sexual relationship with an employee or independent contractor at Freehoo in the years 2012-2014.

“C. INTERROGATORIES FOR RESPONDENT LISA HEINZMAN-MYERS

“Discovery Requested and Objection:

‘INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?’

‘RESPONSE: Respondent Heinzman-Myers objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further. Subject to these objections, Respondent Heinzman-Myers states that she has never been employed by Stars Cabaret & Steak House and has never had any active role in its operation.’

³⁵ As indicated below, this ruling applies to each Interrogatory No. 6 directed to the individual Respondents.

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

‘RESPONSE: Respondent Heinzman-Myers objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. Respondent Heinzman-Myers has never met Aggrieved Person #1 or #2, and there is no allegation that she had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Heinzman-Myers—who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further. Without waiving and subject to these objections, Respondent Heinzman-Myers states that she has never been employed by Stars Cabaret & Steak House and has never had any active role in its operation.’

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

“D. INTERROGATORIES FOR RESPONDENT JON HERKENRATH

“Discovery Requested and Objection:

‘INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual.

‘RESPONSE: Respondent Herkenrath objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the specific allegations and claims regarding the alleged employment of Aggrieved Person #1 or Aggrieved Person #2 at Stars Cabaret & Steak House, Mr. Herkenrath will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.”

“Discovery Requested and Objection:

‘INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

‘RESPONSE: Respondent Herkenrath objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. There is no allegation that Mr. Herkenrath had or attempted to have a romantic or sexual relationship with either Aggrieved Person #1 or #2; the allegations about Aggrieved Person #2's interactions with Mr. Herkenrath as described in Mr. Lynch's notes of her interview (Bates Nos. 001032-1041) do not describe him having behaved inappropriately towards her or anyone else. She does not describe, for example, him using his management authority coercively (Q: Did you tell him what times you wanted to work? A: Yes. She would ask him if she could come in and Jon would say yes.) Aggrieved Person #2 also describes that she is not aware of any managers dating dancers. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondent Herkenrath toward Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

“E. INTERROGATORIES FOR RESPONDENT RANDY KAISER

“Discovery Requested and Objection:

‘INTERROGATORY NO. 3: When did you first learn about Aggrieved Person #1's employment, or alleged employment, at Stars-Beaverton?

‘RESPONSE: Prior to the Agency's charge of discrimination, Respondent Kaiser had not had any discussion in which anyone contended that Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.’

“Analysis and Ruling:

“The Agency requested that a response be provided as to Aggrieved Person #1, instead of Aggrieved Person #2. After the Agency filed its motion, Respondents amended this response to correct a typographical error. Therefore, this request is now moot.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?’

‘RESPONSE: Respondent Kaiser objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent Kaiser will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

‘RESPONSE: Respondent Kaiser objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. To his knowledge, Respondent Kaiser has never met Aggrieved Person #1 or #2, there is no allegation that he had or attempted to have a romantic or sexual relationship with either of them, and Aggrieved Person #1 was never, in any event, an "employee or independent contractor affiliated with Respondents." If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

“F. INTERROGATORIES FOR RESPONDENT TODD MITCHELL

“Discovery Requested and Objection:

‘INTERROGATORY NO. 3: When did you first learn about Aggrieved Person #1's employment, or alleged employment, at Stars-Beaverton?’

‘RESPONSE: Prior to the Agency's charge of discrimination, Respondent Mitchell had not had any discussion in which anyone contended that Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.’

“Analysis and Ruling:

“See Analysis and Ruling as to Kaiser Interrogatory No. 3, which is incorporated herein in its entirety.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?’

‘RESPONSE: Respondent Mitchell objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent Mitchell will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

‘RESPONSE: Respondent Mitchell objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. To his knowledge, Respondent Mitchell has never met Aggrieved Person #1 or #2, and there is no allegation that he had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that

it relates to the allegations and claims regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.'

"Analysis and Ruling:

"See Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"G. INTERROGATORIES FOR RESPONDENT JEFF STRUHAR

"Discovery Requested and Objection:

'INTERROGATORY NO. 3: When did you first learn about Aggrieved Person #1's employment, or alleged employment, at Stars-Beaverton?

'RESPONSE: Prior to the Agency's charge of discrimination, Respondent Mitchell had not had any discussion in which anyone contended that Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

"Analysis and Ruling:

"See Analysis and Ruling as to Kaiser Interrogatory No. 3, which is incorporated herein in its entirety.

"Discovery Requested and Objection:

'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?

'RESPONSE: Respondent Struhar objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent Struhar will consider responding further.'

"Analysis and Ruling:

"See Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

"Discovery Requested and Objection:

'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of

the individual, the dates of the relationship, and the individual's role in Respondents' business.

'RESPONSE: Respondent Struhar objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. To his knowledge, Respondent Struhar has never met Aggrieved Person #1 or #2, and there is no allegation that he had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims regarding conduct by Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.'

"Analysis and Ruling:

"See Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"H. REQUESTS FOR ADMISSIONS

"Discovery Requested and Objection:

'REQUEST NO. 2: Admit that Respondents made no changes in policy or procedure with regard to verifying the age of dancers, at any other club than the Beaverton club, after they learned of Aggrieved Person #2's abuse in the Stars-Beaverton.

'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case insofar as the request seeks age-based information; the Formal Charges allege only sex discrimination, include no claim for age discrimination or any other claim for which age is a material element, and do not allege any unlawful employment practices that occurred after they learned Aggrieved Person #2's true age. Respondents further object that Freehoo operates no clubs other than Stars Cabaret & Steak House in Beaverton, and Stars Cabaret & Steak House is the only club where any events relevant to the Formal Charges are alleged to have occurred. For these reasons and based on these objections, Respondents decline to respond to this RFA.'

"Analysis and Ruling:

"The Agency asserts that this request is relevant because it has 'alleged the sexual harassment of two minors in Respondents' workplace' and age verification is relevant. Respondents object to providing responses as to 'establishments other than those where the Aggrieved Persons allegedly worked.' All parties acknowledge that there were other establishments with adult entertainment that included the name 'Stars' and there was some common ownership. However, the record does not contain sufficient information about the relationship between Freehoo/Beaverton and other Stars-named businesses to

help the forum understand whether they all operate under the same policies with the same leadership and/or management. Accordingly, the record does not establish that an answer to this request for admission is 'reasonably likely to produce information that is generally relevant to the case.'

"Discovery Requested and Objection:

'REQUEST NO. 25: Admit Respondent Jeff Struhar has acted in a managerial capacity inside a Stars establishment while intoxicated or under the influence of illegal drugs.

'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking information outside of the Agency's jurisdiction; the Oregon Liquor License Commission and criminal prosecutors, not the Bureau of Labor and Industries, have jurisdiction over such matters. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Struhar—who was not alleged to have been present inside Stars Cabaret & Steak House during any of the alleged events involving either aggrieved person, and who generally does not exercise managerial responsibility at Stars Cabaret & Steak House—will consider responding further.'

"Analysis and Ruling:

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' However, if Respondent Struhar was intoxicated or under the influence of illegal drugs while acting in a managerial capacity in Freehoo/Beaverton, that may be evidence of the workplace culture and management oversight. Accordingly, he is directed to provide a response for any such instances in the years 2012-2014.

"Discovery Requested and Objection:

'REQUEST NO. 28: Admit Respondent Todd Mitchell has acted in a managerial capacity inside a Stars establishment while intoxicated or under the influence of illegal drugs.

'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking information outside of the Agency's jurisdiction; the Oregon Liquor License Commission and criminal prosecutors, not the Bureau of Labor and Industries, have jurisdiction over such matters. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved

Person #2, Respondent Mitchell—who was not alleged to have been present inside Stars Cabaret & Steak House during any of the alleged events involving either aggrieved person—will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Request for Admission No. 25, which is incorporated herein in its entirety.

“Discovery Requested and Objection:

‘REQUEST NO. 31: Admit Respondent Randy Kaiser has acted in a managerial capacity inside a Stars establishment while intoxicated or under the influence of illegal drugs.

‘RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking information outside of the Agency’s jurisdiction; the Oregon Liquor License Commission and criminal prosecutors, not the Bureau of Labor and Industries, have jurisdiction over such matters. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Kaiser—who was not alleged to have been present inside Stars Cabaret & Steak House during any of the alleged events involving either aggrieved person—will consider responding further.’

“Analysis and Ruling:

“See Analysis and Ruling as to Request for Admission No. 25, which is incorporated herein in its entirety.”

“I. REQUESTS FOR PRODUCTION

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 9: All documents or electronic records regarding the bylaws for Respondent Frehoo, Inc. and all akas.

‘RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents object this request to the extent that it seeks information about any entity other than Frehoo, Inc. dba Stars Cabaret & Steak House, as Frehoo does not do business under any name other than Stars Cabaret & Steak House, and the other listed entities are separate companies that are not parties to this case. Subject to and without waiving this objection, Respondents will produce the bylaws of Frehoo, Inc.’

“Analysis and Ruling:

“It appears that Respondents provided the bylaws for Freehoo/Beaverton to the Agency on August 19, 2016. Accordingly, this request is moot.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 13: All documents or electronic records prepared during the regular course of business as a result of the settlement agreement entered into with the City of Beaverton, executed by Jeff Struhar on April 30, 2015 and Dennis Doyle on May 5, 2015.

‘RESPONSE: Respondents object to this request as overbroad, failing to describe the information sought with sufficient specificity to allow for a meaningful response, and not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking attorney-client privileged and/or, to the extent work-product protections apply in this Forum, attorney work product information. Respondents further object to this request as seeking evidence of conduct or statements made in compromise negotiations. If Complainant can narrow this request and explain its relevance and admissibility, Respondents will consider responding further.’

“Analysis and Ruling:

“The Agency contends that ‘[w]hether or not Respondents have kept records related to age verification and records related to their alleged “zero sex trafficking” policy, as required by the Beaverton Settlement Agreement, is relevant to the Agency’s case.’ Respondents argue, among other things, that this request seeks records after the time period of the alleged events in the Formal Charges. The agreement was executed on May 5, 2015 and as of July 30, 2016, Freehoo/Beaverton is no longer in operation. Aggrieved Person #1 last danced at Freehoo/Beaverton in 2012, and Aggrieved Person No. 2 last danced at Freehoo/Beaverton on August 30, 2014.

“The Settlement Agreement makes reference to ‘maintain[ing] its zero-tolerance policy regarding sex trafficking and prostitution, as set forth in Exhibit A.’ Exhibit 4 to Respondents Response, p. 3. Exhibit A is a picture of a poster stating that ‘Stars Cabaret maintains a zero tolerance policy for prostitution and/or sex trafficking.’ *Id.* at 18. This information referenced in Section 4 of the Settlement Agreement is ‘reasonably likely to produce information that is generally relevant to’ the Agency requests for alternative relief on page 20 of the Formal Charges. Accordingly, those records should be produced.

“The Agency has not sustained its burden to establish the relevance of the other records sought with this request and, thus, the remainder of the request is DENIED.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 14: Any and all communications, including but not limited to emails, text messages, correspondence, etc., between any of the named respondents regarding the facts alleged or the aggrieved persons mentioned in the Formal Charges.

‘RESPONSE: Respondents object to this request as seeking attorney-client privileged and/or, to the extent work-product protections apply in this Forum, attorney work product information. Respondents further object to this request as overbroad, unduly burdensome, and as failing to describe the information sought with sufficient specificity to allow for a meaningful response. Subject to and without waiving these objections, Respondents incorporate by reference the responses to Interrogatory No. 1 and Interrogatory No. 2 directed at each of the Individual Respondents. If Complainant can narrow this request, Respondents will consider responding further.’

“Analysis and Ruling:

“It does not appear that Respondents addressed this request in their response [to the Agency’s motion].³⁶ Accordingly, Respondents must provide the requested information, but may withhold documents which are covered by the attorney-client or work product privileges.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 15: Any and all communications, including but not limited to emails, text messages, correspondence, etc., between any of the named respondents and other individuals, outside the protection of attorney-client privilege, regarding the facts alleged or the aggrieved persons mentioned in the Formal Charges.

‘RESPONSE: Respondents incorporate by reference their response to Request No. 14.’

“Analysis and Ruling:

“It does not appear that Respondents addressed this request in their response [to the Agency’s motion]. Accordingly, Respondents must provide the requested information, but may withhold documents which are covered by the attorney-client or work product privileges.

³⁶ The 39-page response submitted by Respondents did not track the order of the requests in the Agency’s motion, making it challenging and time consuming to attempt to locate Respondents’ responses to particular requests in the voluminous document. If Respondents believe an argument regarding this request was overlooked, they may notify the ALJ, with a copy to the Agency, by email.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 17: Any and all names or identities used by all named respondents on social media, including but not limited to Facebook, Twitter, Instagram, LinkedIn, Snap Chat, XOTICSPOT.

‘RESPONSE: This request does not request any specific document or group of documents, and Respondents therefore treat it as an interrogatory. Respondents object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking attorney-client privileged and/or, to the extent work-product protections apply in this Forum, attorney work product information. Subject to and without waiving these objections, Respondents state that Stars Cabaret & Steak House uses the following social media accounts: Facebook—“Starsbeaverton”; Twitter—“stars Beaverton.”’

“Analysis and Ruling:

“Respondents assert that they have produced all social media posts as to Freehoo/Beaverton and that postings made by other Stars-named business are irrelevant. The Agency contends that it has reason to believe that Respondents use other methods of social media to promote the “Stars” business, collectively.’ For the reasons stated above, Respondents are not required to respond as to postings made by other Stars-named businesses. However, if any postings were made which promoted the Stars-named businesses ‘collectively’ -- as opposed to a posting advertising an individual location other than Freehoo/Beaverton -- then that information must be produced.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 18: Any and all social media posts, including but not limited to Facebook, Twitter, Instagram, LinkedIn, SnapChat, XOTICSPOT, by any named respondent regarding any of the facts alleged or the aggrieved persons mentioned in the Formal Charges.

‘RESPONSE: Respondents object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case. Subject to and without waiving these objections, Respondents will produce social media posts from the accounts listed in Respondents’ response to Request No. 17 that refer to either aggrieved person—and Respondents are not presently aware of any such posts—or to Respondents’ anti-sex-trafficking efforts.’

“Analysis and Ruling:

“It does not appear that Respondents objected to this request in its response [to the Agency’s motion]. However, it appears from the response

above that any material would already be produced in response to Request No. 17. Accordingly, [no] further response is required.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 19: Any and all social media posts, including but not limited to Facebook, Twitter, Instagram, LinkedIn, SnapChat, XOTICSPOT, by any named respondent regarding ‘naughty school girl’ nights at Stars.

‘RESPONSE: Respondents object to this request's use of the term "Stars" because each Stars-branded club is owned and operated by separate corporate entities, and none of the events regarding either aggrieved person is alleged to have occurred at any club other than Stars Cabaret & Steak House in Beaverton, Oregon. Respondents further object to this request as overbroad and failing to describe the information sought with sufficient specificity to allow for a meaningful response. Respondents further object to this request as not reasonably likely to produce information that is generally relevant to the case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret & Steak House relating to the theme of "naughty school girl" nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret & Steak House hosting such an event. Respondents further object to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally-protected free expression. Respondents also object to this request as overbroad insofar as it seeks age-based information, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element. Without waiving and subject to these objections, Respondents state that although this is a common "theme" night for gentlemen's clubs (and various other non-adult clubs), Stars Cabaret & Steak House has not had any schoolgirl-themed nights or events since at least 2010, and certainly did not host any such events during or after the alleged events involving Aggrieved Person No. 1 and Aggrieved Person No. 2 (i.e., between 2012 and the present).

Respondents therefore have no relevant documents responsive to this request.’

“Analysis and Ruling:

“Respondents assert that they have produced all social media posts as to Freehoo/Beaverton and that postings made by other Stars-named business are irrelevant. For the reasons stated above, Respondents are not required to respond as to postings made by other Stars-named businesses. However, if any postings were made which promoted the Stars-named businesses ‘collectively’ --

as opposed to a posting advertising an individual location other than Freehoo/Beaverton -- then that information must be produced.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 20: All documents or electronic records regarding advertising or promotion of ‘naughty school girl’ nights at Stars.

‘RESPONSE: Respondents object to this request’s use of the term “Stars” because each Stars-branded club is owned and operated by separate corporate entities, and none of the events regarding either aggrieved person is alleged to have occurred at any club other than Stars Cabaret & Steak House in Beaverton, Oregon. Respondents further object to this request as overbroad and failing to describe the information sought with sufficient specificity to allow for a meaningful response. Respondents further object to this request as not reasonably likely to produce information that is generally relevant to the case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret & Steak House relating to the theme of ‘naughty school girl’ nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret & Steak House hosting such an event. Respondents further object to this request as seeking information regarding activities that Oregon’s Supreme Court has declared to be constitutionally-protected free expression. Respondents also object to this request as overbroad insofar as it seeks age-based information, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element. Without waiving and subject to these objections, Respondents state that although this is a common “theme” night for gentlemen’s clubs (and various other non-adult clubs), Stars Cabaret & Steak House has not had any schoolgirl-themed nights or events since at least 2010, and certainly did not host any such events during or after the alleged events involving Aggrieved Person No. 1 and Aggrieved Person No. 2 (i.e., between 2012 and the present).

Respondents therefore have no relevant documents responsive to this request.’

“Analysis and Ruling:

“Respondents assert that advertisements produced by other Stars-named business[es] are irrelevant. For the reasons stated above, Respondents are not required to respond with documents produced by other Stars-named businesses. However, if there are any responsive documents which promoted the Stars-named businesses ‘collectively’ -- as opposed to * * * an individual location other than Freehoo/Beaverton -- then that information must be produced.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 24: All documents and electronic records, not previously provided to the Agency, sufficient to provide the following information for all comments received via the Stars website at any time during the past five years:

- ‘a. All content submitted with each comment, including but not limited to sender's name and email address;
- b. URL of the webpage used for submitting the comment;
- c. Email address(es) designated for receiving the comments;
- d. Identities of all Stars personnel able to access the comments;
- e. Content of any response(s) to the comment.

‘RESPONSE: Respondents object this request to the extent that it seeks information about any entity other than Frehoo, Inc. dba Stars Cabaret & Steak House, as Frehoo does not do business under any name other than Stars Cabaret & Steak House, and the other listed entities are separate companies that are not parties to this case. Respondents further object to this request as overbroad, unduly burdensome, failing to describe the information sought with sufficient specificity to allow for a meaningful response, and not reasonably likely to produce information that is generally relevant to the case. Subject to and without waiving these objections, will produce any comments that satisfy all of the following criteria: comments that (1) are from the website for Stars Cabaret & Steak House; (2) were submitted during the time periods that the aggrieved persons allegedly were present at Stars Cabaret & Steak House; and (3) reference sexual harassment or either aggrieved person. At this time, Respondents are not aware of any responsive documents.’

“Analysis and Ruling:

“It does not appear that Respondents objected to this request in its response. The response above indicates that there are no responsive documents for the time periods that the Aggrieved Persons were present or that reference either Aggrieved Person. Respondents are also required to produce additional responsive documents at Freehoo/Beaverton between the years 2012-2014, if such documents exist.

“Discovery Requested and Objection:

‘REQUEST FOR PRODUCTION NO. 28: Copies of any and all manager logs from August 2012 through October 2014.

'RESPONSE: Respondents object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case to the extent it seeks documents covering dates on which neither aggrieved person is alleged to have been present at Stars Cabaret & Steak House. Subject to and without waiving these objections, Respondents state that they already provided the Agency with this information when it was requested from Respondents during the Agency's investigation, and that to the best of Respondents' knowledge, no additional responsive documents exist that are within their possession, custody, or control.'

"Analysis and Ruling:

"The Agency argues that Respondents should produce additional responsive material dating back to 2010. However, the Agency only requested information beginning with August 2012. Accordingly, Respondents' response was sufficient.

"Discovery Requested and Objection:

'REQUEST FOR PRODUCTION NO. 32: All documents, logs, notes, or electronic records of Respondents' compliance officer(s) for the past five years.

'RESPONSE: Respondents object to this request as overbroad, vague in that it fails to specify who the term "compliance officer" refers to, failing to describe the information sought with sufficient specificity to allow for a meaningful response, and not reasonably likely to produce information that is generally relevant to the case. To the extent that this request refers to documents relating to Frehoo's settlement with the City of Beaverton, Respondents further object to this request as seeking evidence of conduct or statements made in compromise negotiations. If Complainant can narrow this request and explain its relevance and admissibility, Respondents will consider responding further.'

"Analysis and Ruling:

"For the reasons stated above regarding Request for Production No. 13, these records do not need to be produced.

"Discovery Requested and Objection:

'REQUEST NO. 37: All images, digital or otherwise, within the custody or control of any named Respondent of the VIP area of the Beaverton Stars between 2012 and the present

'RESPONSE: Respondents object to this request as vague, as there is no area of Stars Cabaret & Steak House that is designated as a "VIP area."

Respondents further object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case. If Respondents can clarify this request and explain its relevance, Respondents will consider responding further.'

"Analysis and Ruling:

"In its motion, the Agency clarified that it was seeking images of an area on the floorplan of the Beaverton location with a raised floor called 'VIP Seating.' Respondents contend that the request is overbroad because it would encompass pictures of individuals dancing who are not parties to this case. A photograph of this seating area is reasonably likely to produce information generally relevant to the case as it will help the forum understand the environment in which the Aggrieved Persons performed. However, Respondents raised valid concerns. Accordingly, if Respondents have 'images, digital or otherwise' of the VIP Seating area that do not contain images of dancing or patrons, then those must be produced.

"Agency's 2nd Informal Request for Discovery

"A. INTERROGATORIES

"Discovery Requested and Objection:

'Interrogatory No. 12: Aside from Aggrieved Person #1 and Aggrieved Person #2, describe all instances in which a person under the age of 18 was present at Stars Cabaret-Bridgeport.

'Response No. 12: Frehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information regarding underage individuals at properties or businesses other than the one (Stars Cabaret & Steak House) in which the Agency claims Aggrieved Persons #1 or #2 allegedly worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret-Bridgeport is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret-Bridgeport; and (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret-Bridgeport. Moreover, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevant to the case. Respondents will consider responding further if the Agency will explain the relevance of the request.'

“Analysis and Ruling:

“For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is ‘reasonably likely to produce information that is generally relevant to the case.’ Therefore, this request is DENIED.

“Discovery Requested and Objection:

‘Interrogatory No. 13: Aside from Aggrieved Person #1 and Aggrieved Person #2, describe all instances in which a person under the age of 18 was present at Stars Cabaret...At the Capitol.

‘Response No. 13: Freehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information regarding underage individuals at properties or businesses other than the one (Stars Cabaret & Steak House) in which the Agency claims Aggrieved Persons #1 or #2 allegedly worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...At the Capitol is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...At the Capitol; and (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...At the Capitol. Moreover, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevant to the case. Respondents will consider responding further if the Agency will explain the relevance of the request.’

“Analysis and Ruling:

“For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is ‘reasonably likely to produce information that is generally relevant to the case.’ Therefore, this request is DENIED.

“Discovery Requested and Objection:

‘Interrogatory No. 14: Aside from Aggrieved Person #1 and Aggrieved Person #2, describe all instances in which a person under the age of 18 was present at Stars Cabaret...In the Cascades.

‘Response No. 14: Freehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information regarding underage individuals at properties or businesses other than the one (Stars Cabaret & Steak House) in which the Agency claims Aggrieved Persons

#1 or #2 allegedly worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Cascades is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Cascades; and (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Cascades. Moreover, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevant to the case. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"Analysis and Ruling:

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"Discovery Requested and Objection:

'Interrogatory No. 16: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret-Bridgeport operates business activities outside of the Stars Cabaret-Bridgeport facility in Bridgeport.

'Response No. 16: Freehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret-Bridgeport is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret-Bridgeport; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret-Bridgeport; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret-Bridgeport facility in Bridgeport, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret-Bridgeport operating business activities outside of the Stars Cabaret-Bridgeport facility in Bridgeport. Freehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.'

“Analysis and Ruling:

“For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is ‘reasonably likely to produce information that is generally relevant to the case.’ Therefore, this request is DENIED.

“Discovery Requested and Objection:

‘Interrogatory No. 17: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret.. in the Capitol operates business activities outside of the Stars Cabaret...In the Capitol facility in Salem.

‘Response No. 17: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Capitol is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Capitol; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Capitol; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret...In the Capitol facility in Salem, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret...In the Capitol operating business activities outside of the Stars Cabaret...In the Capitol facility in Salem. Frehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.’

“Analysis and Ruling:

“For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is ‘reasonably likely to produce information that is generally relevant to the case.’ Therefore, this request is DENIED.

“Discovery Requested and Objection:

‘Interrogatory No. 18: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret...In the Cascades operates business activities outside of the Stars Cabaret...In the Cascades facility in Bend.

‘Response No. 18: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1)

Stars Cabaret...In the Cascades is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Cascades; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Cascades; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret...In the Cascades facility in Bend, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret...In the Cascades operating business activities outside of the Stars Cabaret...In the Cascades facility in Bend. Frehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"Analysis and Ruling:

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"B. REQUESTS FOR PRODUCTION

"Discovery Requested and Objection:

'REQUEST NO. 40: Copies of any and all advertising and/or promotional material pertaining to 'naughty school girl' theme nights, events, or parties at Stars Cabaret & Steak House, Stars Cabaret Bridgeport, Stars Cabaret...At the Capitol, and Stars Cabaret...In the Cascades.

'RESPONSE: Respondents object to this request on multiple grounds. First, insofar as this request seeks information regarding advertising and/or promotional material pertaining to "naughty school girl" theme nights, events, or parties at properties or businesses other than the one (Stars Cabaret & Steak House) where the Agency claims Aggrieved Persons #1 or #2 worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars-Bridgeport, Stars Cabaret...At the Capitol, and Stars Cabaret...In the Cascades are owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person #1 or #2 occurred at Stars-Bridgeport, Stars Cabaret...At the Capitol, or Stars Cabaret...In the Cascades; and (3) Respondents are unaware of any allegation that either Aggrieved Person #1 or #2 ever worked at Stars-Bridgeport, Stars Cabaret...At the Capitol,

or Stars Cabaret...In the Cascades. Respondents further object to this request as not reasonably likely to produce information that is generally relevant to the case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret & Steak House relating to the theme of "naughty school girl," nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret & Steak House hosting such an event. Respondents further object to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally-protected free expression. Respondents also object to this request as overbroad insofar as it seeks age-based information, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element. Finally, Respondents object to this request as overbroad insofar as it seeks information regarding advertising and/or promotional material pertaining to "naughty school girl" theme nights, events, or parties outside of times material to this matter. Without waiving and subject to said objections, Respondents state that there are no documents to produce in response to this request, as Stars Cabaret & Steak House did not host any "naughty school girl" theme nights, events, or parties at any time between January 1, 2012 and September 31, 2014, which (viewed expansively), is the relevant time period relating to this action.'

"Analysis and Ruling:

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"Information obtained via Subpoenas issued by Respondents

"The Agency requests that Respondents produce information relevant to this case pursuant to subpoenas issued with response times beyond the informal discovery and discovery motion deadlines. The Agency further asks that if Respondents contend documents received in response to subpoenas are not relevant, that those documents be submitted to the ALJ for an *in camera* review and relevancy determination. It does not appear that Respondents objected to this motion. Accordingly, the Agency's request is granted.

"SUMMARY OF RULINGS REQUIRING ACTION FROM RESPONDENTS

"Respondents are directed to do the following by September 12, 2016:³⁷

³⁷ The parties may agree to modify this date. If there is a mutual agreement, the parties may simply email the ALJ with the agreed date for production and the ALJ will issue an interim order approving that date. If

“Interrogatories

- Freehoo/Beaverton is directed to answer Interrogatory No. 3 in the Agency’s First Informal Request for Discovery, but may limit its response to Freehoo/Beaverton.
- Respondents Colburn, Heinzman-Myers, Herkenrath, Kaiser and Mitchell are directed to answer Interrogatory No. 6 of the Agency’s First Informal Request for Discovery, but may limit the answer to whether he/she had a romantic or sexual relationship with an employee or independent contractor at Freehoo/Beaverton in the years 2012-2014.

“Requests for Admission

- Respondents are directed to respond to Requests for Admission 25, 28 and 31 to admit or deny whether there were any such instances while acting in a managerial capacity in Freehoo/Beaverton in the years 2012-2014.

“Requests for Production

- Provide copies of the information referenced in Section 4 of the Settlement Agreement with the City of Beaverton to the Agency. Since those documents may include names of individuals who are not parties to these proceedings, the documents may be produced subject to the terms of the interim protective order in this case.
- Respondents must provide the information requested in Request for Production No14 and 15, but may withhold documents that are covered by the attorney-client or work product privileges.
- In response to Request for Production Nos. 17, 19 and 20, if any documents or postings were made which promoted the Stars-named businesses ‘collectively’ -- as opposed to a posting advertising an individual location other than Freehoo/Beaverton -- then Respondents must produce that information.
- In response to Request for Production No. 24, Respondents must produce additional responsive documents for Freehoo/Beaverton between the years 2012-2014, if such documents exist.
- If Respondents have ‘images, digital or otherwise’ of the VIP Seating area in Freehoo/Beaverton that do not contain images of dancing or patrons, then those must be produced to the Agency.

there is a disagreement as to the production date, the parties can request a prehearing telephone conference to address that.

- Respondents must provide copies of documents received in response to subpoenas that were issued to the Agency. If subpoena responses are received after the date of this interim order, Respondents must provide copies of the responses to the Agency within seven days after receiving the subpoena responses. If Respondents contend documents received in response to subpoenas are not relevant, those documents should be submitted to the ALJ for an *in camera* review and relevancy determination.”

(Exs. X64, X75, X83)

31) Respondents filed a Motion to Compel discovery on August 15, 2016. The Agency responded to the motion on August 22, 2016. On September 7, 2016, an interim order was issued ruling on the motion which stated, in pertinent part:

“LEGAL STANDARD

‘Any discovery request must be reasonably likely to produce information that is generally relevant to the case.’ OAR 839-050-0200(7). * * *

“* * * *

“ANALYSIS OF RESPONDENTS’ MOTION

“* * * *

“Discovery Related to Aggrieved Person # 2

“A. Interrogatories the Agency Did Not Respond to Individually

“Discovery Requested and Objection:

“Respondents assert that the Agency asserted a ‘global objection as to form’ to the following interrogatories:

‘INTERROGATORY NO. 94: Describe all specific employment actions or decisions by any of the Individual Respondents or any other Stars Cabaret and Steak House owner, officer, manager, employee, or agent that the Agency contends constituted or contributed to an unlawful employment practice with regard to Aggrieved Person #2.’

‘INTERROGATORY NO. 95: With respect to Complainant’s response to Interrogatory No. 62, identify any individual manager of Frehoo, who told her she was required “to dance nude for customers” and Aggrieved Person #2’s response, including whether she stated that she did not wish to dance or wished to leave and to whom Aggrieved Person #2 communicated this information.’

'INTERROGATORY NO. 102: With respect to Complainant's denial of Requested Admission No. 27 ("that Aggrieved Person #2 was located by authorities as a result of notification by Stars to criminal authorities"), describe the factual basis of this denial.'

"INTERROGATORY NO. 103: With respect to Complainant's denial of Requested Admission No. 28 ("that Jon Herkenrath testified in a grand jury proceeding whereby Washington County District Attorney sought to charge Anthony Curry with criminal misconduct'), describe the factual basis of this denial."

'INTERROGATORY NO. 105: With respect to Complainant's denial of Requested Admission No. 30 ("that Anthony Curry does not have a personal relationship with any manager, employee, or owner of Stars"), describe the factual basis of this denial, including any relationship that the Agency contends existed between Curry and any owner, officer, manager, employee, or agent of Stars Cabaret & Steak House.'

'INTERROGATORY NO. 106: With respect to Complainant's denial of Requested Admission No. 37 ("that while Aggrieved Person #2 worked at Stars, she received the shifts she requested"), describe the factual basis of this denial.'

"The Agency objected to all of these requests, asserting that they had multiple discreet subparts and did not comply with OAR 839-050-0200(6).

"Analysis and Ruling:

"For the same reasons set forth above regarding Interrogatory Nos. 77, 78, 79, 82, 84, 85, 86, 87, 89, 90 and 91, the Agency is also directed to answer Interrogatory Nos. 94, 95, 102, 103, 105 and 106.

"B. Alleged Improper Objections or Improper Answers to Interrogatories

"Discovery Requested and Objection:

'INTERROGATORY NO. 59: Identify and describe any and all other adult entertainment, gentlemen's club, or similar establishment where Aggrieved Person #2 worked as a dancer, whether before or after she worked at Stars' Beaverton location, and identify further whether she presented the same identification at any other club where she worked.'

'RESPONSE: Agency objects as this interrogatory is overbroad and irrelevant to the charges against Respondents.'

'INTERROGATORY NO. 60: If Aggrieved Person #2 did not work at any other club, specify whether she previously gained entry to any other

similar establishment. If so, did she present the same identification she used at Stars?’

‘RESPONSE: Agency objects as this interrogatory is overbroad and irrelevant to the charges against Respondents.’

“Analysis and Ruling:

“At the present time it is unclear whether these interrogatories are ‘reasonably likely to produce information that is generally relevant to’ whether there was negligence in verifying forms of identification. However, these interrogatories are likely to produce information generally relevant to emotional distress damages. Accordingly, the Agency must answer Interrogatories 59 and 60.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 61: Identify and describe any communications between any employee or manager of Stars and Anthony Curry, including whether Aggrieved Person #2 participated in that communication, the circumstances, any witnesses or other participants in such communications, and the purpose of the communication.’

‘RESPONSE: The Agency objects to this interrogatory as the information is outside of the Agency’s possession or control. The Agency does know that Aggrieved Person #2 spoke with Respondent Herkenrath verbally on the phone regarding scheduling for work. Aggrieved Person #2 stated these contacts occurred on a cell phone provided to her by Anthony Curry.’

“Analysis and Ruling:

“In the Agency’s response to the motion to compel, it supplemented its answer to this interrogatory to provide further detail, but the Agency should include that additional detail in an amended interrogatory signed under oath in accordance with OAR 839-050-0200.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 64: Attached as Exhibit A is a list of "Rules of Conduct," "Entertainer Lessee Operating Guidelines," and related documents. Identify the person who asked Aggrieved Person #2 to sign these documents and describe whether, during the days that Aggrieved Person #2 worked at Stars, she ever violated any of these Rules of Conduct or Operating Guidelines. If so, describe in detail the facts and circumstances surrounding any violation, including Aggrieved Person #2’s motivation for engaging in the violation, and any witnesses to any violation.’

'RESPONSE: Aggrieved Person #2 indicated that the documents looked familiar to her but she wasn't sure if they were the exact same documents. She stated she was given them on the day she auditioned, by the unidentified manager, and was asked to fill them out. She stated Respondents did not provide her a copy. Aggrieved Person #2 stated most of the rules were not followed and she saw dancers violating them all the time, with no action by management or other employees.'

"Analysis and Ruling:

"In its response, the Agency points out that its response to a subsequent interrogatory provided more detail. Given the additional detail provided later, no further response is needed.

"Discovery Requested and Objection:

'INTERROGATORY NO. 65: During the days Aggrieved Person #2 worked at Stars, describe whether she did or said anything inconsistent with the age as represented on the identification she used to gain entry to Stars, including all details about such comments, statements, or actions, including the circumstances, any witnesses to such comments or actions, and her purpose in engaging in such conduct.'

ORIGINAL RESPONSE: 'The Agency objects to this interrogatory as overbroad and vague. The Agency also objects as to standing.'

SUPPLEMENTAL RESPONSE: 'The Agency objects to this interrogatory as overbroad and vague. The Agency further asserts that this interrogatory is very poorly written and is a compound question containing multiple subparts Respondents make no attempt to define what actions or conduct would be "inconsistent with the age as represented on the identification [Aggrieved Person #2] used" and the Agency refuses to speculate as to Respondents' meaning.'

"Analysis and Ruling:

"Respondents are correct that this interrogatory may be relevant to whether Respondents 'knew of should have known' Aggrieved Person #2 was underage. However, as worded, it is overbroad and vague. Accordingly, the Agency should amend its response to indicate what actions, if any, Aggrieved Person #2 did to conceal the fact that she was underage, but need not respond further.

"Discovery Requested and Objection:

'INTERROGATORY NO. 66: During the days Aggrieved Person #2 allegedly worked at Stars, does the Agency have evidence that anyone had sex or engaged in sexual acts on the Stars premises? If so, describe

the circumstances, the identity of the persons involved, any other witnesses, and the location.'

'RESPONSE: According to witnesses, it was not uncommon for dancers to engage in sexual acts on Respondents' premises. During the course of the Agency's investigation dancers, customers, and Respondents' club manager acknowledged that this was a systemic problem at Respondents' establishments. Respondents have not produced any evidence to prove that they addressed or corrected the systemic problems of sexual acts on the club's premises. Aggrieved Person #2 suffered from sexual abuse and harassment as a result of Respondents' acts or omissions. These witnesses are named in the previously provided discovery and include but are not limited to Nathan Wheeler, Steve Toth, the Aggrieved Persons, and unidentified customers. The Agency relies upon the discovery previously provided, including but not limited to Bates No. 00034, 000035, and 001134-001265.'

"Analysis and Ruling:

"The Agency should amend its response to indicate whether any sexual acts occurred on the premises of Freehoo/Stars during the days Aggrieved Person #2 allegedly worked at Freehoo/Stars.

"Discovery Requested and Objection:

'INTERROGATORY NO. 127: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency's possession or knowledge that the Agency contends supports the Agency's denial that "Aggrieved Person #2 did not engage in prostitution at Stars Cabaret & Steak House," as stated in Request for Admission No. 81.'

'RESPONSE: The Agency objects to this Interrogatory on the basis that it is vague and Respondents failed to define what they meant by "prostitution." Notwithstanding that objection, to the extent that "prostitution" may include "sexually explicit conduct" within ORS 163.665(3), the Agency asserts that Aggrieved Person #2 was engaged in unlawful sexually explicit conduct during the entire course of her employment at Stars Cabaret and Steak House.'

"Analysis and Ruling:

"In the Agency's response to the motion to compel, it supplemented its answer to this interrogatory to provide further detail, but the Agency should include that additional detail in an amended interrogatory signed under oath in accordance with OAR 839-050-0200.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 128: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency’s possession or knowledge that demonstrates or tends to show that, at the time that Aggrieved Person #2 sought work at Stars, any of the Individual Respondents had any personal knowledge of any shortcomings that existed in the age verification process.’

‘RESPONSE: Respondents knew or should have known of any shortcomings that existed in the age verification process based on their lack of records and their inadequate vetting process. Evidence supporting this response includes, but is not limited to, Bates Nos. 000028-000029, 000034, and 005407-016998.’

“Analysis and Ruling:

“In the Agency’s response to the motion to compel, it supplemented its answer to this interrogatory to provide further detail, but the Agency should include that additional detail in an amended interrogatory signed under oath in accordance with OAR 839-050-0200. Additionally, the response should indicate which clubs it contends Respondents Kaiser, Mitchell and Struhar had ‘particular control over.’

“Discovery Requested and Objection:

‘INTERROGATORY NO. 129: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency’s possession or knowledge that demonstrates or tends to show that any person who the Agency contends was an owner, manager, representative, or agent of Stars Cabaret & Steak House was aware at the time Freehoo retained Aggrieved Person #2 to work as an exotic dancer that she had been "groomed by a sex offender" to seek employment as a nude dancer.’

‘RESPONSE: The Agency objects to this interrogatory on the basis of relevance. Whether Respondents knew Aggrieved Person #2 had been groomed by a sex offender to dance nude on stage is irrelevant to Respondents’ liability for their unlawful conduct.’

“Analysis and Ruling:

“Respondents note that the Agency denied Request for Admission No. 85 (‘that BOLI has no evidence to suggest that Freehoo was aware at the time it retained Aggrieve Person #2 to work as an exotic danger that she had been ‘groomed by a sex offender’ to seek employment as a nude dancer’). Since this request was denied, one must assume that some evidence on that point exists.

Such information is relevant to whether Respondents 'knew or should have known' of the age of Aggrieved Person #2, and her willingness to work as a nude dancer, which would assist the forum in understanding how reasonable person in complainant's circumstances would have perceived the workplace conduct. Accordingly, the Agency must respond.

"Discovery Requested and Objection:

'INTERROGATORY NO. 138: Identify all assumed (or "stage") names that Aggrieved Person #2 used at any time in connection with working or dancing at adult entertainment clubs from 2013 to the present.'

'RESPONSE: The Agency objects to this interrogatory to the extent that it requests stage names used by Aggrieved Person #2 outside of her employment with Respondents. Without waiving that objection, the Agency offers the following response: Isis and [redacted].'

"Analysis and Ruling:

"This interrogatory is likely to produce information generally relevant to emotional distress damages. Accordingly, the Agency must answer it.

"Discovery Requested and Objection:

'INTERROGATORY NO. 44: Copies of all photo identifications, whether legitimate, counterfeit, or falsified, possessed and/or used by Aggrieved Person #2 from 2014 to the present.'

'RESPONSE: The Agency objects to this request to the extent that it requests identifications outside of times material to Aggrieved Person #2's employment with Respondents. Without waiving its objection, the Agency has previously provided Bates Nos. 001029, 001051-001053, and 001709."

"Analysis and Ruling:

"This interrogatory is likely to produce information generally relevant to damages, and possibly other matters at issue. Accordingly, the Agency must answer it.

"Discovery Related to Both Aggrieved Persons

"A. Interrogatories the Agency Did Not Respond to Individually

"Discovery Requested and Objection:

'INTERROGATORY NO. 107: Identify the specific act(s) or omission(s) by each Respondent that you claim constitutes any part of the "systemic

practice of sexual harassment” that the Agency referred to in its responses to Interrogatory No. 35 and Interrogatory No. 41.’

“The Agency objected, asserting that this interrogatory has multiple discreet subparts and did not comply with OAR 839-050-0200(6).

“Analysis and Ruling:

“For the same reasons set forth above regarding Interrogatory Nos. 77, 78, 79, 82, 84, 85, 86, 87, 89, 90 and 91, the Agency is also directed to answer Interrogatory 107.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 122: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency's possession or knowledge that demonstrates or tends to show that any of the Respondents authorized or knowingly allowed prostitution to occur at Stars Cabaret & Steak House. (Ex. G at 5).’

‘RESPONSE: The Agency objects to this request as unduly repetitive and previously asked and answered. The Agency incorporates its previous responses to the above interrogatories here by reference. The Agency notes that the mental element to the unlawful conduct in this case is known or should have known.’

“Analysis and Ruling:

“The Agency provided information showing a number of interrogatories already answered on these topics. Accordingly, the objection that this is unduly repetitive is sustained, and no further answer is required.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 135: Describe all verbal communications between either of the Aggrieved Persons and any employee of the Agency-including the Commissioner-between 2012 and the present regarding or referring to the possibility that the Aggrieved Persons would file any civil or administrative action. The description should include the date, persons present, and the substance of the conversation. (Ex. I at 3).’

‘RESPONSE: The Agency objects to this interrogatory as to form because it contains multiple subparts.

(a) Aggrieved Person #1: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant to the factual matters alleged in this case. The Agency objects to

this request to the extent it requests information subject to work-product and/or attorney-client information.

(b) Aggrieved Person #2: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant to the factual matters alleged in this case. The Agency objects to this request to the extent it requests information subject to work-product and/or attorney-client information.'

and

'INTERROGATORY NO. 139: Describe all verbal communications between either of the Aggrieved Persons and any employee of the Agency—including the Commissioner—between 2012 and the present regarding any of Respondents, exotic dancing, or any other matters potentially relevant to their alleged claims. The description should include the date, persons present, and the substance of the conversation.'

'RESPONSE: The Agency objects to this interrogatory as to form because it contains multiple subparts. The Agency objects to these requests as they are overbroad and vague. The Agency objects to these requests to the extent they request information subject to work-product and/or attorney-client information. Without waiving and subject to these objections, the Agency offers the following responses:

(a) Pertaining to Aggrieved Person #1, the Agency has already provided its investigative interview, Bates No. 001021-001025. This interview took place on August 18, 2015. Present were BOLI employees Rafael Colin and Chris Lynch.

(b) Pertaining to Aggrieved Person #2, the Agency has provided Bates No. 001026-001028. This investigative interview was conducted by Agency employee Maria Perez and took place on May 5, 2015, by phone. The Agency has additionally provided Bates No. 001032-001041, a summary of an interview of Aggrieved Person #2 that took place on December 12, 2015. Present were Agency employees Chris Lynch and Jessica Ponaman.'

"Analysis and Ruling:

"The interrogatories are extremely broadly worded and are not focused on information that is 'reasonably likely to produce information that is generally relevant to the case.' The Agency's objection that these requests are overbroad is sustained and no further response to these interrogatories is required.

“Requests for Production

“Discovery Requested and Objection:

“The Agency objected to several requests on the grounds that ‘the work product of the Agency’s administrative prosecutors is irrelevant to the facts at issue in the contested cases.’ The requests and objections made were as follows:

‘Request for Production No. 3: Communications relating to the Aggrieved Persons’ initial interviews with BOLI.’

‘RESPONSE: All documents, not subject to privilege or work product protection, regarding communications relating to the Aggrieved Persons’ initial interviews with BOLI have been provided in discovery.’

‘Request for Production No. 10: All documents and electronically stored information that refer to, relate to or comprise any and all statements from any person or persons having any information or knowledge relating in any way to the allegations in the Complaint.’

‘RESPONSE: Any information responsive to this request, and not subject to privilege or work product protection, has been provided in the Agency’s discovery that was previously provided to Respondents. Any subsequently acquired discovery will be provided as soon as possible.’

‘Request for Production No. 11: All statements obtained by or on behalf of the Agency from others, or made by the Aggrieved Persons or employees or officers of the Agency, concerning this action or its subject matter.’

‘RESPONSE: Any information responsive to this request, and not subject to privilege or work product protection, has been provided in the Agency’s discovery that was previously provided to Respondents. Any subsequently acquired discovery will be provided as soon as possible.’

‘Request for Production No. 12: All videotapes, audiotapes, photographs or other recordings and electronically stored information that relate in any way to the claims or to any work allegedly performed by the Aggrieved Persons at Stars.’

‘RESPONSE: Any information responsive to this request, and not subject to privilege or work product protection, has been provided in the Agency’s discovery that was previously provided to Respondents. Any subsequently acquired discovery will be provided as soon as possible. The Agency does not have access to information within Respondents’ control that it has, thus far, refused to provide.’

'Request for Production No. 25: Documentation of any and all communications relating to any false identification either of the Aggrieved Persons used to gain entry to or secure work at Stars.'

'RESPONSE: The Agency has provided all materials responsive to this request, and not subject to privilege or work product protection, as part of the discovery previously provided to Respondents.'

'Request for Production No. 37: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of the Oregon Bureau of Labor & Industries (BOLI) and the Oregon Department of Human Services (DHS) regarding or relating to any of the Respondents, Steven Toth, Aggrieved Person #1, or Aggrieved Person #2.'

'RESPONSE: The Agency objects to this request to the extent that it requests information that would be protected work product. Without waiving its objection, the Agency has previously provided this information, including but not limited to Bates Nos. 001712, 001742-001749, and 001752-001756.'

"Respondents also sought to compel documents responsive to the following additional requests in this section of their argument, but the Agency did not specifically respond or insert a copy of their objections into their response:

'Request for Production No. 38: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of BOLI and the Washington County District Attorney 's Office regarding or relating to any of respondents, Steven Toth, Aggrieved Person #1, or Aggrieved Person #2. (Id. at 8).

'Request for Production No. 39: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of BOLI and the Oregon Liquor Control Commission (OLCC) regarding or relating to any of respondents, Steven Toth, Aggrieved Person # 1 or Aggrieved Person #2. (Id.)

'Request for Production No. 40: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of BOLI and the Beaverton Police Department regarding or relating to any of respondents, Steven Toth, Aggrieved Person #1, or Aggrieved Person #2. (Id.)'

"Analysis and Ruling:

"Although the Agency did not initially object to all of these requests on the basis of relevancy, the ALJ is nevertheless required to make a determination as to whether the request is 'reasonably likely to produce information that is

generally relevant to the case.’ OAR 839-050-0200(7); see also OAR 839-050-0200(1) (describing the role of the ALJ in authorizing discovery). As with many of Respondents’ interrogatories, these requests for production are extremely broadly worded and are not focused on information that is ‘reasonably likely to produce information that is generally relevant to the case.’ Additionally, the Agency indicates that some information has already been produced in response to some of the requests. Accordingly, no further response to these requests for production is required.

“Discovery Requested and Objection:

‘Request for Production No. 4: Any testimony the Aggrieved Persons provided in any other proceeding, criminal or civil.’

‘RESPONSE: The Agency objects to this request for production as overbroad and on the basis of relevance. The Agency has provided all testimony of the Aggrieved Persons in any relevant proceedings that are within the Agency’s possession or control.’

“Analysis and Ruling:

“This request is overbroad, to the extent it requests information that is not related to the allegations in the Formal Charges. Since the Agency indicates it has produced all documents ‘it could reasonably obtain and that bore some relevance to this proceeding,’ no further response is required.

“Discovery Requested and Objection:

‘Request for Production No. 15: All documents and electronically stored information that concern, refer or relate to any charge or complaint against Stars that the Aggrieved Persons filed or contemplated filing with any governmental or administrative agency including, without limitation, the U.S. Department of Labor (“DOL”), the Equal Employment Opportunity Commission (“EEOC”), the National Labor Relations Board (“NLRB”), the Oregon Department of Consumer and Business Services, Occupational Health and Safety Division (“OR-OSHA”), and the Occupational Safety and Health Administration (“OSHA”).’

‘RESPONSE: The Agency objects to this request as overbroad and irrelevant. The Agency also objects on the basis of privileged communications and protected work product.’

and

‘Request for Production No. 22: All documents and electronically stored information that evidence, memorialize, refer to, relate to or concern possible legal action by the Aggrieved Persons against Stars that created prior to the point when: (a) the Agency began informally or formally

investigating this matter; and/or (b) the Aggrieved Persons retained counsel or sought legal advice.'

RESPONSE: 'The Agency objects to this request as overbroad, irrelevant, and seeking protected and privileged information.'

"Analysis and Ruling:

"These requests for production are extremely broadly worded and are not focused on information that is 'reasonably likely to produce information that is generally relevant to the case.' No further response to these requests for production is required.

"Discovery Requested and Objection:

'Request for Production No. 16: All documents and electronically stored information relating to any legal proceeding or threatened legal proceeding to which the Aggrieved Persons have been a party including, without limitation, all documents relating to any lawsuits the Aggrieved Persons have filed or threatened to file.'

RESPONSE: 'The Agency objects to this request as overbroad and irrelevant. The Agency also objects on the basis of privileged communications and protected work product.'

"Analysis and Ruling:

"This request is overbroad, to the extent it requests information that is not related to the allegations in the Formal Charges. Since the Agency indicates it has produced all documents 'it could reasonably obtain and that bore some relevance to this proceeding,' no further response is required.

"Discovery Requested and Objection:

'Request for Production No. 19: All social media postings, communications, blog entries, comments or other written material concerning or referring to Stars that the Aggrieved Persons posted, uploaded or otherwise published or communicated on any Internet-based communication of any kind including, but not limited to, Facebook, Instagram, Snapchat, or other platforms.'

RESPONSE: 'The Agency does not have anything responsive to this request within its possession. Any further information will be provided as soon as possible, once it's received.'

“Analysis and Ruling:

“The Agency’s response is insufficient in that it does not indicate whether the Aggrieved Persons attempted to locate responsive information on their social media accounts. The Agency is directed to respond to this request by obtaining responsive information from the Aggrieved Persons, regardless of whether responsive information is currently ‘within [the Agency’s] possession.’ See *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 144 (2015), *appeal pending* (a respondent may request a discovery order to obtain documents from a complainant through the Agency that are discoverable under OAR 839-050-0020(7)).

“Discovery Requested and Objection:

‘Request for Production No. 20 [amended]: All social media postings, communications, blog entries, comments or other written material concerning or referring to any activities by the Aggrieved Persons that either of the Aggrieved Persons posted, uploaded or otherwise published or communicated on any Internet-based communication of any kind including, but not limited to, Facebook, Instagram, Snapchat or other platforms.

‘Respondents will agree to narrow the relevant time period of this request to 2012 to the present.’

‘RESPONSE: The Agency objects to this request as overbroad and irrelevant to the extent that it requests “all social media postings, communications, blog entries, comments or other written material concerning or referring to any activities by the Aggrieved Persons posted, uploaded or otherwise published or communicated on any Internet-based communication of any kind.” If Respondents can narrow this request to information relevant to this case, the Agency may consider responding further.’

“Analysis and Ruling:

“Respondents assert that this request is relevant to determining ‘possible other causes of emotional distress.’ Based on that limitation and the amendment limiting the time period from 2012 to the present), the Agency is directed to respond to this request by obtaining responsive information from the Aggrieved Persons with any social media postings describing other causes of emotional distress from 2012 to the present time.

“Discovery Related to Alleged Damages

“Discovery Requested and Objection:

“Respondents moved to compel answers to Interrogatory Nos. 36 and 42. Since the Agency responded to those on August 30, 3016, no further response is necessary.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 37: If the Agency contends that any of Respondents is [sic] responsible for emotional distress damages, identify each physician or health care professional who was consulted— whether by the Agency, Aggrieved Person #2, or persons acting on their behalf— with respect to emotional distress damages or other non-economic damages Aggrieved Person #2 allegedly sustained as a result of any action by any of the Respondents.’

‘INTERROGATORY NO. 38: With respect to each condition of Aggrieved Person #2 state the physician or health care provide [sic] who provided treatment or assessment for any condition relating to the alleged emotional distress.’

‘INTERROGATORY NO. 39: With respect to each condition of Aggrieved Person #2 state the date(s) of any treatment for any condition relating to the alleged emotional distress.’

‘INTERROGATORY NO. 40: With respect to each condition of Aggrieved Person #2 state any diagnosis or treatment plan, or recommendations for future treatment relating to the allegations in this case for any condition relating to the alleged emotional distress.’

“It does not appear that the Agency objects to this request, but rather that it has not yet received medical records from the attorney of Aggrieved Person #2.

“Analysis and Ruling:

“It is not clear why there has been a delay in the Agency obtaining the requested documents from Aggrieved Person #2. However, given the rapidly approaching hearing date, this information must be provided without further delay.

“Discovery Requested and Objection:

‘INTERROGATORY NO. 20: Identify and describe any and all complaints that Aggrieved Person #2 made to anyone regarding their alleged experience(s) at Stars, including to whom the complaint(s) was made, whether the complaint(s) was verbal or written, the circumstances, any

witnesses, the location where the interaction(s) took place, and any response(s) received.'

'RESPONSE: Aggrieved Person #2 first verbally reported her abuse and harassment to Detective Chad Optiz, of the Beaverton Police Department, during the course of the criminal investigation into Anthony Curry. These reports occurred on or about September 6, 2014.

'During the course of the criminal investigation, Aggrieved Person #2 also made a verbal report to REDACTED, of REDACTED, in Portland, Oregon, on or about October 2, 2014. REDACTED is a medical program set up to assess, treat and prevent of child abuse.

'Aggrieved Person #2 also stated that she made a verbal disclosure pursuant to a therapy session. Those records will be requested and provided as soon as possible, once received.

'Aggrieved Person #2 subsequently verbally reported her abuse and harassment to a Grand Jury, the date of which is unknown, and in open court, on June 4, 2015, in Washington County, Oregon. The criminal defendant was found guilty of his crimes against Aggrieved Person #2 and sent to prison.

'Aggrieved Person #2 gradually verbally complained to her mother about her treatment at Respondents' Stars-Beaverton location. She indicated it took a long time to tell her about it.'

"Analysis and Ruling:

"Respondents request an order for the production of documents. However, this is not a request for documents, and the Agency is already required to produce information in response to Request for Production No. 37-40 regarding medical treatment. Accordingly, no further response to this interrogatory is required.

"Discovery Requested and Objection:

'Request for Production No. 17: All documents and electronically stored information that describe, refer, relate to, substantiate or evidence any and all economic damages for which the Agency alleges any of Respondents is responsible.'

'Response: The Agency has provided all information within its possession and control, and not subject to privilege or work product protection, that relates to any damages sought by the Agency. (Ex. B at 40).'

and

'REQUEST FOR PRODUCTION NO. 18: All documents and electronically stored information that describe, refer, relate to, substantiate or evidence any and all non-economic damages for which the Agency alleges Stars is responsible.'

'Response: The Agency has provided all information currently within its possession, and not subject to privilege or work product protection, that relates to any damages sought by the Agency. Any further information will be provided as soon as possible, once it's received. (Id.)'

and

'REQUEST FOR PRODUCTION NO. 24: To the extent not already produced in response to the preceding requests, all documents and electronically stored information that concern, support or substantiate, or relate to any alleged loss or damage allegedly sustained as a result of the matters set forth in the Complaint.'

'Response: The Agency has provided all materials responsive to this request, and not subject to privilege or work product protection, as part of the discovery previously provided to Respondents. (Ex. B at 42).'

"Analysis and Ruling:

"Since the Agency is not seeking economic damages from Respondents, it need not respond further to Request for Production No. 17.

"With regard to Request for Production No. 18, it is not clear why there has been a delay in the Agency obtaining the requested documents from Aggrieved Person #2. However, given the rapidly approaching hearing date, this information must be provided without further delay.

"With respect to Request for Production No. 24, the Agency indicates it has produced responsive documents within its possession and it is unclear how this request differs from Request for Production No. 18. Since the Agency must produce additional information in response to Request for Production No. 18, no further response to this request is required.

"Discovery Requested and Objection:

'Request for Production No. 21: All medical and counseling records for the Aggrieved Persons from 2000 to the present from any institution, physician, physician's assistant, nurse, chiropractor, psychiatrist, psychologist, health care professional, alternative or religious health practitioner, mental health professional, employee assistance program or in-home nursing service by whom the Aggrieved Persons have been examined or treated, or with whom the Aggrieved Persons or someone on their behalf consulted. (Respondents make this request to the extent that

the documents are in their possession or of any other person cooperating with the Agency or acting or purporting to act on the Agency's behalf. To the extent that these documents are not in the Agency's immediate possession or control or in the immediate possession or control of another state body but rather in the possession of health care providers, the provision of a signed authorization to obtain medical or counseling records and the identity of the health care providers shall be treated as compliance with this request. If a signed authorization is provided please identify any providers of care for physical or mental health by name of institution, address and telephone number, patient number, and dates of employment.)'

'Response: The Agency objects to this request as overbroad. The Agency will provide the relevant medical records within its possession.'

"Analysis and Ruling:

"The Agency objects to overbreadth, in particular because the request seeks records dating back to the year 2000 when the Aggrieved Persons would have been just one year old. For purposes of this case and due to the ages of the Aggrieved Persons, the forum finds that Respondents are entitled to responses within the time period of one year prior to the events in the Formal Charges up until present day.

"Discovery Requested and Objection:

'INTERROGATORY NO. 92: With respect to Complainant's denial of Requested Admission No. 22 ("that Aggrieved Person #1 has not sustained any economic damages"), describe the factual basis of this denial and identify the nature of economic damages incurred.'

'Response: The Agency's Formal Charges do not seek economic damages on behalf of Aggrieved Person #1, nor does the Agency intend to ask for economic damages on behalf of Aggrieved Person #1.'

"Analysis and Ruling:

"The Agency has confirmed that it is not seeking economic damages on behalf of either of the Aggrieved Persons and, thus, need not respond further to this interrogatory.

"Discovery Requested and Objection:

'Request for Production No. 13: All calendars, diaries, journals, e-mail correspondence, or any personal records or notes that the Aggrieved Persons or any other witnesses created or maintained, including but not limited to any electronically stored information, at any time from 2000 to the present.

‘Response: The Agency objects to this response as overbroad.’

“Analysis and Ruling:

“The Agency is correct that this request is overbroad. Respondents request that the forum limit the time frame from 2010 to the present, and the scope to include anything related to Respondents, to the mental or emotional [state] of the Aggrieved Persons, or to other sources of emotional distress.

“Responsive records regarding Respondents and emotional distress are relevant, but any other responsive material does not meet the forum’s relevancy standard.

“With respect to time frame, for purposes of this case and due to the ages of the Aggrieved Persons, the forum finds that Respondents are entitled to responses within the time period of one year prior to the events in the Formal Charges up until present day.

“Discovery Regarding Issues of Due Process

“Respondents issued several discovery requests seeking communications between various BOLI employees. Respondents assert that these requests are related to the issues of due process and decision-maker bias. Those include Request for Production Nos. 5-8, 32-35, and 41, and Interrogatory Nos. 73-76, and 109. The interrogatories are extremely broadly worded and are not focused on information that is ‘reasonably likely to produce information that is generally relevant to the case.’ Given that the forum has previously ruled that Respondents have not sustained their burden in showing decision-maker bias, it is unclear how any of this information relates to the case. Accordingly, no further responses to these requests for production and interrogatories are required.

“Allegations of Inconsistent Responses

“Finally, Respondents ask the Agency to ‘correct inconsistencies’ in some of the discovery responses. The Agency contends that perceived inconsistencies can be created if the Agency ‘view[s] evidence one way’ and an Aggrieved Person views it differently. Respondents’ argument appears to be more of an attack on the credibility of witnesses, rather than insufficient answers to discovery requests. Respondents will have the opportunity to point out any inconsistencies during the hearing. The motion to ‘correct inconsistencies’ is DENIED.

“SUMMARY OF RULINGS REQUIRING ACTION FROM THE AGENCY

“The Agency is directed to do the following by September 15, 2016:

Interrogatories

- Answer Interrogatory Nos. 37-40, 44, 59, 60, 77, 78, 79, 82, 84, 85, 86, 87, 89, 90, 91, 94, 95, 102, 103, 105, 106, 107, 121, 129, and 138.
- Supplement the answer to Interrogatory No. 24 to answer whether a Freehoo/Beaverton manager expressed a 'expressed a desire to have sex with Aggrieved Person #2.'
- In response to Interrogatory No. 43, if Aggrieved Person #1 has copies of photo identifications used from 2012 to the present time within her possession, custody or control, copies should be produced.
- Amend the response to Interrogatory No. 110 to either (1) identify more specific Bates Nos. within 005407-016998 or, alternatively, (2) provide a written explanation as to why this large grouping of documents (005407-016998) demonstrates or tends to support its denial that, 'with regard to the alleged employment of Aggrieved Person #1, Stars Cabaret and Steak House did not follow its regular hiring process for exotic dancers.'
- Amend the answers to Interrogatories 113 and 115 to answer whether 'any person who the Agency contends was an owner, manager, representative or agent' of Freehoo/Beaverton knew of Toth's actions.
- Amend the response to Interrogatory No. 117 to indicate whether Aggrieved Person #1 made tips at Freehoo/Beaverton that she shared with other individuals at the club, such as DJs and security guards.
- Amend the answers to Interrogatory No. 61, 118 and 127 to include the additional detail contained in the Agency's response to the motion to compel, signed under oath in accordance with OAR 839-050-0200.
- Amend the answer to Interrogatory No. 128 to include the additional detail contained in the Agency's response to the motion to compel, and indicate which clubs it contends Respondents Kaiser, Mitchell and Struhar had 'particular control over.'
- Amend the answer to Interrogatory No. 65 to indicate what actions, if any, Aggrieved Person #2 did to conceal the fact that she was underage, but the Agency need not respond further.
- Amend the answer to Interrogatory No. 66 to indicate whether any sexual acts occurred on the premises of Freehoo/Stars during the days Aggrieved Person #2 allegedly worked at Freehoo/Stars.

Requests for Production

- The Agency must provide documents responsive to Request for Production No. 13, but may limit its response to documents referencing Respondents and/or emotional distress within the time period of one year prior to the events in the Formal Charges up until present day.
- The Agency must provide documents responsive to Request for Production Nos. 16, 18 and 19.
- The Agency is directed to respond to Request for Production No. 20 by obtaining responsive information from the Aggrieved Persons with any social media postings describing other causes of emotional distress from 2012 to the present time.
- The Agency must provide documents responsive to Request for Production No. 21, but may limit its response to records within the time period of one year prior to the events in the Formal Charges up until present day.”

(Exs. X66, X78, X85)

32) After receiving an email from the parties indicating a joint agreement to revise the case schedule, the following deadlines were reset in an interim order dated September 8, 2016:

- The deadline for the Agency and Respondents to produce responsive information/documents to one another in response to rulings made regarding the Agency’s and Respondents’ motions to compel was moved to September 15, 2016.
- The deadline for filing dispositive motions was moved to September 22, 2016.
- The deadline for filing responses to dispositive motions was moved to October 13, 2016.

(Exs. X84, X86)

33) On August 8, 2016, Respondents filed Motions to Strike, to Make More Definite and Certain, and Motions to Dismiss. The Agency filed a response to the motion on August 22, 2016. An interim order was issued on September 14, 2016, which stated, in pertinent part:

“The majority of Respondents’ motions assert that the Formal Charges lack sufficient specificity to provide Respondents with a more detailed notice to prepare its defense. Adequate notice of an agency action must include a ‘short and plain statement of the matters asserted or charged.’ ORS 183.415(3)(d); see *also* OAR 839-050-0060(1)(b) (a charging document must contain a ‘short

and concise statement of the matters that constitute the violation'). Formal Charges alleging a civil rights violation must also 'specify the allegations of the complaint to which the respondent will be required to make response.' ORS 659A.845(1).

"A violation can be found based on evidence 'reasonably related' to the allegations in the Formal Charges if the evidence either corroborates the Formal Charges or is 'included as a fact underlying a specific charge.' *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 120 (2015), *appeal pending*.

"As indicated below, the current motions are not the appropriate procedure for addressing most of the alleged deficiencies that Respondents find with the Formal Charges. Instead, many of the motions (1) raise questions that could be answered through the discovery process or (2) prematurely raise concerns that violations will be found against Respondents based on alleged inadequate notice in the Formal Charges.

"A. Motion to Strike and/or Delete Other Corporate Entities from the Case Caption/Alternative Motion to Make More Definite and Certain (Respondents' 'Motion One')"

"1. Motion to Strike"

Respondents move to strike the 'AKA entities' from the case caption. The caption in this case lists only one corporate Respondent: Freehoo, Inc. dba Stars Cabaret & Steak House ('Freehoo'). Following the identification of Freehoo as a party, numerous entities are listed, all preceded by the acronym 'aka.' Respondents assert that the 'AKA entities' should be removed from the caption since they are not named as parties. In response, the Agency argues that the Formal Charges 'very clearly identify Freehoo, Inc. as the only corporate entity respondent,' and that the other entities are ones 'through which Freehoo, Inc. conducts its business.'

"The forum has previously granted motions to strike when a pleading contains allegations that are irrelevant or not at issue before the forum. See, e.g. *Mountain Forestry, Inc.*, 29 BOLI 10, 24 (2007), *aff'd without opinion*, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009). The Agency indicates it will be attempting to argue that the named corporate Respondent, Freehoo, 'conducted business as the' other corporate entities. At the pleading stage of the case -- which essentially requires adequate notice of what statutes or rules a Respondent is accused of violating -- the forum is not convinced that the 'AKA entities' are irrelevant or not at issue before the forum. Accordingly, Respondents' motion is DENIED.

“2. Alternative Motion to Make More Definite and Certain

In the alternative, Respondents move to require the Agency to amend the Formal Charges to ‘state with specificity how the AKA entities are responsible for unlawful employment practices and, if they can do so properly given BOLI’s jurisdictional requirements, to name the appropriate entities as parties.’ If the ‘AKA entities’ were parties, then the Agency would be required to meet the pleading standard set forth in ORS 183.415(3)(d) and ORS 659A.845(1) as to those entities. However, since the Agency has confirmed that the Freehoo is the only corporate Respondent, it need not state how other non-party entities are ‘responsible’ for any unlawful conduct. Therefore, this motion is also DENIED.

“B. Motions to Make More Definite and Certain Allegations Against the Individual Respondents (Respondents’ ‘Motion Two’)

“Respondents request that the Agency specify what statute or administrative rule each Respondent is alleged to have violated, and to identify the alleged acts by each Respondent that the Agency believes to constitute the violations.

“OAR 839-050-0060(1) requires that a charging document issued by the Agency contain:

‘a) A reference to the particular statutes or administrative rules involved in the violation;

‘(b) A short and concise statement of the matters that constitute the violation; and

‘(c) A statement of the remedies sought and, when appropriate, the penalty imposed.’

“The Formal Charges adequately meet the due process requirements of OAR 839-050-0060(1)(a), and motions to make more definite and certain are not the correct procedural tool for obtaining the information sought by Respondents. *See, e.g. Blachana, LLC*, 32 BOLI 220, 223 (2013), *aff’d Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806 (2015), 359 P3d 574 (2015) (discovery was the appropriate procedure for ascertaining additional information needed to defend the case); *see also Oregon Department of Fish and Wildlife*, 16 BOLI 263, 264 (1998). Therefore, this motion is DENIED.

“C. Motion to Strike Paragraph 16/Alternative Motion to Make More Definite and Certain (Respondents’ ‘Motion Three’)

“Respondents argue that allegations in paragraph 16 of the Formal Charges ‘which have no apparent connection to either Aggrieved Person or the underlying Amended Complaint’ should be stricken or, alternatively, the forum

should require the Agency to make those allegations more definite and certain. Paragraph 16 states as follows:

‘During the course of the Agency’s investigation, multiple witnesses described the systematic practice of sexual harassment by Respondents in their workplace, including but not limited to the following:

“a. Witnesses stated that dancers engaged in sex acts both inside and outside of the club. These acts were sometime engaged in as part of an individual private dance for money; or occurred after a dancer was ‘bought off the floor,’ a practice which involved a customer paying the club a specific amount of money to be permitted to take the dance out of the stage rotation, or to have a waitress go off the clock. Witnesses reported that dancers who were ‘bought off the floor’ were sometimes taken off-site to engage in sexual activities with the purchasing customer.

“b. Steven Toth stated, under oath, that while he was employed as a manager for Respondents, he arranged for dancers to engage in prostitution with customers. Steven Toth stated Respondent Todd Mitchell was present during one of these incidents.

“c. Witnesses described dancers being groped by managers and also engaging in sex acts with managers in order to secure better shifts or other work benefits. Steven Toth also reported that Respondent Jeff Struhar engaged in sex acts with employee-dancers both at the club and off site.’

‘Respondents specifically take issue with the reference to a “systematic practice of sexual harassment by Respondents in the workplace.” The Agency argues that the allegations are reasonably related to the commissioner’s complaint and, also, that the facts in Paragraph 16 support the remedies sought in the Formal Charges. Based on the Agency’s explanation, the forum is not convinced that the facts in Paragraph 16 are irrelevant. Accordingly, the motions to strike Paragraph 16 and/or make more definite and certain are DENIED.

“D. Motion to Require the Agency to Make Paragraphs 22 and 23 More Definite and Certain (Respondents’ ‘Motion Four’)

“Respondents request that the forum require the Agency to clarify the means or manner by which Respondents allegedly discriminated against the Aggrieved Persons, as alleged in Paragraphs 22 and 23 of the Formal Charges. Respondents assert that they are ‘entitled to know the form that the alleged discrimination took, and [each Respondent’s] alleged role in it * * *.’ Paragraphs 22 and 23 state as follows:

‘22. On, about or between September 2012 to December 2012, Respondents, because of Aggrieved Person #1’s sex, discriminated

against her in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030.

'23. On, about or between August 14, 2014 to September 18, 2014, Respondents, because of Aggrieved Person #2's sex, discriminated against her in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030.'

"Although the Agency did not specifically address the sufficiency of the allegations in Paragraphs 22 and 23 in its response, the Agency's response generally argues that the Formal Charges comply with the Oregon's Administrative Procedures Act and BOLI's Contested Case Rules. The Agency contends that Respondents request 'additional information beyond the basic requirements' and 'offer no actual legal argument to support their suggested new standard of pleading.' Th[is] is similar to Respondents' 'Motion Two.' The Formal Charges adequately meet the due process requirements of OAR 839-050-0060(1)(a), and motions to make more definite and certain are not the correct procedural tool for obtaining the information sought by Respondents. Accordingly, this motion is also DENIED."

(Exs. X55, X77, X87)

34) Based on an email request received from the parties indicating a joint agreement to revise the case schedule and a prehearing telephone conference held on September 15, 2016, the following deadlines were revised in an interim order dated September 16, 2016:

- The deadline for the Agency and Respondents to produce responsive information/documents to one another in response to rulings made regarding the Agency's and Respondents' motions to compel was changed to September 16, 2016. Medical records of Aggrieved Person #2 that were not available on that date were required to be produced the following week after they are received by the Agency and the Agency has the opportunity to make redactions in accordance with the time periods in the interim order of September 8, 2016.
- The deadline for filing dispositive motions was moved to September 23, 2016.
- The deadline for filing responses to dispositive motions was moved to October 14, 2016.

(Ex. X88)

35) On August 8, 2016, Respondents filed a Motion to Amend Answer and Defenses to Formal Charges and Notice of Hearing. The Agency filed a response to

the motion on August 19, 2016. The ALJ issued an interim order ruling on the motion on September 19, 2016, which stated in pertinent part:

“For good cause shown to the administrative law judge, a party may amend its answer at any time before the hearing commences.’ OAR 839-050-0140(3). All of the proposed amendments concern affirmative defenses. Respondents seek to amend two existing defenses and insert two new affirmative defenses. The forum recently summarized its precedent on the issue of what is or is not an appropriate affirmative defense as follows:

‘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.’

In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 n. 33 (2015), *appeal pending*. The forum has also rejected affirmative defenses that raise matters not at issue before the forum or have no basis in fact. See, e.g. *Mountain Forestry, Inc.*, 29 BOLI 10, 23-24 (2007), *aff’d without opinion*, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

“ANALYSIS OF PROPOSED AMENDMENTS

“A. Fourteenth Amendment Procedural Due Process

“Respondents seek to add language to paragraph 13 of Section VIII.A of their Answer as follows:³⁸

‘The convoluted statutory and regulatory scheme that governs proceedings stemming from Commissioner’s complaints, ~~and the Commissioner’s ability to enter a final order in this proceeding, the lack of impartiality on the part of the ultimate decision maker(s) including the Commissioner and/or the Deputy Commissioner, the appearance of the Contested Case Coordinator as a witness in this matter, and the~~

³⁸ Throughout this interim order, the text of Respondents’ proposed additions will be underlined and proposed deletions will be crossed out.

associated ex parte communications deprive Respondents of their Fourteenth Amendment procedural due process rights.'

Respondents raised these issues in two separate motions before the forum. Their arguments were rejected because Respondents lacked evidence to establish that the decision maker in this case, the Deputy Commissioner, was personally biased against Respondents. See Interim Orders dated 5/31/2016 and 8/25/2016. Since the requested amendments 'ha[ve] no basis in fact,' the motion to insert this language is DENIED. Mountain Forestry, 29 BOLI at 23.

"B. Equitable Estoppel

"Respondents request that they be permitted to add the following affirmative defense to section VII. C of their Answer:

'17. Aggrieved Person #2, knowing that she was underage, falsely represented that she was 21 years old with the intention that Stars would permit her to dance at the club. Respondents had no knowledge that Aggrieved Person #2 was not the age that she represented herself to be. Stars acted in reliance on Aggrieved Person #2's false representation, to Respondents' detriment. Any claims related to damages allegedly suffered by Aggrieved Person # 2 are barred due to the principles of equitable estoppel.'

The forum recently described the doctrine of equitable estoppel as follows:

'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).'

Sweetcakes, 34 BOLI at 171 (emphasis in original). Respondents' proposed defense does not establish the elements of equitable estoppel for several reasons.

"First, the doctrine of equitable estoppel does not fit the procedural posture of this case which is a state agency action brought on behalf of a complainant, the Commissioner. There is no allegation that the Agency made a

misrepresentation to Respondents. Accordingly, the allegations do not support the use of equitable estoppel against the Agency.

“Second, Respondents have not alleged that their reliance on a misrepresentation was ‘reasonable,’ which is a requirement for asserting such a defense. *Sweetcakes*, 34 BOLI at 171, *citing Dept. of Transportation*, 321 Or at 126.

“Finally, the facts alleged in this proposed defense more appropriately appear to be a denial of the allegations in Paragraph 20 of the Formal Charges, which alleges that Respondents ‘fail[ed] to adequately vet forms of identification, and * * * knew or should have known that minors had been or eventually would be employed in Respondents’ establishments and subjected to sexual harassment in the workplace.’ A statement which denies an element of the Agency’s case is viewed as a denial, rather than an affirmative defense. *Sweetcakes*, 34 BOLI at 161.

“Therefore, the request to add equitable estoppel as an affirmative defense is DENIED.

“C. Constitutional Right to a Jury Trial”

“Respondents also seek to add the following affirmative defense:

‘17. Forcing Respondents to defend against the Formal Charges in this forum violates Respondents’ right to a jury trial pursuant to Article I, § 17 of the Oregon Constitution.’

“This argument was previously raised by Respondents and addressed by the forum. For the reasons set forth in detail in the interim order of August 25, 2016, there is no constitutional entitlement to a jury trial as to the claims under ORS chapter 659A alleged in the Formal Charges. Accordingly, the request to add this defense is also DENIED.

“* * * *”

(Exs. X56, X72, X91)

36) On September 22, 2016, Respondents filed an Amended Answer and Defenses to Formal Charges and Notice of Hearing. (Ex. X93)

37) On October 4, 2016, a prehearing telephone conference was held at the request of Respondents to discuss a dispute between the parties regarding redactions made to medical records produced by the Agency to Respondents in response to the forum’s interim order of September 8, 2016. After the Agency and Respondents were provided with the opportunity to address the issues, the Agency was ordered to submit copies of the medical records in dispute (both redacted and unredacted) to the ALJ for

an *in camera* review determine whether the redactions were consistent with the interim order of September 8, 2016. (Ex. X103)

38) Respondents filed Respondents' Motion to Amend Protective Order to Include Identifying Information for Non-Party Witnesses Requesting Confidentiality of Their Identities on September 22, 2016. Respondents requested that the Interim Protective Order of April 27, 2016, be amended to include the following:

"1. PII [Personal Identifying Information] of Respondents Colburn, Heinzman-Myers, Kaiser, Mitchell, and Struhar as it relates to their responses to the Agency's Interrogatory No. 6; and

"2. PII of any witness who testifies or submits declarations about private or personal matters as described above, including employment at the Club that the witness seeks to keep private."

The Agency filed a response to the motion on September 30, 2016, asserting that the information that Respondents seek to protect is too broad and "would have the effect of essentially protecting the entire hearing from public disclosure." The Agency further argued that "there is no legal basis for protecting all witnesses to the degree requested by Respondents." On October 13, 2016, the ALJ issued an interim order which stated, in pertinent part:

"Respondents seek to add two categories of information to the Interim Protective Order.

"First, Respondents seek to protect the responses of the individual Respondents to the Agency's Interrogatory No. 6. Interrogatory No. 6 requested the following information from Respondents Colburn, Heinzman-Myers, Kaiser, Mitchell, and Struhar:

'Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.'

"The individual Respondents were ordered to 'answer whether [he or she] had a romantic or sexual relationship with an employee or independent contractor at Freehoo in the years 2012-2014.' The forum has previously protected private or personal information of the employees of a respondent employer, such as drug screen reports and medical records. See *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 259 (2005); *In the Matter of Sharon Kaye Price*, 21 BOLI 78, 80-81 (2000). The forum has also previously issued a protective order preventing the public disclosure of the legal names of aggrieved persons who requested that their names be kept private. See *Blachana, LLC*, 32 BOLI 220, 224 (2013), *aff'd Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806 (2015), ___ P3d ___ (2015). Accordingly, because Interrogatory No. 6 requests private and intimate information about individuals who are not

parties to this case, it would be appropriate to limit the disclosure of the names of the individuals who are named in Respondents' answers to Interrogatory No. 6.

"Second, Respondents seek to protect the disclosure of the PII 'of any witness who testifies or submits declarations about private or personal matters as described above, including employment at the Club that the witness seeks to keep private.' The Agency asserts that this request is too broad. The forum agrees that the request extends beyond any protective order that appears to have ever been issued by the forum and, indeed, may not be consistent with Oregon's Public Records Law. However, as indicated above, the forum has previously limited the disclosure of private or personal information about individuals who were employed by a respondent employer. Accordingly, if a party submits a declaration signed by a current or former employee who is not a Respondent in this case, that declaration must be filed under seal in accordance with the terms of the Interim Protective Order. This directive applies to all prehearing filings. The treatment of the names of witnesses who testify at hearing will be discussed with the parties at a later date in advance of the hearing.

"Accordingly, Respondents' Motion to Amend Protective Order is hereby GRANTED IN PART AND DENIED IN PART as explained above."

"SUMMARY OF RULING

"The interim order of April 27, 2016, is hereby amended to include the following:

PII also includes:

- (1) The names of individuals identified in Respondents' responses to the Agency's Interrogatory No. 6, and
- (2) The names of any non-party current or former employees of a Stars' establishment who have signed a declaration filed with the forum.

When the participants file documents with the PII described above, the original document should be submitted for filing under seal. Additionally, a copy with redactions removing the names of individuals described above should also be filed with the Contested Case Coordinator."

In response to a question sent by email from Respondents, the ALJ clarified that the interim order includes individuals that are considered to be either employees or independent contractors. (Exs. X94, X102, X107, X109)

39) Respondents filed motions for summary judgment on behalf of all Respondents on September 23, 2016. The Agency filed a response to the motions on October 13, 2016. (Exs. X99, X100, X108)

40) Amended Formal Charges were filed on October 19, 2016, removing references to “AKA entities” in the case caption and identifying Frehoo as the only corporate Respondent. (Ex. X112)

41) On October 11, 2016, Respondents filed a document with the following motions:

1. Motion to postpone the hearing scheduled for November 8, 2016;
2. Motion to postpone the ruling on Respondents’ motions for summary judgment;
3. Motion to reopen and extend the period for informal discovery so that Respondents “have the opportunity to discover information necessary to assess the truthfulness and reliability of the remaining BOLI investigator interview accounts”; and
4. Motion to permit Respondents to file a reply brief in response to the Agency’s response to Respondents’ motion for summary judgment.

Respondents asserted that the motions were based on their “discovery of falsified and misleading information in [BOLI] interview notes [which] occurred almost simultaneously with the discovery that the Agency inappropriately redacted plainly discoverable information from the Aggrieved Person’s medical records.” Respondents also asked that the forum “conduct a fact-finding process to assess the validity of the record in this case to determine whether it contains additional falsified or misleading materials.” Finally, Respondents requested expedited consideration of their motions, a prehearing telephone conference and a shortening of the Agency’s time for responding to the motion. The Agency filed a response to the motion on October 18, 2016, requesting that the forum deny Respondents’ motions and order Respondents to produce individuals who have signed declarations at hearing so that they can be cross examined pursuant to OAR 839-050-0260(9). Respondents also filed a “supplemental” motion on October 18, 2016, with an additional witness declaration. On October 19, 2016, the ALJ issued an interim order ruling on Respondents’ motions which stated, in pertinent part:

“First, Respondents contend that they recently discovered that some of the witness interview statements from BOLI investigators ‘contain false and/or misleading statements.’ Respondents refer to notes from interviews of witnesses named Megan * * *, Hayli * * * and Laurel * * *, and compare information in the interview notes to declarations from those witnesses which appear to contradict some of the statements contained in the interview notes. Respondents assert that the Agency should not rely on the investigation notes from those witness interviews when responding to Respondents’ summary judgment motion because those notes are ‘unreliable, misleading, and even falsified.’ In reviewing the Agency’s response to Respondents’ motion for summary judgment, it does not appear that the Agency has submitted the notes from the interviews of [Megan], [Hayli] and [Laurel] with its summary judgment response. Accordingly, it does

not appear that any action needs to be taken prior to ruling on Respondents' motion for summary judgment.

"Secondly, the fact that BOLI interview notes differ from statements in declarations made by witnesses can be pointed out and discussed at the hearing in this matter. There is no prehearing procedure to 'conduct a fact-finding process to assess the validity of the record in this case to determine whether it contains additional falsified or misleading materials.' Respondents' counsel will have the opportunity to cross-examine all of the Agency's witnesses and can point out any discrepancies in documents.

"Finally, Respondents have not provided a reason why the motion was filed at this date, instead of at an earlier time prior to the deadline. There is nothing to suggest that the alleged 'false and/or misleading statements' were not contained in documents produced to Respondents at the beginning of this case. Respondents' motions do not explain why there is an urgency at this late date to conduct additional discovery that could have been conducted earlier in the case.³⁹

"For all of those reasons, Respondents' request for an expedited ruling on their motions is DENIED. However, as indicated above, Respondents may address issues regarding the reliability and accuracy of documents produced by the Agency at the hearing in this matter.

"AGENCY'S REQUEST TO CROSS EXAMINE DECLARANTS

"Respondents have submitted three declarations with its motions and supplemental motions. In its response to the motions, the Agency requested the opportunity to cross examine the witnesses at hearing, pursuant to OAR 839-050-0260(9). The Agency's request is GRANTED. Respondents' declarations will not be received into evidence unless the witnesses appear at hearing so that they can be subject to cross examination."

(Exs. X106, X110, X111, X113)

42) On October 27, 2016, Respondents filed a motion to extend the time for filing their case summary materials by one day, until October 26, 2016. In response to an email from the ALJ requesting copies of documents which supported the representations in Respondents' motion, supplemental materials were submitted by Respondents on October 28, 2016. The Agency filed a response opposing the motion

³⁹ In support of their motion, Respondents reference redactions made to medical records that Respondents contend are not consistent with the forum's discovery order. However, it is unclear how the redactions relate to information in the notes of BOLI's investigators, which are the subject matter of these motions. Additionally, Respondents' request to engage in discovery as to who made redactions to medical records does not appear to be reasonably likely to produce information that is generally relevant to the case as required by OAR 839-050-0200(7).

on October 28, 2016. The ALJ issued an interim order ruling on Respondents' motion on November 1, 2016, which stated, in pertinent part:

"The administrative law judge may disregard any document that is filed with the Forum beyond the established number of days for filing.' OAR 839-050-0050(1). It is undisputed that Respondents' case summary and exhibits were filed one day late on October 26, 2016, the date of the postmark from the U.S. Postal Service. OAR 839-050-0040(1). OAR 839-050-0050(3) provides that 'the administrative law judge may grant [an] extension of time only in situations where the requesting participant shows good cause for the need for more time or where no other participant opposes the request.' Under OAR 839-050-0020(16), '[g]ood 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.'

"This forum has recently summarized the good cause standard as follows:

'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 which 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 Or App 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).'

In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 203 (2015), *appeal pending*. The forum has only found 'good cause' to exist on rare occasions, which generally include a showing that a party took reasonable measures to meet a deadline, but an unforeseen circumstance arose. For example, the forum found 'good cause' to exist when a respondent relied on their attorney to file an answer and an 'electronic glitch' in the attorney's new computer docketing system failed to flag the due date. *In the Matter of Glenn Walters Nursery, Inc.*, 11 BOLI 32, 34-35 (1992).

"After reviewing the sequence of events described in great detail by Respondents, the forum concludes that Respondents took reasonable steps to meet the case summary deadline, but were faced with unexpected delays caused by third party printing vendors. Respondents hired attorneys to defend this case and prepare its case summary filing. Respondents' counsel assigned

[a paralegal] to arrange for the printing of the exhibits.⁴⁰ When [the paralegal] learned of a printing delay from the first vendor, she immediately contacted another vendor and engaged the help of others in the office to assist with copying and driving to multiple post offices.⁴¹ Unlike past cases before the forum, Respondents' counsel and counsel's staff not only made initial efforts to meet the filing deadline, but then proceeded to take multiple additional steps late into the night to attempt to file the case summary on time. Therefore, Respondents have demonstrated 'good cause' and their motion for a one-day extension is GRANTED."

(Exs. X116-X124, X128)

43) The Agency filed its case summary on October 25, 2016, and filed an addendum to the case summary on November 4, 2016. (Exs. X114, X145)

44) Respondents' case summary was filed on October 26, 2016. Addendums to the case summary were filed on November 1, 2016, November 3, 2016, and November 7, 2016. (Exs. X116, X127, X139, X155)

45) On November 1, 2016, Respondents sent an email to the ALJ and the parties with a copy of Respondents' Motion to Exclude Agency Case Summary, which was subsequently filed with the forum. Respondents' moved to exclude the Agency's case summary filing, asserting that they were prejudiced because the Agency's case summary documents were sent by "media mail" and did not arrive at the office of Respondents' counsel until October 31, 2016, six days after the case summary deadline. On November 2, 2016, the ALJ entered an interim order requiring the Agency to file and serve its response to Respondents' motion no later than noon, November 3, 2016, because Respondents' motion required an expedited ruling prior to the hearing scheduled to begin on November 8, 2016. The ALJ further required the parties to file and serve all documents by hand delivery. On November 3, 2016, the Agency filed a response to Respondents' motion. The ALJ issued an interim order on November 4, 2016, which denied Respondents' motion, but provided that Respondents may raise objections regarding individual exhibits or witnesses if they believed they were prejudiced by the delay caused by the "media mail" postage on the service copy of the Agency's case summary. (Exs. X114, X130, X131, X141, X146-X148, X150)

46) Both the Agency and Respondents filed motions to cross examine authors of declarations and individuals who were interviewed by investigators. The ALJ denied the motions in an interim order issued on November 4, 2016, but noted that the forum

⁴⁰ The Agency asserts that Respondents should not have waited until the date of filing to contact a printing vendor. However, that does not appear unreasonable in light of the fact that multiple vendors accepted the work after being informed of the deadline.

⁴¹ To be clear, the forum does not consider a misinterpretation of post office hours to support "good cause" for an extension. See *Green Thumb Landscape & Maintenance, Inc.*, 32 BOLI 185, 189 (2013) (finding no "good cause" when envelope was mailed to the wrong address with insufficient postage). Rather, the problems with third party printing vendors coupled with the totality of the efforts taken after learning of printing delays/errors support a finding of "good cause."

would likely give greater weight to the statements of individuals who testify at hearing and are subject to cross examination. (Exs. X115, X133, X138, X150)

47) On October 28, 2016, the Agency filed a motion in limine to exclude the testimony of a witness identified in Respondents' case summary, a family member who had allegedly abused AP2 in 2010. Respondents filed a response to the motion on November 2, 2016. The ALJ granted the Agency's motion in an interim order issued on November 4, 2016. (Exs. X119, X134, X150)

48) Respondents filed a motion to exclude the testimony of the Agency's expert for failing to comply with OAR 839-050-0260(1)(b). After Respondents filed their motion, the Agency indicated that it would file an addendum to its case summary with supplemental information about the expert. On November 4, 2016, the ALJ issued an interim order denying Respondents' motion as moot, but stated the Respondents could raise the issue again if the supplemental information provided by the Agency was insufficient under BOLI's contested case rules. (Exs. X132, X150)

49) On October 31, 2016, a prehearing telephone conference was held. The conference was originally scheduled to discuss a number of issues in preparation for the hearing set for November 8, 2016. Immediately prior to the hearing, Respondents' counsel sent an email to the ALJ and all of the parties which stated that Respondent Frehoo, Inc. "filed for protection under the US Bankruptcy Code in the District of Oregon at approximately 0900 today" and that "the automatic stay under 11 USC 362 is now in effect and precludes post-petition action against the debtor which could have been maintained prior to the filing." The Agency responded, stating: "The Oregon Department of Justice has indicated that the automatic stay does not apply to our proceeding and that we can move forward with our November 8th hearing. Given the different viewpoints on this issue, the Agency requests that Respondents be required to make a formal filing and the Agency be given the opportunity to respond."

The ALJ informed the parties by email that no action would be taken until a written document was filed with the forum. During the prehearing telephone conference, Respondents were informed that a formal written document should be filed with the forum. Following the conference, Respondents filed a Notice of Bankruptcy with the forum and the Agency filed a response to the Notice on November 2, 2016. On November 3, 2016, the Agency notified the ALJ that a hearing was scheduled in bankruptcy court on November 7, 2016, to address whether the BOLI proceeding was covered by the bankruptcy automatic stay provision.

On November 8, 2016, the bankruptcy court entered an order stating that the pending BOLI proceeding was "exempt from the operation of the automatic stay pursuant to 11 U.S.C. § 362(b)(4) as an exercise of the state's police power which satisfies the pecuniary purpose test." The bankruptcy court order further stated that the exemption did not allow for collection or enforcement, and that BOLI should not take any collection or enforcement action against Frehoo beyond filing a proof of claim in the bankruptcy court without further order of the bankruptcy court. (Exs. X125, X126, X129, X144, X157)

50) On November 2, 2016, Respondents filed an Emergency Motion for Set-Over due to the pending bankruptcy hearing. The Agency indicated by email that it did not oppose the motion. On November 4, 2016, the ALJ entered an interim order setting the case over for one day, and the hearing was scheduled to begin November 9, 2016. (Exs. X135, X142, X150, X154)

51) In an interim order issued on November 4, 2016, the parties were informed that the ALJ would be granting Respondents' motions for summary judgment to dismiss Respondents Pamela Colburn and Lisa Heinzman-Myers, and would be denying the remainder of the motions. The forum issued an interim order on November 8, 2016, ruling on Respondents' motions for summary judgment, which stated, in pertinent part:

"INTRODUCTION

"On March 31, 2016, the Agency issued Formal Charges against Respondents. Amended Formal Charges were filed on October 19, 2016, removing references to 'AKA entities' in the case caption. Respondent filed an answer to the Formal Charges on April 20, 2016, and filed an Amended Answer on September 22, 2016. The Amended Formal Charges allege that Respondents discriminated against both Aggrieved Persons in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030. ORS 659A.030(1)(b) states, in pertinent part, that it is an unlawful employment practice '[f]or an employer, because of an individual's * * * sex * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment.' The Amended Formal Charges also allege that all of the individual Respondents 'aided, abetted, incited, compelled and/or coerced acts forbidden under ORS chapter 659A, specifically the unlawful practices alleged here, and [are] individually liable for violations alleged herein as an aider and abettor pursuant to ORS 659A.030(1)(g).'

Respondents filed motions for summary judgment on behalf of all Respondents on September 23, 2016. The Agency filed a timely response to the motions on October 13, 2016.⁴²

"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:

⁴² The interim order of May 16, 2016, extended the deadline for responding to motions to 14 days.

‘ * * * 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 Amended Formal Charges; (2) Respondents' Amended Answer; (3) Respondents' argument made in support of its motions and the exhibits submitted with Respondents' motions, and (4) the Agency's argument opposing Respondents' motions, and the exhibits submitted with the Agency's response.

“DISCUSSION

“Respondents raised the follow[ing] motions for summary judgment:

1. Respondent Frehoo, Inc. dba Stars Cabaret & Steak House ('Frehoo') should be granted summary judgment as to Aggrieved Person #2's claim of sexual harassment because Frehoo did not know nor should it have known of her 'alleged touching by a patron, which she did not report.'
2. Respondent Frehoo should be granted summary judgment regarding Aggrieved Person #2's 'claim in so far as it is based on taking her clothes off or being looked at by a supervisor.'
3. Respondent Frehoo should be granted summary judgment as to claims concerning Aggrieved Person #1 because Frehoo was not her 'employer' under ORS 659A.001(4).
4. Respondent Frehoo should be granted summary judgment as to the agency's request for injunctive relief because the business is closed.
5. The forum should grant summary judgment to the extent that any of the claims or relief sought relate to corporate entities other than Frehoo.
6. The forum should dismiss the claims seeking damages for the Aggrieved Persons because they are not 'Complainants.'
7. All of the individual Respondents are entitled to summary judgment as to the charges of aiding and abetting.

“Following is a discussion and analysis of each of Respondents’ motions.

“A. Aggrieved Person #2’s Claim of Sexual Harassment Due to Alleged Touching by a Patron

“Respondents move for summary judgment as to the claims of Aggrieved Person #2 because ‘the harassment claim appears to be based on a few instances of alleged unwelcome touching by a customer, * * * which it is undisputed that [Aggrieved Person #2] failed to report.’ In response, the Agency argues that ‘asking a child to take off her clothes, for the entertainment of adult customers, whether it involves overt sex acts or “simply” the lewd exhibition of body parts’ meets the criteria for sexual harassment. The Agency further states that a child cannot consent to a sex act, citing ORS 163.315(1).

“‘Sexual harassment’ is defined as follows:

‘(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:

‘(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual’s sex and:

‘(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

‘(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

‘(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.’

OAR 839-005-0030. In this case, there is evidence that Aggrieved Person #2 had to submit to ‘conduct of a sexual nature when such conduct is directed toward an individual because of [her] sex’ when she performed nude dancing for the purpose of entertaining adults at Frehoo. Accordingly, the forum must determine whether that conduct was ‘unwelcome.’

“When the Agency argues that Aggrieved Person #2 was incapable of consenting to sexual acts under ORS 163.315(1),⁴³ the Agency is essentially arguing that the conduct was ‘unwelcome.’ Courts that have considered this

⁴³ Under Oregon law, a person under the age of 18 is “incapable of consenting to a sexual act.” ORS 163.315(1)(a). As well, it is illegal to use a person who is less than 18 years of age in a display of sexually explicit conduct. ORS 163.670(1); 163.665(1). The definition of “sexually explicit conduct” includes “actual or simulated * * * [l]ewd exhibit of sexual or other intimate parts.” ORS 163.665(3)(f). Oregon also prohibits exhibiting an obscene performance to a minor. ORS 167.075(1).

issue have held that ‘the age of consent in the state in which [an individual] is employed’ determines whether sexual conduct was ‘welcome.’ *EEOC v Finish Line, Inc*, 915 F Supp 2d 904, 917 (MD Tenn 2013), *quoting Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir 2006). These cases are consistent with an Oregon Court of Appeals opinion which held that ‘a person’s incapacity to consent under ORS 163.315(1) extends to civil cases.’ *Wilson v Tobiassen*, 97 Or App 527, 534, 777 P2d 1379, 1384 (1989), *rev den*, 308 Or 500 (1989). Accordingly, it is reasonable to extend the age of consent in ORS 163.315(1) to this administrative proceeding, which would render any sexual conduct involving Aggrieved Person #2 as ‘unwelcome.’ Therefore, Respondents have not demonstrated that, as a matter of law, Aggrieved Person #2 was not subjected to sexual harassment.

“Respondents also assert that Frehoo did not know, nor should it have known, of any sexual harassment of Aggrieved Person # 2. An employer can be held liable for harassment if the employer knew or should have known of the conduct and fails to take immediate and appropriate corrective action. *In the Matter of Murrayhill Thriftway, Inc.*, 20 BOLI 130, 153 (2000).⁴⁴ There is a disputed issue of fact in this case as to whether Respondents should have taken greater care in checking the identification presented by Aggrieved Person #2 to determine whether she was over the age of 18 and eligible to dance nude for entertainment purposes. Therefore, this motion is DENIED.

“B. Aggrieved Person #2’s Claim ‘Based on Taking Her Clothes Off or Being Looked at By a Supervisor’”

“Respondents assert that Aggrieved Person # 2 cannot base her sexual harassment claim on the fact that she took her clothes off or was watched by a supervisor while dancing nude because those things were an integral part of her work as a dancer. As previously stated, Aggrieved Person #2 was under the age of 18 when she danced nude at Frehoo in front of adults for entertainment purposes, and there is a disputed fact as to whether Respondents knew or should have known that she was underage. Therefore, Respondents have not demonstrated that they are entitled to summary judgment as a matter of law and this motion is also DENIED.

“C. * * * *⁴⁵”

“D. Agency’s Request for Injunctive Relief”

“In the Amended Formal Charges, the Agency seeks an injunction against ‘Respondents, their agents, employees and successors’ pursuant to ORS 659A.030(1)(b), OAR 839-005-0021 and OAR 839-005-0030. Respondents

⁴⁴ If the harassment is from a supervisor, there is a presumption that the employer should have known of the harassment, but there is no presumption if the harassment was from a non-employee. *Id.*

⁴⁵ This section related to claims involving AP1. All of those claims have since been resolved by the parties.

request summary judgment on behalf of Frehoo, its ‘agents,’ and ‘employees’ because Frehoo ceased operations on July 31, 2016. Respondents argue that because the purpose of an injunction is to prevent future harm, the need for injunctive relief as ‘set forth on page 20, paragraph 3 of the Formal Charges’ is moot due to the closure of the business. In response, the Agency produced evidence that there are indications that, as of September 28, 2016, the Frehoo location in Beaverton was still set up as a business and ‘could resume operations at that location with little or no delay.’⁴⁶ (Agency Ex. C, Lynch Decl., ¶ 7) More specifically, Lynch observed:

- Seating, privacy curtains, glassware and bottles of alcohol appeared ready for use.
- Sound equipment in the DJ booth was powered on and appeared ready for use.
- Pilot lights were burning on a gas range in the kitchen.
- In an office, a video monitoring system and a computer were powered on.

Id. As well, Frehoo is listed as an active business with the Corporation Division of Oregon’s Secretary of State. (Agency Ex. H)

“When recently faced with the question of nonmonetary relief after the closure of a respondent’s business, the Commissioner ruled as follows:

‘[T]he nonmonetary remedies sought by the Agency would be a futile exercise of the forum’s authority, given that *Respondent MBI is no longer doing business in Oregon and that there is no indication in the record that MBI has any intention of resuming business in Oregon in the future.*’

In the Matter of Maltby Biocontrol, Inc., 2014 BOLI 121, 157 (2014) (emphasis added). By contrast, in this case there is evidence on the record in the Lynch Declaration, as described above, which creates a question of fact as to whether there is ‘an intention [to] resum[e] business in Oregon in the future.’ Accordingly, Respondents’ Fifth Motion for Summary Judgment is DENIED.

“E. Claims Related to Corporate Entities Other Than Frehoo

“Respondents request that the forum ‘grant summary judgment to the extent that any of the claims or relief sought related to corporate entities other than Frehoo.’ This argument was based on the caption in the original Formal Charges which named Frehoo as the only corporate Respondent. The identification of Frehoo as a party was followed by the listing of numerous other

⁴⁶The Agency also made an argument based on ORS 659A.850(4) which is not cited on page 20, paragraph 3 of the Amended Formal Charges and, thus, was not considered when ruling on Respondents’ motion.

corporate entities, which were preceded by the acronym ‘aka.’ The Agency did not object to Respondents’ argument in its response and recently filed Amended Formal Charges which ‘remove[d] the “aka” entities.’ Accordingly, because the ‘AKA entities’ have been removed from the caption and there are no claims made against any corporate entities other than Frehoo, Respondents’ motion is DENIED AS MOOT.

“F. Damage Claims on Behalf of Aggrieved Persons who are not Complainants

“The Agency seeks damages for each Aggrieved Person in the amount of \$4,000,000 under ORS 659A.850. Respondents assert that the forum has no authority to award damages because the Aggrieved Persons are not complainants and ORS 659A.850(4)(b) refers to ‘paying award of actual damages suffered by the *complainant*.’ (Emphasis added). In response, the Agency points out that the language in ORS 659A.850(4)(b) referencing ‘damages suffered by the complainant’ is preceded by the phrase ‘including but not limited to * * *.’ The Agency also cites to past cases awarding damages to an aggrieved person and legislative history. See, e.g. *Blachana, LLC*, 32 BOLI 220 (2013), *aff’d Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806 (2015), 359 P3d 574 (2015), *opinion adh’d to as modified on recons sub nom. Blachana, LLC v. Oregon Bureau of Labor & Indus.*, 275 Or App 46 (2015).

“A BOLI Final Order ‘may require that the respondent:

‘(a) Perform an act or series of acts designated * * * that are reasonably calculated to:

‘(A) Carry out the purposes of [ORS chapter 659A];

‘(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 * * *’

ORS 659A.850(4) (emphasis added). The Oregon Supreme Court recently stated that the phrases ‘includes’ and ‘including but not limited to’ indicate that ‘the legislature likely intended a nonexclusive meaning.’ *Sather v. SAIF Corp*, 357 Or 122, 134, 347 P3d 326 (2015). In other words, the reference to ‘actual damages suffered by the complainant’ does not mean ‘that the specific examples constitute the universe of items to which the general term refers; rather, it means only that our interpretation of the general term includes consideration of those specific examples.’ *Schmidt v. Mt Angel Abbey*, 347 Or 389, 404, 223 P3d 399 (2009). Accordingly, the reference in ORS 659A.850(4)(b) to ‘damages suffered by complainant’ includes that specific example, but does not *exclude* an award of

damages to an aggrieved person. Thus, BOLI's interpretation is consistent with how the Supreme Court has interpreted similar phrases in *Sather* and *Schmidt*. Therefore, Respondents' motion to dismiss the claims requesting damages on behalf of the Aggrieved Persons is DENIED.

"G. Aiding and Abetting Allegations against the Individual Respondents

"ORS 659A.030(1)(g) provides that it is an unlawful employment practice '[f]or any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under this chapter or to attempt to do so.' 'Person' includes 'individuals.' ORS 659A.001(9)(a). '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.' *Maltby*, 33 BOLI at 151 (internal citations omitted). '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.' *Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 97 (2015). See also *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012). Aiding and abetting, in the context of an unlawful employment practice, means 'to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.' *Hey Beautiful*, 80 BOLI at 97.

"Respondents assert that aiding and abetting requires active participation in an unlawful act, and Respondents cannot be liable simply because of their ownership interests or positions in the organization. In response, the Agency asserts that the individual Respondents can be liable for '[t]heir complete indifference and inaction to monitor and remedy the situation.'

"1. Facts Regarding the Individual Respondents

"Following is a summary of the facts regarding each individual Respondent.⁴⁷

"Colburn and Heinzman-Myers

"Colburn and Heinzman-Myers own interests in corporations that own NPC Concepts ('NPC'). NPC holds a 100% ownership stake in Frehoo. Colburn and Heinzman-Myers both live in Colorado. Heinzman-Myers has not visited Oregon since 1976. These individuals are not involved in recordkeeping for

⁴⁷ For purposes of this summary judgment motion, the facts are presented in the light most favorable to the Agency, the nonmoving party. Accordingly, not all facts Respondents discussed in their motions are included.

Frehoo and have no knowledge of, or responsibility for, creating or enforcing policies. These individuals did not know of any conduct involving the Aggrieved Persons until after suspects were arrested. The Agency has admitted that it has no 'evidence or information in [its] possession or knowledge that demonstrates or tends to show that either' Colburn or Heinzman-Myers 'has ever played an active role in the management of [Frehoo] or in the development of any of its employment policies.' (Resp. Ex. 20, Interrogatory Response #32)

"Herkenrath

"Herkenrath began working for Frehoo in December 2010, and performed on-site management duties beginning in 2012. During the time Aggrieved Person #1 was allegedly at the club, Herkenrath worked part-time as a manager on the day shift, and also worked as a security person. He recalls seeing Aggrieved Person #1 with Toth on one occasion. Herkenrath has known Toth since Herkenrath was ten years old. Toth told Herkenrath about the initial job opportunity to work for Frehoo.

"Herkenrath was present when Aggrieved Person #2 applied for a position at Frehoo, but he was not the manager on duty.

"Kaiser

"Kaiser holds an ownership in Frehoo through his interest in RKG Holdings, Inc. During the events at issue in this case, Kaiser was responsible for overseeing the management of Stars Cabaret in Bend, Oregon, where he lives. He also generally oversees the financial, corporate and legal matters that affect for clubs in Oregon, including Frehoo. He was not generally involved in the day-to-day management of Frehoo. Kaiser never had any contact with the Aggrieved Persons.

"Mitchell

"Mitchell has an ownership interest in Frehoo through his interest in SHM Holdings, Inc. He is the corporate secretary of Frehoo. He was the corporate officer designated to oversee the management of Frehoo. In 2012, prior to the time that Aggrieved Person #1 was allegedly on Frehoo's premises, Frehoo hired an investigator to determine whether entertainers were engaging in prostitution, and to ensure the security was doing its job. At the time that Toth was arrested, Mitchell had never received any complaints that Toth sexually harassed anyone. The last communication Mitchell had with Toth was to send him a letter terminating his employment with Stars-Bridgeport, the location where Toth worked at the time of his arrest.

"Mitchell never had any contact with Aggrieved Person #2. During 2012 through 2014, Mitchell had a romantic/sexual relationship with a woman who worked as an entertainer at Frehoo.

“Struhar

“Struhar has an ownership interest in Frehoo through his interest in JMS Holdings, Inc., and is the corporate president of Frehoo. He has the ability to exercise management control at Frehoo, and has a romantic or sexual relationship with a Stars entertainer. Lynch Decl., p. 4.

“2. Analysis and Ruling

“The forum agrees with the Agency that sometimes the failure to take action can support a claim for aiding and abetting. See, e.g. *Alch v Superior Court*, 122 Cal App 4th 339, 389, 19 Cal Rptr 3d 29, 67 (2004) (under California law, talent agency could be liable for aiding and abetting an employer's age discrimination violation if talent agency gave ‘substantial assistance or encouragement’ to the employer); *Hurley v Atl City Police Dep’t*, 174 F3d 95, 126 (3d Cir 1999) (under New Jersey law, ‘inaction can form the basis of aiding and abetting liability if it rises to the level of providing substantial assistance or encouragement’); *Chapin v. Univ. of Mass.*, 977 F Supp 72, 78 (D.Mass.1997) (holding that the inaction of a supervisor who is aware of sexual harassment is aiding and abetting in violation of Massachusetts law).

“With respect to Respondents Herkenrath, Kaiser, Mitchell and Struhar, there is evidence that they had management control over Frehoo and may have failed to take action to prevent conduct at Frehoo which led to the events involving the Aggrieved Persons. However, there is no evidence to demonstrate that Colburn and Heinzman-Myers (who both reside in Colorado) had any involvement with Frehoo other than financial interests. Accordingly, Respondents’ motion to dismiss Colburn and Heinzman-Myers is GRANTED, and the motion as to the remaining individual Respondents is DENIED.”

(Exs. X150, X156) The ALJ’s ruling on Respondents’ motion for summary judgment is hereby CONFIRMED.

52) At the start of the hearing on November 9, 2016, 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. (Hearing Record)

53) To comply with the terms of the interim protective orders, throughout the hearing the aggrieved persons were referred to as AP1 and AP2 instead of their actual names. However, when AP1 and AP2 testified, their actual first names were used, but were not included in the transcript. With the exception of the named Respondents, Frehoo’s employees and alleged independent contractors were referred to by their first names. When the medical records of AP1 and AP2 were discussed, any hearing observers who had not certified that they had read and agreed to the terms of the interim protective orders were asked to leave the room. (Hearing Record)

54) On November 14, 2016, the parties submitted a Joint Stipulation of Exhibits identifying exhibits that all the parties agreed should be admitted into evidence. (Ex. X158)

55) During the hearing, the ALJ sustained Respondents' objections to the audio recording of the BOLI interview of Nathan Wheeler (Ex. A28) because it contained material that was irrelevant, immaterial, repetitious and unreliable. Additionally, because Wheeler did not testify in person, Respondents did not have an opportunity to cross examine the witness. (Hearing Record)

56) The Agency attempted to offer evidence of sexual harassment at the Stars Salem location through the testimony of Chris Lynch. Respondents objected to this evidence on the basis of relevancy. The ALJ permitted Lynch to testify as to this evidence through an offer of proof. At the conclusion of the offer of proof, the ALJ sustained Respondents' objection because there was insufficient evidence on the record as to when the incident happened and how the management of the Salem club related to Frehoo. (Hearing Record)

57) On November 23, 2016, the ALJ issued an interim order which stated:

"INTRODUCTION

"The following summarizes rulings made during the hearing, as well as additional directives that will apply to the case when the hearing resumes.

"HEARING DATES

"The hearing in this case began on November [9], 2016, and went into recess before noon on November 18, 2016, after the Agency indicated it had no additional witnesses available to testify that day. The hearing will resume at **9:00 a.m. on Tuesday, November 29, 2016, and will continue until December 7, 2016.** At this time, the hearing facility is not available after December 7, 2016. The parties were informed that they needed to work towards December 7, 2016, as the ending date for the presentation of witness testimony and evidence. If necessary, the ALJ will arrange for closing arguments to be made on another date at another location.

"At 4:00 p.m. on Monday, November 28, 2016, the parties will have access to the hearing room to set up for hearing the next day.

"WITNESS TESTIMONY

"The Agency has indicated that it will call its expert witness to testify on November 29, 2016, and that this testimony (including direct, cross examination and re-direct) will last the entire day. Respondents have asserted that it seems unlikely that this testimony will last the entire day, and have requested that the Agency be prepared to have additional witnesses lined up. The Agency was

instructed to disclose any additional witnesses to Respondents by noon on Monday, November 28, 2016.

“Furthermore, this hearing has progressed much slower than anticipated by the parties. Accordingly, the following procedures will be implemented going forward to help move the case along more expeditiously:

- When presenting their respective cases, both the Agency and Respondents should fill the entire day with witness testimony and avoid ‘dead spots,’ except for the usual mid-morning, lunch and mid-afternoon breaks. The parties will be expected to have additional witnesses ready in the event the testimony of a witness proceeds more quickly than anticipated. If a party does not have a witness lined up, they should be prepared to explain why there is ‘good cause’ for the lack of a witness.
- In order to avoid ‘unduly repetitious evidence’ under OAR 839-050-0260(2), the parties will be discouraged from asking testifying witnesses to summarize statements made by other witnesses who will also be testifying at the hearing. In other words, in most circumstances information should be presented with live testimony, rather than by having one witness read a lengthy summary statement of another witness who will also be coming in to testify.
- When the hearing resumes after the lunch hour break each day at approximately 1:00 p.m., the parties will be asked to identify the witnesses they intend to call the following day.
- On the morning of November 29, 2016, the Agency will be asked to provide an updated estimate as to when its case-in-chief will be complete, and Respondents will be asked for an estimation of how long its case will take.

“STRICKEN TESTIMONY OF DET. OPITZ

“After the conclusion of the Agency’s direct examination of Beaverton Police Det. Chad Opitz, Lauren Mehrstens, an attorney from the Beaverton City Attorney’s Office, appeared and asked to be heard. Ms. Mehrstens stated that she would be instructing Det. Opitz not to answer any questions regarding a pending criminal investigation. The Agency had asked some questions about this investigation in its direct examination of Det. Opitz and, thus, Respondents were effectively prevented from having an opportunity to conduct cross examination on that subject. Accordingly, the portion of the direct testimony of Det. Opitz on that topic was stricken from the record. The court reporter provided the forum with a transcript of that testimony, and copies of the transcript were provided to the Agency, Respondents, and Ms. Mehrstens.

“The Agency was provided with the opportunity to file a legal brief or motion as to why the stricken testimony should be admitted. The brief must be emailed to Respondents, Ms. Mehrtens and the ALJ by 5:00 p.m. on Monday, November 28, 2016. The original, hard copy for the forum file may be delivered to the ALJ on the morning of November 29, 2016.

“Respondents and the Beaverton City Attorney may file responses to the Agency’s briefing. Responses must be emailed to the Agency, the Beaverton City Attorney’s office and the ALJ by noon on Thursday, December 1, 2016. The original, hard copy for the forum file may be delivered to the ALJ on the morning of December 2, 2016.”

(Exs. X159, X160)

58) The Agency filed a Motion to Allow Evidence of Third Party Minor Dancer on November 28, 2016. Respondents and the City of Beaverton filed responses to the Agency’s motion on December 1, 2016. On December 6, 2016, the ALJ announced on the record that the Agency’s motion was denied because there was no way to predict whether Det. Opitz would need to rely on records which were determined to be exempt from disclosure under ORS 192.501 to 192.505 to answer questions on cross examination, in violation of the public officer privilege of ORS 40.270. If he could not answer questions due to privilege, then Respondents would not have the opportunity to fully and completely cross examine the witness. (Exs. X161, X162, X163; Hearing Record)

59) Throughout its case-in-chief, Respondents attempted to offer the testimony of witnesses who were not listed on their case summary and the Agency objected. Respondents were unable to establish that the witnesses met the standard for an “impeachment” witness. However, the ALJ allowed the witnesses to testify when Respondents established that the Agency offered witness testimony that differed from what was provided in discovery and, thus, Respondents would not have had advance notice of the need to list the “impeachment” witnesses in their case summary. (Hearing Record)

60) During the hearing, the Agency requested copies of email communications between Kaiser and Herkenrath. Respondents asserted that the emails were protected by attorney client and work product privileges. At the ALJ’s request, Respondents produced copies of the emails for *in camera* inspection. The ALJ ruled that one email was covered by attorney client privilege and need not be produced. With respect to an email subject to the work product privilege, which is not absolute, the ALJ did not find a substantial need for the document to be produced. (Hearing Record)

61) At the conclusion of the evidentiary portion of the hearing, the ALJ and the parties discussed the filing of post-hearing briefs on matters which arose during the hearing, including motions made by Respondents at the conclusion of the Agency’s case-in-chief. On December 12, 2016, the parties were provided with a copy of an excerpt from the proceedings on December 1, 2016, which included discussion of the

issues. On December 13, 2016, the ALJ issued an interim order allowing the parties to file briefs regarding cases cited in the hearing by Respondents and the offer of proof regarding witness Alexa/"Satine" no later than December 19, 2016. The Agency and Respondents filed post-hearing briefs on December 19, 2016. (Exs. X164 - X166)

62) In response to a question from the Agency, the ALJ sent an email to the parties on December 19, 2016, which lifted the requirement that documents had to be filed and served by hand delivery. (Ex. X167)

63) On December 19, 2016, the ALJ sent an email to the parties which stated, in pertinent part:

"As discussed at the end of the evidentiary portion of the hearing in this matter, closing arguments will take place at BOLI's Portland office at the address below on **Wednesday, December 21, 2016**. The proceedings will begin at **9:00 a.m.** (note that this is a half hour change from what was previously discussed). The parties may access the hearing room after 8:00 a.m. to set up their materials.

"Each side's closing arguments will be limited to 90 minutes, and the Agency will have 15 minutes at the end for rebuttal closing arguments.

"If the parties intend to make any video or PowerPoint presentations, they should be prepared with their own equipment and should bring copies of any materials that are presented on screen."

(Ex. X168)

64) On December 20, 2016, the ALJ sent an email to the parties which stated, in pertinent part:

"Following are the forum's interim rulings after reviewing the parties' post-hearing briefs:

"1. Respondents' motions for judgment as a matter of law are DENIED. The issues raised in the motions will be addressed in the Proposed and Final Orders.

"2. The testimony of witness Alexa/"Satine" is not admitted into evidence. This witness was not identified in Respondents' case summary and was labeled as an 'impeachment' witness. Impeachment by extrinsic evidence, e.g. testimony of a witness or by introduction of an exhibit, can be used to show bias, interest, prejudice, improper motive, a witness's ability to perceive or remember, prior inconsistent conduct and prior inconsistent statements directly related to a relevant issue, and conviction of a crime as set out in OEC 609. Respondents did not demonstrate that this witness testimony met any of the categories of 'impeachment' evidence set forth in OEC 609.

“Respondents also asserted that this witness was first named in the hearing testimony of Steve Toth and was not disclosed in response to discovery requests. The ALJ has the authority to take appropriate remedial action when relevant information is not produced in response to a discovery order. See, e.g. *In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 263-64 (2013). However, in this circumstance, although the Agency was asked to identify the names of any witnesses, there is no information to indicate that the Agency knew of the name of this witness prior to Toth’s testimony and failed to disclose it. Accordingly, the witness testimony cannot be admitted due to an alleged failure on the part of the Agency to respond to a discovery request.

“This testimony is not admitted into evidence but will remain in the record as an offer of proof.

“Additionally, the Agency’s motion for the forum to take judicial notice of the final order of the OLCC (Ex. A25) is DENIED. Ex. A25 is a Stipulated Settlement Agreement for Entry into Final Order. The agreement, as well as any ‘statements made in compromise negotiations’ are inadmissible under OEC 408. See also *In the Matter of Ruston, Christopher and Christine Stahler*, 34 BOLI 56, 66 (2015).”

(Ex. X169)

65) The ALJ issued an interim order on February 2, 2017, inviting the parties to submit briefing on the issue of damages. The Agency filed its brief on February 10, 2017, and Respondents filed their briefing on December 21, 2017. (Exs. X171, X172, X173)

66) On January 5, 2017, the Agency filed a request for hearing transcript and Respondents sent an email also requesting a copy of the transcript. With the ALJ’s interim order of February 2, 2017, the parties were provided with copies of draft transcripts of the testimony of AP1 and AP2 to be reviewed for the purpose of determining which portions should be subject to the interim protective orders in this matter. The parties were encouraged to confer and notify the ALJ if they were able to reach a stipulation. After the parties informed the ALJ that they could not reach an agreement regarding the testimony, a telephone conference was scheduled for February 27, 2017, to discuss the matter. After the parties discussed their general positions regarding the treatment of the transcripts, a briefing schedule was set forth in an interim order issued on March 1, 2017 so that the parties could explain their respective positions in writing.

In response to the forum’s interim order of March 1, 2017, the parties submitted briefs outlining their respective positions as to which portions of the draft transcripts of the testimony of AP1 and AP2 should be redacted to remove information subject to the interim protective orders. On March 15, 2017, the ALJ issued an interim order specifying the particular portions of the transcript that should be redacted to remove “[i]nformation of a personal nature such as but not limited to that kept in a personal,

medical or similar file” pursuant to ORS 192.502(2). (Exs. X170, X171, X176, X177, X179, X180)

67) During the February 27, 2017, telephone conference, the Agency and Respondents requested 45 days to file exceptions to the Proposed Order to allow time to review the transcript of the hearing. The ALJ granted the oral request to deviate from the forum’s typical 10-day exceptions period, and indicated that the Exceptions Notice in the Proposed Order would reflect the revised time period. (Post-Hearing Record)

68) The ALJ issued an interim order on February 22, 2017, requesting that the Agency file a brief addressing the issue of adequate notice in the Amended Formal Charges no later than March 1, 2017. Respondents were permitted to file responsive briefing no later than March 8, 2017. The Agency filed its brief on March 1, 2017, and Respondents filed their brief on March 8, 2017. On March 15, 2017, the ALJ issued an interim order which stated as follows:

“INTRODUCTION

“The parties submitted briefing on the issue of the adequacy of notice in the Amended Formal Charges with respect to particular sections of OAR 839-005-0030 in response to the forum’s interim order issued February 22, 2017.

“The Agency argued that all sections of OAR 839-005-0030 – including the proxy liability theory set forth in OAR 839-005-0030(3) – were relevant at the time the charges were issued. The Agency asserted that the allegations in the Amended Formal Charges are sufficient, but moved ‘for leave to issue Second Amended Formal Charges to further clarify that each subsection applies and specifically allege that Steven Toth and Respondents’ other managers acted as a proxy for Respondent Frehoo, Inc., during times material.’ (Agency’s Post-Hearing Brief, p. 4)

“Respondents asserted that they ‘did and reasonably could have understood that the Agency was proceeding based only on sections (5) (‘Harassment by Supervisor, No Tangible Employment Action’) and (7) (‘Harassment by Non-Employees’) of OAR 839-005-0030, and not on the basis of proxy liability.’ (Resp’s Post-Hearing Brief, p. 11) (emphasis in original). Respondents further argue that they would be substantially prejudiced if the Agency could add the theory of proxy liability to the Amended Formal Charges. Additionally, Respondents asserted that if the Agency is permitted to amend, then Respondents should be granted leave to amend their Answer and the record should be reopened to allow Respondents to offer evidence to defend against proxy liability allegations.

“RULING

“The Agency mentioned the proxy liability theory for the first time during closing arguments. OAR 839-050-0140(4) does not apply because the Agency

did not move to amend the Amended Formal Charges before the close of the evidentiary portion of the hearing. Under OAR 839-050-0140(5), the ALJ may allow pleadings to be amended to conform to evidence when (1) the Agency has shown good cause for not including the new matter in its charging document and (2) Respondents are not able to show substantial prejudice from the amendment. The ALJ may grant a continuance to allow the objecting party to produce additional evidence.

“As set forth in the rule, if the forum found there was good cause and permitted the Agency to add the proxy liability theory, the record would need to be reopened to allow Respondents to present additional evidence to respond to the new allegation. Because the evidentiary record in this case closed on December 7, 2016, the forum declines to permit the Agency to amend and add the proxy liability allegations.

“As indicated above, Respondents expected to defend against charges of harassment by supervisor, no tangible employment action, under OAR 839-005-0030(5) and harassment by non-employees under OAR 839-005-0030(7). The Amended Formal Charges and the Amended Answer also included allegations and defenses related to the definition and standard for determining sexual harassment as set forth in OAR 839-005-0030 (1) and (2). The Amended Formal Charges did not mention the theories set forth in OAR 839-005-0030(3) (employer proxy), OAR 839-005-0030(4) (harassment by supervisor plus tangible employment action), OAR 839-005-0030(8) (withdrawn consent), OAR 839-005-0030(9) (opportunities/benefits granted).

“Accordingly, the forum GRANTS the Agency’s request to amend the Amended Formal Charges to specifically cite to OAR 839-005-0030(1), (2), (5) and (7). The request to add additional sections of OAR 839-005-0030 to the Amended Formal Charges is DENIED.”

(Exs. X174, X175, X178, X181)

69) On May 1, 2017, the Agency submitted a Notification of Settlement of Charges as to AP1 and Joint Request for Transcript. The ALJ issued an interim order on May 10, 2017, which stated:

“Notification of Settlement

“On May 1, 2017, the Agency filed a document notifying the forum that the parties reached an agreement in settlement of the charges concerning Aggrieved Person #1 and that a fully executed settlement document would be submitted to the forum within the coming weeks. **The parties are hereby ordered to submit a fully executed settlement agreement or, alternatively, a status report with an estimate as to when an agreement will likely be filed no later than May 19, 2017.**

“After the settlement is finalized according to the procedures set forth in OAR 839-050-0220, a Proposed Order will be issued which contains the facts necessary to make proposed findings regarding the charges concerning Aggrieved Person #2.

“Request for Transcript

“The parties also jointly requested a copy of the hearing transcript “as soon as practicable and prior to the issuance of the Proposed Order.” Under normal circumstances, the forum does not receive a transcript of the hearing until after a Final Order is issued and a Notice of Appeal is filed. See OAR 839-050-0350(3). However, this case involves several unique circumstances, which are as follows:

- The hearing lasted for 15 days, including closing arguments.
- A court reporter was present throughout the entirety of the hearing to transcribe the testimony, arguments and objections made by the parties, and statements of the ALJ.
- Over 40 witnesses testified and there were significant factual disputes.
- The ALJ had access to a draft transcript when preparing the Proposed Order.

Given the totality of these circumstances, the ALJ exercises discretion pursuant to OAR 839-050-0240 and finds that distribution of the transcript to the parties will likely result in a more efficient process for reviewing the Proposed Order and drafting any potential Exceptions that may be filed.

“The final, certified transcript will be provided to the ALJ by the court reporter within the next few days. The ALJ will then instruct the Contested Case Coordinator to make hard copies of the transcript and provide them to the parties at the same time and on the same day, subject to the following conditions:

- The parties may use the transcript solely for the purpose of reviewing the Proposed Order and filing Exceptions (or, thereafter, for appellate purposes).
- The parties may not scan or make electronic copies of the transcript.
- The parties may only make and distribute hard copies of the transcript to attorneys and staff who are involved in reviewing the Proposed Order and filing Exceptions (or, thereafter, for appellate purposes).
- The parties are bound by all interim protective orders that have been issued in this matter.

IT IS SO ORDERED”

(Exs. X182, X183)

70) On May 12, 2017, Respondents filed a request for clarification regarding the use of the transcript, and the Agency responded on May 15, 2017. After reviewing the issues and concerns raised by the parties, the ALJ issued an interim order on May 17, 2017, which stated, in pertinent part:

“After reviewing the issues and concerns raised by the parties, the interim order of May 10, 2017, is hereby supplemented as follows:

- Electronic copies of the transcript may be made for the purposes described in the interim order of May 10, 2017. However, any electronic copies must be secured with a password or some other means of restricting access only to those individuals permitted to review the transcript under the terms of the May 10, 2017, interim order.
- The forum will release copies of the transcript to the Agency, Respondents’ counsel and counsel for AP2. The Contested Case Coordinator will contact the parties when the transcript is available to be picked up from BOLI’s Portland office. The forum will not be providing a copy of the transcript to counsel for AP1, because the parties notified the forum that an agreement was reached to resolve the claims involving AP1.
- No one is permitted to copy or use the transcript for purposes other than for the reasons set forth in the May 10, 2017, interim order.⁴⁸
- The restrictions set forth above and in the interim order of May 10, 2017, shall remain in place until a Notice of Appeal is filed with the Oregon Court of Appeals (unless this ruling is modified by a subsequent interim order or by the Deputy Commissioner in the Final Order).

“Record Clarification as to Volume 9

“The index at the beginning of Volume 9 indicates that page 1873 was removed and saved in a sealed envelope. However, that particular page is not subject to the interim protective orders and was not removed and placed in a sealed envelope.

IT IS SO ORDERED”

(Exs. X184 - X186)

⁴⁸ This forum only has jurisdiction over the matters alleged in the Amended Formal Charges. Any additional concerns regarding access to the transcript for purposes of fairness in the civil proceeding are not properly directed to the forum and could be raised with the court.

71) Telephone conferences with the parties were held on May 19, 2017, and May 26, 2017, to discuss the status of the settlement documents regarding AP1. After requests were received for a Final Order of Informal Disposition ("FOID") as to the claims involving AP1, the ALJ issued a FOID on June 15, 2017, disposing of the claims related to AP1. (Exs. X187 - X189, X191, X192)

72) On June 14, 2017, Respondents filed motion to remove the restrictions on the use of the hearing transcript. The Agency filed a response to Respondents' motion on June 16, 2017. Respondents' motion is DENIED. (Exs. X190, X193)

73) The ALJ issued a proposed order on July 18, 2017, that notified the participants they were entitled to file exceptions to the proposed order within 45 days of its issuance. The Agency and Respondents timely filed exceptions on September 1, 2017. The exceptions are addressed following the Opinion section of the Final Order.

**In the Matter of
NAVEX GLOBAL, INC.,**

CASE No. 59-17

Final Order of Commissioner Brad Avakian

Issued April 30, 2018

Withdrawn and vacated by Amended Final Order
Issued September 30, 2019

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In the Matter of
LIONESS HOLDINGS, LLS DBA TAN REPUBLIC AND PETER LAMKA,
INDIVIDUALLY,

CASE No. 08-18
Final Order of Commissioner Brad Avakian
Issued July 3, 2018

SYNOPSIS

The forum concluded that Respondents (1) retaliated or discriminated against Complainant because she submitted a request for sick leave and took sick time, in violation of ORS 653.641(2) and OAR 839-007-0065(2); (2) applied an absence control policy that resulted in an adverse employment action against Complainant, in violation of ORS 652.641(3) and OAR 839-007-0065(3); (3) required Complainant to search for or find a replacement worker as a condition of her use of sick time, in violation of ORS 653.606(8)(a); and (4) constructively discharged Complainant, in violation of OAR 839-050-0011(1)-(4). The forum declined to award Complainant lost wages but did award \$20,000 in emotional, mental, and physical suffering damages.

The above-entitled case came on regularly for hearing before Jennifer Gaddis, 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 May 1, 2018, in BOLI’s W. W. Gregg Hearing Room, located at 800 NE Oregon Street, Portland, Oregon.

BOLI was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Complainant Sarah Levin was present throughout the hearing via livestream video. Neither Respondent Lioness Holdings, LLC, dba Tan Republic (“Respondent Tan Republic”) nor Respondent Peter Lamka (“Respondent Lamka”) attended the hearing.

The Agency called BOLI Civil Rights Investigator Moayyad Khoshnaw, Complainant Sarah Levin and BOLI Wage and Hour Investigator Emily Sitton as witnesses.

The forum received into evidence Administrative exhibits X1 through X19. The forum also received the following Agency exhibits:

- 1) A1 through A8;
- 2) A10 through A12;

- 3) A14, pages 1 and 2;
- 4) A15 through A23; and
- 5) A25 through A29.

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, On the Merits, and Ultimate¹), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On November 21, 2016, Sarah Levin filed verified complaint no. EEEMRG161121-11634 with BOLI's Civil Rights Division. The complaint alleged that Respondent Tan Republic had committed unlawful employment practices against Levin by unlawfully subjecting her to different terms and conditions of employment, subjecting her to retaliation, disciplining her, suspending her and constructively discharging her. Levin's complaint was amended on May 3, 2017, to include Respondent Lamka, as an aider and abettor in the unlawful employment practices. (Ex. A3 and A28)

2) On July 10, 2017, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found:

- a. Substantial evidence of an unlawful employment practice based on Respondents' denial of a sick leave request, interference with a sick leave request and restraint of Complainant's ability to take sick leave, in violation of ORS 653.641(1);
- b. Substantial evidence of an unlawful employment practice based on Respondents' termination of Complainant in retaliation for invoking Oregon Sick Time Leave, in violation of ORS 653.641(2); and
- c. Substantial evidence of an unlawful employment practice based on Respondents' unlawful absence control policy, in violation of ORS 653.641(3).

The SED further stated that the Division did not find substantial evidence of the alleged unlawful employment practices based on Complainant's religion. In the SED's Finding of Facts #26, the Civil Rights Division found that the May 3, 2017 complaint was amended to "add Peter Lamka as [sic] Respondent pursuant to ORS 653.641."² (Ex. A29)

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 The Civil Rights Division did not make any findings that Respondent Lamka was an aider or abettor to Respondent Tan Republic's unlawful actions. Rather, the SED listed Respondent Lamka as a separate and distinct Respondent, pursuant to ORS 653.641. (Ex. A29, p 8)

3) On December 14, 2017, the forum issued a Notice of Hearing to Respondents, the Agency and Complainant stating the time and place of the hearing as February 27, 2018, beginning at 10:00 a.m., at BOLI's W. W. Gregg Hearing Room, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. With the Notice of Hearing, the forum also 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)

4) The Formal Charges alleged that Respondents retaliated or discriminated against Complainant for submitting a request for sick time and/or taking sick time in violation of ORS 653.541(2) and OAR 839-007-0065(2); that Respondents applied an absence control policy that included sick time absences covered under ORS 653.601 to 653.661 and resulted in an adverse employment action against Complainant, in violation of ORS 653.641(3) and OAR 839-007-0065(3); that Respondents required Complainant to search for or find a replacement worker as a condition of the employee's use of sick time, in violation of ORS 653.606(8)(a); and that Respondents constructively discharged Complainant, in violation of OAR 839-005-0011(1)-(4). The Agency alleged that Respondent Lamka was an employer of Complainant, pursuant to ORS 653.010(3) or, in the alternative, a person pursuant to ORS 653.641. The Formal Charges sought damages for emotional, mental and physical suffering in the amount of "at least \$20,000.00." The Formal Charges also requested that an appropriate Cease and Desist Order be entered against Respondents if they engaged in or committed any unlawful employment practices alleged in the Formal Charges, and that the forum order that they immediately stop all such unlawful practices. The Formal Charges stated that the forum's order may include such other relief as appropriate to eliminate the effects of the unlawful practices found as to Complainant and others similarly situated. (Ex. X2a)

5) On January 11, 2018, the Agency filed a motion requesting default against Respondent Tan Republic for failing to file a timely Answer. Respondent Tan Republic did not file a response to the Agency's motion. (Ex. X3)

6) On January 17, 2018, the forum reissued the Notice of Hearing to Respondent Lamka at the following addresses:

- a. Peter Lamka, 2344 SW Chelmsford Ave., Portland, OR 97201
- b. Peter Lamka, PO Box 8984, Portland, OR 97207

(Ex. X4)

7) On January 23, 2018, the forum issued a Notice of Default against Respondent Tan Republic. Respondent did not request relief from default. (Ex. X6)

8) On January 24, 2018, the forum reissued the Notice of Hearing to

Respondent Peter Lamka at PO Box 8984, Portland, OR 97204. (Ex. X5)

9) On February 2, 2018, the ALJ issued an Interim Order Requiring Case Summaries to be Filed and Setting a Prehearing Conference Date. (Ex. X7)

10) On February 7, 2018, the Agency filed a Motion for Postponement, in order to attempt other methods of service on Respondent Lamka. Respondent Lamka did not file a response. (Ex. X8)

11) On February 8, 2018, the ALJ issued an interim order granting the Agency's unopposed motion for postponement and setting new case deadlines.³ (Ex. X9)

12) On February 15, 2018, the Agency filed a Motion to Allow Service by Alternative Means. The Agency outlined 11 separate attempts to serve Respondent Lamka, both by mail and personal service, at various locations. The Agency sought permission from the forum to attempt service on Respondent Lamka by alternative means, pursuant to ORCP 7D(6)(a). Specifically, the Agency moved to allow service by email to: (a) peterlamka@gmail.com; (b) first-class mailing to PO Box 8984, Portland, OR 97207; and (c) PO Box 8984, Portland, OR 97204, and posting at 2344 SW Chelmsford Ave., Portland, OR 97201. (Ex. X11)

13) On February 22, 2018, the ALJ issued an interim order denying the Agency's Motion to Allow Service by Alternative Means. The interim order concluded that the Agency's service requirement fell squarely under ORS 183.415(2), stating:

"Pursuant to OAR 839-050-0030(1),⁴

'Service of the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

- (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.'

This rule is compliant with ORS 183.415(2), which requires the Agency to serve Formal Charges on a respondent either 'personally or by registered or certified mail.' The Agency attempted to serve Respondent multiple times in accordance with the statute and the bureau's contested case service rule prior to moving the forum to allow for alternative service. The Agency is correct that the forum may draw upon the Oregon Rules of Civil Procedure for guidance in certain circumstances. See *In the Matter of United Grocers*, 7 BOLI 1, 2 (1987). However, in this case, there is no ambiguity in the

³ The forum issued an amended interim order, correcting a scrivener's error on the location of the hearing. (Ex. X10)

⁴ The Agency's motion misstates OAR 839-050-0060 as the contested case rule pertaining to service. OAR 839-050-0060 is the contested case rule pertaining to Charging Documents.

statutory service requirement applicable to the Agency. ORS 183.415(2) requires the charges be served personally or by registered or certified mail upon Respondent.⁵ ORCP 7D(6)(a) is inapplicable in this case.”

(Ex. X12)

14) On February 28, 2018, the Agency filed its Motion for Default against Respondent Lamka, based on Respondent’s failure to fail a timely Answer. The Agency asserted that it had satisfied the service requirement necessary to find Respondent in default, arguing “service to a substantiated PO Box address belonging to Respondent would be complete upon the date of the certified mail, regardless of whether Respondent chose to claim the certified mailing from his PO Box.” Respondent Lamka did not file a response. (Ex. X13)

15) On March 3, 2018, Respondent Lamka included the ALJ on an email in which he responded to an email from the Administrative Prosecutor, presumably providing Respondent Lamka with an electronic copy of the Agency’s Motion for Default.⁶ Within the email, Respondent stated:

“It appears from the motion attached to your correspondence above that you either did not receive the formal response on behalf of Peter Lamka, or else it was ignored. I know that international mail can be notoriously slow, and thus, am of the opinion that you simply have not yet received it. As you are corresponding with me via this more informal email method, I am responding in like kind. Regarding the allegations your Agency has leveled at Peter Lamka, responses were as follows:

- Peter Lamka was never a Director of Lioness Holdings, LLC.
- The unsigned letter alleging Peter Lamka as ‘Our Director’ was not written by Peter Lamka, nor did Peter Lamka cause it to be written.
- At the time in question, Peter Lamka was not a Member of Lioness Holdings, an employee of Lioness Holdings, nor was he a Director of Lioness Holdings.
- Peter Lamka's permanent residence is not maintained in the United States.
- The house you reference in Portland as ‘Peter Lamka's residence’ is on a long-term lease to a third-party.

⁵ Arguably, ORCP 7D(6)(a) could provide guidance for questions of service on a wage claim, subject to the provisions of ORS 652.332(1). Service in those cases “shall be made in the same manner as service of summons or by certified mail.” See OAR 839-050-0030(1) (including an exception to the service requirements “as otherwise provided in ORS 652.332(1)”).

⁶ The Agency’s email was sent on February 28, 2018, and did not include the ALJ. The email, from then Administrative Prosecutor Cogswell to Respondent Lamka at peterlamka@gmail.com, simply states, “Please find attached a courtesy copy of the Agency’s motion filed today.”

- Peter Lamka does not maintain a bank account in the United States, nor has he for several years.

Peter Lamka does not receive mail at the address the Agency listed as 'Lamka's mailing address', nor has he for quite some time.”⁷

On March 5, 2018, the ALJ directed Respondent Lamka, via email, to provide a correct mailing address no later than March 9, 2018. Respondent did not provide the information as directed.⁸ (Ex. X14)

16) On March 12, 2018, the forum issued a Notice of Default to Respondent Peter Lamka, based on his failure to file a timely Answer to the Agency's Formal Charges. In regard to the service requirement, the ALJ concluded:

“...that the PO Box 8984, Portland, Oregon 97207 address is a correct mailing address for Respondent and that service was complete upon the Agency's certified mailing to that address, on January 17, 2018. As stated in a prior order, service is not dependent on whether Respondent chooses to pick up his certified mail from his correct address. *Stroh v. State Acc. Ins. Fund*, 261 Or. 117, 119 (1972) and *El Rio Nilo, LLC v. Oregon Liquor Control Commission*, 240 Or. App. 362 (2011).”

In support of its conclusion, the forum noted:

“The Agency has made various attempts to serve Respondent with the Notice of Hearing and Formal Charges, both by personal service and certified mail. In his March 5th email, Respondent asserted that ‘the house [the Agency] reference[s] in Portland as ‘Peter Lamka's residence’ is on a long-term lease to a third party’ and ‘Peter Lamka does not receive mail at the address the Agency listed as ‘Lamka's mailing address,’ nor has he for quite some time.’ (Email between Forum and Respondent dated 3/5/2018, p. 1). However, both the 2344 SW Chelmsford Ave., Portland, Oregon, 97201 address and the PO Box 8984, Portland, Oregon 97207 address are listed as Respondent's addresses with the Multnomah County Tax Assessor's Office. (Agency's Motion for Default, Exhibit 5, p. 1). Further the process server, Mr. Berg, signed a sworn statement indicating two different individuals confirmed that 2344 SW Chelmsford Ave., Portland, Oregon was Respondent's personal residence. (Agency's Motion to Allow for Service by Alternative Means, Exhibit 7, p. 1). Both addresses were also considered correct mailing addresses for Respondent by the Multnomah County Circuit Court in an unrelated matter. (*Id.*, Exhibit 14, pp. 5-7).

⁷ Respondent's email did not comply with filing requirements outlined in the contested case rules and was not considered a formal filing by the Forum.

⁸ On March 12, 2018, Respondent replied to the Forum's March 5, 2018, email directing him to provide a correct mailing address. Respondent claimed that he did not have a correct mailing address, however, he stated that peterlamka@gmail.com was “correct for [him] personally...” (Ex. X15)

“The Agency included a copy of the cover page of the Notice of Hearing with its Motion for Default, which it emailed to Respondent on February 28, 2018. (Email between Forum and Respondent dated 3/5/2018, p. 2). Respondent did not express any confusion or surprise in his response that a contested case proceeding was pending against him. To the contrary, Respondent referenced a ‘formal response’ to the Formal Charges and offered rebuttal arguments to the Agency’s ‘allegations.’

* * *

“Respondent’s claim that a ‘formal response’ was sent acknowledges that he is aware of the allegations in the Agency’s Formal Charges.⁹ To date, the contested case coordinator has not received any documents from Respondent. The Notice of Hearing clearly indicates how a respondent should file an answer. It also provides the contested case coordinator’s phone number, in the event a party needs clarification on procedural matters. The forum takes judicial notice that a copy of the Division 50 Contested Case Rules, which outlines filing and timeline requirements, etc., are [sic] also sent with a copy of the Formal Charges. Pursuant to OAR 839-050-0050(1) and (3), the forum may disregard any document that is filed beyond the established number of days for filing, unless the responsible party can show good cause as to why the deadline was not met.”

(Ex. X16)

17) On March 15, 2018, the Agency filed Amended Formal Charges. The Agency noted on the charging document itself that it was amended to “correct a statutory citation on Page 5, Line 2.” The Amended Formal Charges also sought \$5,000 in lost wages and \$10,000 for emotional, mental, and physical suffering.¹⁰ Respondents did not file an Answer to the amendments in the Agency’s Amended Formal Charges. (Ex. X17)

18) On March 15, 2018, the Agency filed a Notice to Forum, informing the forum that Complainant would be testifying via a video conference system. (Ex. X18)

19) The Agency timely submitted its Case Summary on April 16, 2018. (Ex. X19)

20) At the start of hearing, the ALJ orally informed the Agency and Complainant Levin of the issues to be addressed, the matters to be proven, and the procedures governing the conduct of the hearing. (Hearing Record)

21) The hearing concluded and the record closed on May 1, 2018.

⁹ Respondent does not provide any information regarding when his response was sent or by what method.

¹⁰ The original Formal Charges did not seek lost wages and sought \$20,000 for emotional, mental, and physical suffering. (Ex. X2a)

22) On June 11, 2018, the ALJ issued a proposed order that notified the Agency it was entitled to file exceptions to the proposed order within ten days of its issuance. Respondents were not entitled to file exceptions since they were both found in default, prior to the hearing. The Agency did not file any exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Tan Republic was an active foreign limited liability company registered with the Oregon Secretary of State Business Registry. (Testimony of Khoshnaw; Ex. A2)

2) At all times material herein, Respondent Lamka was the owner and “Director” of Respondent Tan Republic. He was authorized to pay employees, and hire and fire employees. (Testimony of Khoshnaw, Complainant, Sitton; Exs. A6; A8; A11; A12; A13; A29)

3) Respondents employed Complainant Levin from May, 2015, until October, 2016. At the beginning of Complainant’s employment with Respondents, she averaged over 40 hours per week. By the end of her employment she was down to 25 to 30 hours per week. (Testimony of Complainant; Exs. A1; A3; A7; A8)

4) Respondents’ absence control policy required an employee to find coverage for their duties, in the event of illness. Their Employee Handbook states, “If you are forced to call in sick, you must...arrange for someone to cover your shift no less than four hours prior to the scheduled shift.” This Employee Handbook was provided by Respondents to Civil Rights Investigator Khoshnaw. (Testimony of Khoshnaw; Complainant; Exs. A4; A9; A10; A11)

5) Respondents’ absence control policy required an employee to obtain a note from their physician, in the event of illness. This policy was included in Respondents’ Employee Handbook, which was provided by Respondents to Civil Rights Investigator Khoshnaw. (Testimony of Khoshnaw, Complainant; Exs. A5; A6; A7; A9; A10; A11)

6) On October 7, 2016, Complainant informed her manager, Mariah Salyer, that she could not report to work due to illness. Ms. Salyer asked Complainant to go in anyway, and told Complainant that she could sit on the couch if she wished, but that they just needed “a warm body in the store.” (Testimony of Complainant)

7) Despite her illness, Complainant went in to work on October 7, 2016. While on duty, Complainant sat down on a couch and wrapped herself in a blanket because she felt so ill. Complainant was visibly ill, feverish, and nauseous. Respondent Lamka arrived at the business sometime later. Complainant was initially relieved to see Respondent Lamka because she assumed he would see how ill she was and offer to take over the store for Complainant. Instead, Respondent Lamka verbally reprimanded Complainant for being on the couch in front of a third-party, and told her if he ever caught her on the couch again like that, she would be “out.” Respondent then sent Complainant out in the rain to place advertising fliers on cars. Complainant felt

humiliated. She was crying and feeling very nauseous. (Testimony of Complainant; Exs. A1; A3)

8) At 6:45 a.m. on October 8, 2016, Complainant informed her manager, Mariah Salyer, that she felt ill and needed to stay home from work. The conversation occurred over text message, as follows:

Complainant: "Hey Mariah, I'm running a fever and super dizzy. I just need to stay home today. Will this be alright? I hate to ask.
I don't feel better than yesterday. I was up half [sic] night nauseous but couldn't throw up."

Ms. Salyer: "So if you don't come in today, I have to work y [sic] forst [sic] day off in 2 weeks..."

Complainant: "I don't want you to have to work on your day off. If I wasn't genuinely sick I wouldn't ask."

Ms. Salyer: "Have you tried calling anyone for coverage?"

Complainant: "Nobody's on the Time Off column in our district.
Do you know who I can text? I looked on Tracksmart earlier."

Ms. Salyer: "Alexis and jan [sic] are the only two off i [sic] can see. Jans [sic] phone is off and alexis [sic] didn't answer."

Complainant: "I will try Alexis."

Ms. Salyer: "I just text [sic] her."

Complainant: "I don't know what to do. I am sick and I need to rest or I won't get better. I don't want you to work on your day off."

Ms. Salyer: "I'm dealing with it. If i [sic] have to work i [sic] have to work. Im [sic] so tired. I was out woth [sic] kenneth [sic] and Brandon until 3 am :'(

Complainant: ":(

Ms. Salyer: "Im [sic] sorry if i [sic] seemed like i [sic] didnt [sic] care that you are sick. I do. I didnt [sic] answer the phone because i [sic] have been crying for the past hour :(patrick [sic] was just like bit [sic] my problem. Figure it out. I cannot believe the lack of compassion for some people..."

(Testimony of Complainant; Exs. A4; A6).

9) At 11:21 a.m. on October 8, 2016, Complainant received an email from Patrick McNeill, stating that she needed to provide a doctor's note "by the end of the business day!" Complainant replied to Mr. McNeill, copying Respondent Lamka and Ms. Salyer, and explained that her doctor's office had no openings that day since it was a Saturday. She stated that she would schedule an appointment for the coming week.

Complainant told Mr. McNeill that she could not afford the “\$80 cost” of obtaining an appointment at an urgent care facility. (Testimony of Complainant; Ex. A5).

10) At 11:35 p.m. on October 8, 2016, Ms. Salyer emailed Complainant notice that Complainant was suspended for 30 days and instructed Complainant to turn in her keys to either Ms. Salyer or Mr. McNeill by noon the following day. Attached to the email were three “Write-Ups” for “Misuse of paid time,” “Insubordination,” and “Lack of professionalism.”¹¹ (Testimony of Complainant; Ex. A6)

11) Complainant responded to the email on October 9, 2016, asking for clarification on why she was being suspended and asking for further explanation of the “Write-Ups.” Complainant understood that she had already been held accountable on October 7, 2016 for “sitting on the sofa with a blanket.” Respondent Lamka responded in part:

“To be very clear Sarah, you were not ‘sitting on the couch with a blanket,’ you were laying on the couch wrapped in a blanket. That, in and of itself, is unquestionably grounds for suspension, given that this is sadly not your first write-up.

Truly, it’s just sad.”

Respondent Lamka went on to characterize Complainant’s absence due to illness, on October 8, 2016, as “abandon[ing] [her] shift.” (Ex. A6, p. 2)

12) In a February 8, 2017, interview, Respondent Lamka told Investigator Khoshnaw that he had every right to fire Complainant when he found her in the facility wrapped in a blanket, on October 7, 2016, but he did not. He went on to explain that he was not going to pay someone who called in sick when they were not sick, and stated that he had the right to ask for a doctor’s note. (Testimony Khoshnaw; Ex. A11)

13) Complainant did not return to work after the October 8th email exchange because she could not afford to take 30 days off from work without pay. Complainant was able to pick up more hours at her other job. (Testimony of Complainant)

14) Complainant testified that she felt angry and betrayed by Respondents’ actions. She testified that she felt that she was “under the hand of gross unprofessionalism” and that “it reeked of dishonesty.” (Testimony of Complainant)

15) Complainant knew Respondents actively discouraged employees from taking sick time, prior to her experiences in October of 2016. In May, 2015, Complainant suffered from shingles. She testified that she went into work but that “the pain became so bad, and the rash got worse” that she felt she had to go to the emergency room. Complainant testified that she “was crying in pain,” because it hurt so

¹¹ The “Write-Ups” consisted of three single sheets of paper with an offense, listed above, printed on each page. The logo “TR” was also present on each sheet. No other explanatory information was in the “Write-Ups.”

badly. Upon discharge from the hospital, Complainant was told to return to work “because [she] would have made the store close early” otherwise. (Testimony of Complainant)

16) Wage and Hour Investigator Emily Sitton interviewed multiple former employees of Respondents. The employees provided information, via emails and interviews, that corroborated Complainant’s testimony regarding Respondents’ disregard for the Oregon Sick Time law and Respondents’ active discouragement of, and often retaliation against, its employees for taking sick time. (Testimony of Complainant, Sitton; Exs. A14 - A22, A25 - A27)

17) Complainant Levin and Witnesses Khoshnaw and Sitton gave credible testimony. (Testimony of Complainant, Khoshnaw, Sitton)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Tan Republic was an employer, as defined in ORS 653.601(2)(a) and employed Complainant.¹²

2) At all times material herein, Respondent Lamka was an employer, as defined in ORS 653. 601(2)(a) and employed Complainant. Respondent Lamka was also a “person,” for purposes of ORS 653.641.

3) At all times material herein, Respondents employed 10 or more people in the state of Oregon and were covered employers under ORS 653.606. (Ex. A29)

4) The actions, statements, and motivations of Ms. Salyer (Complainant’s direct manager) and Mr. McNeill (Respondents’ District Manager)¹³ are properly imputed to Respondent Tan Republic and Respondent Lamka. *In the Matter of Leo Thomas Ryder dba Leo’s BBQ Bar & Grill*, 34 BOLI 67, 73 (2015).

¹² The Agency alleged that Respondents were employers “pursuant to ORS 653.010(3).” The definition of “employer” for purposes of ORS 653.641 is instead found in ORS 653.601(2)(a). The Oregon Court of Appeals has interpreted ORS 183.415 to require a citation of all administrative rules and statutes that are substantially relevant to the charges, in addition to the statutes and rules allegedly violated. *Villanueva v. Board of Psychologist Examiners*, 175 Or App 345, 27 P3d 1100 (2001), *adh’d to on recons* 179 Or App 134, 39 P3d 238 (2002).

ORS 653.010(3) defines “employer” as “any person who employs another person including the State of Oregon or a political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter.”

ORS 653.601(2)(a), alternatively, defines “employer” as “any person that employs one or more employees working anywhere in this state, a political subdivision of the state and any county, city, district, authority, public corporation or entity, and any instrumentality of a county, city, district, authority, public corporation or entity, organized and existing under law or charter.”

Based on the particular facts of this case, the difference between the two statutes is not substantially relevant to the charges or violations alleged. The Amended Formal Charges complied with ORS 183.415.

¹³ Mr. McNeill is identified in the Substantial Evidence Determination as Respondents’ District Manager. (Ex. A29)

5) Respondents retaliated or discriminated against Complainant because she submitted a request for sick time and took sick time, thereby violating ORS 653.641(2).

6) Respondents applied an absence control policy that included sick time absences covered under ORS 653.601 to 653.661 and resulted in an adverse employment action against Complainant, thereby violating ORS 653.641(3) and OAR 839-007-0065(3).

7) Respondents required Complainant to search for or find a replacement worker as a condition of the employee's use of sick time, thereby violating ORS 653.606(8)(a).

8) Respondents constructively discharged Complainant because she submitted a request for sick time and took sick time, thereby violating ORS 653.641(2).

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

10) 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

The Agency argued that Respondents committed several unlawful practices against Complainant because she requested and used protected sick time. Specifically, the Agency alleged that: (1) Respondents retaliated or discriminated against Complainant for submitting a request for sick time and taking sick time, in violation of ORS 653.641(2) and OAR 839-007-0065(2); (2) Respondents applied an absence control policy that included sick time absences covered under ORS 653.601 to 653.661 and resulted in an adverse employment action against Complainant, in violation of ORS 653.641(3) and OAR 839-007-0065(3); (3) Respondents required Complainant to search for or find a replacement worker as a condition of the employee's use of sick time, in violation of ORS 653.606(8)(a); and (4) Respondents constructively discharged Complainant in violation of OAR 839-005-0011(1)-(4).

Oregon's "Sick Time Law"¹⁴ went into effect On January 1, 2016. It requires all employers to allow employees to earn particular amounts of protected sick time each year, for their use when they are ill. Under ORS 653.651, an employee asserting a violation of ORS 653.641(2) or (3) may file a complaint with BOLI under ORS 659A.820. The Agency may then seek remedies available under ORS 659A.850(4), on behalf of the employee, through the contested case process.

¹⁴ ORS 653.601 to ORS 653.661.

RESPONDENTS' LIABILITY UNDER ORS 653.641(2)

ORS 653.641 states:

"It is an unlawful practice for an employer or any other person to:

(1) Deny, interfere with, restrain or fail to pay for sick time to which an employee is entitled under ORS 653.601 to 653.661;

(2) Retaliate or in any way discriminate against an employee with respect to any term or condition of employment because the employee has inquired about the provisions of ORS 653.601 to 653.661, submitted a request for sick time, taken sick time, participated in any manner in an investigation, proceeding or hearing related to ORS 653.601 to 653.661, or invoked any provision of ORS 653.601 to 653.661; or

(3) Apply an absence control policy that includes sick time absences covered under ORS 653.601 to 653.661 as an absence that may lead to or result in an adverse employment action against the employee."

The question of retaliation under ORS 653.641(2) is a matter of first impression for the forum. When the Oregon Legislature allows an employee to file a complaint under ORS 659A.820, alleging an unlawful practice under another chapter, the forum's precedent has followed the prima facie elements of a retaliation claim under ORS 659A.030(1)(f). *In the Matter of Navex Global, Inc.*, 36 BOLI 200, 230 (2018). As such, the Agency's prima facie case in this matter consisted of the following elements: (1) Complainant opposed an unlawful practice; (2) Respondents subjected Complainant to an adverse employment action; and (3) there was a causal connection between Complainant's opposition to the unlawful practice and Respondents' adverse action against her. *Id.*, see also *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 123 (2012).

Complainant opposed an unlawful practice.

At all times material, Respondents employed 10 or more people and were subject to the Oregon Sick Time Law, under chapter 653. Respondents were "employers" for purposes of ORS 653.601(2)(a) and ORS 653.041. Respondent Lamka was also a "person" for purposes of ORS 653.641. As their employee, Complainant was entitled to accrue paid sick time pursuant to the Oregon Sick Time Law. ORS 653.606(1). During the beginning of Complainant's employment with Tan Republic she averaged over 40 hours per week. By the end of her employment she was down to 25 to 30 hours per week. (Finding of Fact – The Merits, #3). There was no evidence offered regarding how much sick time Complainant should have accrued or had available to her by October, 2016. However, even assuming she worked only 25 hours per week when the Oregon Sick Time Law first went into effect and she began to accrue time, Complainant would have had sick time to which she was entitled to use in October of 2016.

On October 7, 2016, Complainant informed her manager, Ms. Salyer, that she could not report to work due to illness. Ms. Salyer told Complainant to report to work anyway, despite her illness. An employee may use sick time, earned under ORS 653.606, for the employee's "mental or physical illness, injury or health condition, need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition or need for preventive medical care." ORS 653.616(1). Complainant's notice to her manager that she could not report to work due to illness was a valid request to use her accrued sick time. Although Complainant did not want to come into work while she was ill, Ms. Salyer denied her request for sick time and Complainant showed up for her shift.

On October 8, 2016, Complainant informed her manager that she could not report to work due to illness. Through a series of text messages, Complainant told Ms. Salyer, "...I'm running a fever and super dizzy. I just need to stay home today...I was up half [sic] night nauseous..." When Ms. Salyer replied negatively and asked Complainant if she had found coverage for the shift she would miss, Complainant responded "I don't know what to do. I am sick and I need to rest or I won't get better..." (Finding of Fact – The Merits, #8) Complainant did not go into work that day. Complainant's October 8th request and subsequent use of her sick time were permissible under ORS 653.616(1). The evidence showed that Complainant opposed Respondents' unlawful practice of not allowing her to take sick time when she was ill.

Respondents subjected Complainant to an adverse employment action.

Complainant was visibly ill when she arrived at work on October 7th, after being denied her request to use her sick leave. Complainant sat on a couch inside the store, with a blanket, feeling feverish and nauseous. When Respondent Lamka arrived at the business, Complainant was relieved to see him because she thought he would allow her to go home and that he would take over watching the store for her. Respondent Lamka instead verbally reprimanded her for sitting on the couch with a blanket in front of a third-party and sent her out, into the rain, to place advertisement pamphlets on car windows. (Finding of Fact – The Merits, #7)

Complainant notified her manager at 6:42 a.m. the next day that she could not come into work due to illness. By 11:35 p.m. that same day, Ms. Salyer emailed Complainant and informed her that she was suspended for 30 days without pay, effective immediately, and directed her to turn in her keys by noon the following day. Complainant also received three "FORMAL WRITE-UP"s for "Misuse of paid time," "Insubordination," and "Lack of Professionalism." (Finding of Fact – The Merits, #8, #10 and #11)

There was a causal connection between Complainant's opposition to the unlawful practice and Respondents' adverse action against her.

In *Navex Global*, the forum examined whether an employee had been retaliated against by her employer because she was summoned for jury duty. As part of its analysis, the forum considered prior precedent on the specific intent theory of

discrimination, stating:

“Under the ‘specific intent’ theory of discrimination, proof of a causal connection may be established through evidence that shows a respondent knowingly and purposefully discriminated against a complainant because of the complainant’s membership in a protected class.’ *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 32 (2012); OAR 839-005-0010(1)(d)(A). Specific intent may be shown through direct or circumstantial evidence. *Cyber Center*, 32 BOLI at 32. ‘Direct evidence is evidence that proves a fact in dispute directly, without any inferences or presumptions, and which in itself, if true, conclusively establishes the fact.’ *In the Matter of Kenneth D. Wallstrom*, 32 BOLI 63, 84 (2012). ‘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.’ *In the Matter of Income Property Management*, 31 BOLI 18, 39 (2010).”

In the Matter of Navex Global, 36 BOLI 200, 230-231 (2018). The causal connection between Complainant’s request to use, or her actual use of sick time, and the adverse employment action Respondents took against her is plain. Complainant notified her manager she could not come in, due to illness, and she was suspended for 30 days without pay less than 17 hours later.

While Respondent Lamka disputed Complainant’s description of sitting on the couch inside the business, his email exchanges with Complainant make clear that the adverse employment action taken against her was directly related to her use of sick time. In an email sent to Complainant on October 9, 2016, Respondent Lamka stated:

“To be very clear Sarah, you were not ‘sitting on the couch with a blanket,’ you were laying on the couch wrapped in a blanket. That, in and of itself, is unquestionably grounds for suspension, given that this is sadly not your first write-up.

Truly, it’s just sad.”

He went on to characterize her absence due to illness, on October 8, 2018, as “abandon[ing] [her] shift.” (Finding of Fact – The Merits, #11) In a February 8, 2017, interview, Respondent Lamka told Investigator Khoshnaw that he had every right to fire Complainant when he found her in the facility wrapped in a blanket, on October 7, 2016, but he did not. He went on to explain that he was not going to pay someone who called in sick when they were not sick, and stated that he had the right to ask for a doctor’s note. (Finding of Fact – The Merits, #12) Respondents provided no statements or evidence as to why they believed that Complainant was lying about being sick. Both Complainant and Respondents agreed that Complainant was on the business’s couch wrapped in a blanket on October 7, 2016, when Respondent Lamka entered the business and verbally confronted her. Complainant was visibly ill, feverish, and nauseous. (Finding of Fact – The Merits, #7) Complainant offered a reasonable

explanation for not being able to obtain a doctor's note on October 8, 2016.¹⁵ Respondents retaliated against Complainant because she took sick time, protected under ORS chapter 653, and are liable under ORS 653.641(2).

RESPONDENTS' LIABILITY UNDER ORS 653.641(3)

Under ORS 653.641(3), an employer may not apply an absence control policy that includes sick time covered under ORS 653.601 to 653.661 as an absence that may lead to or result in an adverse employment action against the employee. In this case, Respondent Lamka told Investigator Khoshnaw he was not going to pay someone who called in sick when they were not sick, and stated that he had the right to ask for a doctor's note. (Finding of Fact – The Merits, #12) It is a reasonable inference that Respondent Lamka's statements referred to District Manager McNeill's request that Complainant "Please provide a doctor's note by the end of the business day!" Mr. McNeill sent this request to Complainant the same day she called out sick, on October 8, 2016, some time prior to 11:21 a.m.¹⁶ Complainant responded that her doctor's office did not have an opening that day, since it was a Saturday, but that she would make an appointment for the coming week. Complainant explained that she could not afford the \$80 cost associated with going to an urgent care clinic. (Finding of Fact – The Merits, #9) Respondents almost immediately suspended Complainant without pay for 30 days. Based on the evidence before the forum, Respondents applied an absence control policy that included sick time covered under ORS 653.601 to 653.661 as an absence that lead to or resulted in an adverse employment action against Complainant.

RESPONDENTS' LIABILITY UNDER ORS 653.606(8)(A)

According to ORS 653.606(8)(a), an employer may not require an employee to "search for or find a replacement worker as a condition of the employee's use of accrued sick time." Respondents' requirement that employees secure their own shift coverage is expressly written in their Employee Handbook; it states, "If you are forced to call in sick, you *must*...arrange for someone to cover your shift no less than four hours prior to the scheduled shift." (Finding of Fact – The Merits, #5) (*emphasis added*) This policy was echoed by Complainant's manager, Ms. Salyer, when Complainant notified Ms. Salyer that she could not come in for her shift on October 8, 2016. (Finding of Fact – The Merits, #8) Respondents' policy requiring employees to find their own sick time coverage was corroborated by Investigator Sitton's interviews with other employees, as well. (Finding of Fact – The Merits, #16) Based on the evidence before the forum, it is clear Respondents required employees to secure their own replacement as a condition of that employee's use of accrued sick time, in violation of ORS 653.606(8)(a).

¹⁵ Regardless of Complainant's ability to provide a note that day, Respondents' requirement that she provide a note less than 15 days from when they made the request and when she had not been out sick for more than 3 consecutive days, was not compliant with ORS 653.626.

¹⁶ Mr. McNeill's email does not bear a time stamp. However, Complainant's response to his email was sent on October 8, 2016 at 11:21am.

RESPONDENTS' LIABILITY FOR COMPLAINANT'S CONSTRUCTIVE DISCHARGE

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

- (1) The employer intentionally created or intentionally maintained discriminatory working conditions related to the individual's protected class status;
- (2) The working conditions were so intolerable that a reasonable person in the individual's circumstances would have resigned because of them;
- (3) The employer desired to cause the individual to leave employment as a result of those working conditions, or knew or should have known that the individual was certain, or substantially certain, to leave employment as a result of the working conditions; and
- (4) The individual left employment as a result of the working conditions."

OAR 839-005-0011. "This forum has consistently held that if an employer imposes objectively intolerable working conditions, i.e., that a reasonable person in complainant's position would have resigned under those conditions, the employee's resignation due to those conditions is a constructive discharge." *In the Matter of Spud Cellar Deli, Inc.*, 31 BOLI 106, 137 (2010).

Respondents intentionally created or maintained discriminatory working conditions related to Complainant's ability to take her accrued sick time.

Respondents created and maintained a workplace environment in which employees were strongly discouraged and even punished from taking their lawfully accrued sick time. Respondents' written policy required employees to find their own coverage, when out due to illness, and was overly broad in its language, allowing Respondents to demand doctor's notes outside the parameters of ORS 653.626. (Finding of Fact – The Merits, #4 and #5) When Complainant tried to take her accrued sick time on October 7, 2016, she was pressured to come in by her manager, Ms. Salyer. She was subsequently verbally reprimanded by Respondent Lamka for appearing too ill on the job, when he came into the business and found her on the couch, wrapped in a blanket. When she called in sick the next day, she was suspended without pay for 30 days.

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

After being verbally reprimanded by Respondent Lamka for being so ill at work that she needed to sit down, Respondent then sent her out into the rain to put advertisements on vehicles. Complainant was feverish and nauseous at this time. On October 8, 2016, Complainant was still sick and had just been reprimanded for coming in when ill the day before. After calling in sick, she received an email from Respondents

to provide a doctor's note by the end of that day. Complainant was running a fever, nauseous and dizzy on October 8, 2016. (Finding of Fact – The Merits, #8). Complainant told Respondents that her doctor's office was closed, since it was a Saturday, and that going to an urgent care facility would cause her a financial hardship because the out-of-pocket fee would be too high. Complainant told Respondents she would set up an appointment for the coming week. (Finding of Fact – The Merits, #9) Respondents took an adverse employment action against her by suspending her without pay for 30 days later that day.

Complainant could not afford to go an entire month without the income she received from working for Respondents. Complainant was verbally reprimanded and sent out into the rain for being ill on October 7, 2016; she was discouraged by her manager from staying home when ill on October 8, 2016; she was pressured to provide a doctor's note, outside the parameters of ORS 653.626; and she was suspended without pay for 30 days because she used her accrued sick time. The forum concludes that such working conditions are so intolerable that a reasonable person in Complainant's circumstances would have resigned because of them.

Respondents knew or should have known that Complainant was substantially certain to leave her employment as a result of the working conditions.

Based on the length and severity of Respondents' adverse employment action against Complainant, Respondents should have known that Complainant was substantially certain to leave her employment as a result of their working conditions. Complainant had already alerted Respondents that she could not afford "the \$80 cost" of going to an urgent care facility outside of her insurance coverage. (Finding of Fact – The Merits, #9) Respondent should have known that depriving an employee of their pay for 30 days would create a substantial certainty that the employee would then be forced to seek employment elsewhere.

Complainant left her employment as a result of the working conditions.

Complainant could not go 30 days without the income she received from Respondents. Complainant was able to pick up more hours at her other job and did not return to work for Respondents. (Finding of Fact – The Merits, #13) Based on the evidence before the forum, it is clear that Complainant left her employment as a result of the working conditions placed upon her by Respondents.

DAMAGES

"In a constructive discharge case, a prevailing complainant is entitled to the same damages she would have received, had he or she been fired." *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012). Such damages may include lost wages and emotional distress damages. ORS 659A.850(4)(a)(B). The Agency amended its Formal Charges on March 15, 2018, changing the amount of damages sought for emotional, mental, and physical suffering from \$20,000 to an amount of at least \$10,000, and adding a pleading for lost wages, in an amount of at least \$5,000.00.

Lost Wages

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

The only evidence received regarding Complainant’s wages was a copy of her final paycheck.¹⁷ (Ex. A7) A complainant who seeks back pay is required to mitigate damages by using reasonable diligence to find other suitable employment. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI at 238. Complainant credibly testified at hearing that, after receiving her suspension from Respondents, she did not return to work and that she “had a second job, that was happy to give [her] hours...” There was no testimony or evidence offered regarding a gap in employment or a difference in pay with her new job. Based on the evidence before the forum, there is insufficient evidence to award lost wages to Complainant.

Emotional Distress Damages

Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering, and fashion a remedy adequate to eliminate the effects of unlawful employment practices. *In the Matter of Frehoo Inc.*, 36 BOLI 42, 71 (2017). Although the Agency amended its charges to seek \$10,000 in emotional distress damages on behalf of Complainant, the Agency argued for \$20,000 in emotional distress damages on her behalf at hearing. The Agency’s Amended Formal Charges specifically stated that it sought “[d]amages for emotional, mental, and physical suffering in the amount of at least \$10,000.” (*emphasis added*) The Oregon Court of Appeals has previously acknowledged that the *at least* language in the pleadings provides a respondent with notice that the Agency may seek a higher amount of damages at hearing. *Klein v. Oregon Bureau of Labor and Industries*, 289 Or App 507, 561-562 (2017).

At hearing, Complainant credibly testified that she was actively discouraged from taking sick time. She recounted another instance, prior to the October 8, 2016, occurrence, in which she needed to take sick time and was unable to do so. In May, 2015, Complainant suffered from shingles. She testified that she went into work but that “the pain became so bad, and the rash got worse” that she felt she had to go to the

¹⁷ The Agency’s closing argument addressed the \$20,000 amount of emotional distress damages pled in the original Formal Charges and was silent on the issue of \$5,000 in lost wages. When the Agency was asked if it wished to supplement its argument with information relating to the issue of lost wages, the Agency declined.

emergency room. Complainant testified that she “was crying in pain,” because it hurt so badly. Upon discharge from the hospital, Complainant was told to return to work “because [she] would have made the store close early” otherwise. (Finding of Fact – The Merits, #15) Complainant’s description of Respondents’ policy against taking sick time was echoed by other employees that worked for Respondents. Ms. Sitton credibly testified that several employees reported that Respondents denied employees sick time or actively discouraged them from taking it. (Finding of Fact – The Merits, #16)

With this past experience and knowledge of Respondents’ policy in mind, Complainant went into work on October 7, 2016, feeling feverish and nauseous. Respondent Lamka verbally reprimanded her for her behavior and appearance, which based on the evidence at hearing were a direct result of her illness, in front of a third party in the store. Complainant testified she was crying and felt “humiliated.” (Finding of Fact – The Merits, #7) When she called out sick the next day, she was suspended for 30 days without pay. Complainant was in a no-win situation. Not only did Respondents retaliate against her for being too sick at work, they also retaliated against her when she was sick and not at work.

A complainant’s testimony, if believed, is sufficient to support a claim for emotional distress damages. *In the Matter of Maltby Biocontrol, Inc.*, 33 BOLI 121, 159 (2014). Complainant had worked for Respondents for over a year when they took the adverse employment action against her. (Findings of Fact – The Merits, #3) After such a significant time working for Respondents, the suspension due to her illness made her feel angry and betrayed. She felt as though Respondents were grossly unprofessional and dishonest. (Findings of Fact – The Merits, #14) Based on the evidence and testimony at hearing, as well as BOLI precedent, the forum finds that \$20,000 is an appropriate amount of emotional distress damages in this case. See *In the Matter of Hey Beautiful Enterprises, Ltd. and Kimberly Schoene*, 34 BOLI 188 (2015) and *In the Matter of Blue Gryphon, LLC and Flora Turnbull*, 34 BOLI 216 (2015).

ADDITIONAL RELIEF REQUESTED BY THE AGENCY

The Agency also sought a cease and desist order against Respondents requiring them to stop committing any unlawful employment practices the forum concludes occurred. 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[.]”

The forum finds the Agency’s requested cease and desist order to be appropriate relief 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 **Respondents’** violations of ORS 653.641(2) and OAR 839-007-0065(2), ORS 653.641(3) and OAR 839-0070065(3), ORS 653.606(8)(a), and OAR 839005-0011(1)-(4), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Lioness Holdings, LLC, dba Tan Republic, and Respondent Peter Lamka**, 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 **Sarah Levin** in the amount of:

1) TWENTY THOUSAND DOLLARS (\$20,000.00), representing damages for emotional and mental suffering Complainant Sarah Levin experienced as a result of Respondents’ unlawful employment practices; plus,

2) Interest at the legal rate on the sum of TWENTY THOUSAND DOLLARS (\$20,000) from the date the Final Order is issued until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Lioness Holdings, LLC, dba Tan Republic, and Respondent Peter Lamka** to cease and desist from discriminating or retaliating against any employee based upon the employee’s use of sick time under ORS chapter 653.

In the Matter of

BRAVO EVENT SERVICE, INC., AND DAN KOR INDIVIDUALLY AS AIDER AND ABETTOR UNDER ORS 659A.030(1)(G) AND CYNTHIA RIOS, INDIVIDUALLY AS AIDER AND ABETTOR UNDER ORS 659A.030(1)(G),

**CASE No. 01-18
Final Order of Commissioner Brad Avakian
Issued August 27, 2018**

SYNOPSIS

The Agency established by a preponderance of the evidence that Respondent Bravo Event Services, Inc. ("Bravo"), acting through Daniel Kor, its president, subjected Complainant, a female, to unlawful sexual harassment. ORS 659A.030(1)(b); OAR 839-005-0030. The forum concluded that Kor was Bravo's proxy because of Kor's officer status in Bravo, making Bravo strictly liable for the harassment of Complainant. ORS 659A.030(1)(g). The forum awarded Complainant \$100,000 in emotional, mental, and physical suffering damages. The forum also required Kor and Bravo's managers and supervisors to undergo approved training on unlawful harassment and discrimination in the workplace. ORS 659A.850.

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 February 27 and April 4, 2018, 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 Kara Cogswell, an employee of the Agency.

The Agency called BOLI Field Operations Manager Eric Yates, Complainant Sairy Miller and Merrie Miller as witnesses.

Respondent Daniel Kor called himself as a witness.

The forum received into evidence: (a) Administrative exhibits X1 through X35¹⁸ and (b) Agency exhibits A1-A11 and A13-A18.

Having fully considered the entire record in this matter, the Administrative Law Judge hereby makes the following Findings of Fact (Procedural and on the Merits),

¹⁸ Exhibits X23 –X35 were received after the hearing commenced.

Ultimate¹⁹ Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) Complainant filed a complaint with the Agency's Civil Rights Division on November 28, 2016, alleging that Respondent Bravo Event Services, Inc. ("Bravo") subjected her to severe or pervasive sexual harassment and retaliated against her, leaving her no choice other than to resign. The complaint also named Respondent Rios as an aider and abettor. She later filed an amended complaint naming Respondent Kor as an aider and abettor. (Exs. A1, A2; Testimony of Yates)

2) On November 28, 2017, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence of an unlawful employment practice (sexual harassment) in violation of ORS 659A.030. The Notice further stated that the Division did not find substantial evidence of retaliation or constructive discharge. (Ex. A7)

3) On November 9, 2017, the forum issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as February 27, 2018, 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)

4) The Formal Charges alleged that Respondent Bravo engaged in an unlawful employment practice under ORS 659A.030(1)(b), OAR 839-005-0021(1), (2) and OAR 839-005-0030(1)-(5). Additionally, the Formal Charges alleged that Respondents Kor and Rios unlawfully aided and abetted an unlawful employment practice in violation of ORS 659A.030(1)(g). The Formal Charges sought damages for physical, mental and emotional distress in the amount of "at least \$100,000.00." The Formal Charges also asked that Respondents be trained, at their expense, "on unlawful harassment and discrimination in the workplace" and that Respondents be enjoined from violating laws. The Formal Charges state that the forum's order may include such other relief as appropriate to eliminate the effects of the unlawful practices found as to Complainant and others similarly situated. (Ex. X2a)

5) On November 28, 2017, the following documents were filed with the forum:

- A document labeled "Responding to Answer: Not Guilty" filed by Respondent Daniel Kor.

¹⁹ The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

- A document labeled “Memorandum in Support of Motion to Dismiss Replying to Charges with an Answer” filed by Respondent Cynthia Rios.

The Agency submitted a filing on November 29, 2017, asking the forum to determine whether these documents should be considered to be answers, motions or some other documents so that the Agency could appropriately respond. The ALJ issued an interim order stating, in pertinent part:

“Respondents’ documents each deny the allegations made in the Formal Charges. A motion to dismiss must be based upon:

- ‘(a) Lack of jurisdiction over the subject matter or person;
- (b) Insufficiency of process or service of process; or
- (c) Failure to state a claim upon which relief can be granted.’

OAR 839-050-0150(1). Respondents’ filings do not make a motion for any of these reasons. Accordingly, the forum considers the documents to be answers filed pursuant to OAR 839-050-0130, not motions. Respondents may file motions to dismiss in separate documents for one of the reasons set forth in OAR 839-050-0150(1).”

(Exs. X3-X5)

6) On December 5, 2017, the Agency moved for an Order of Default against Respondent Bravo, based on Bravo’s failure to file an answer to the Formal Charges. In its motion, the Agency represented that the Formal Charges were issued on November 9, 2017, that Bravo was served with the Formal Charges on November 9, 2017, and that Bravo had not filed an answer. Bravo did not file a response to the Agency’s motion. The forum issued an interim order on December 22, 2017, which stated, in pertinent part:

“RULING ON THE AGENCY’S MOTION

“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), describes the methods of serving Formal Charges and states, in pertinent part:

* * * [T]he charging document [in a BOLI contested case] will be served on the party or the party’s representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

- ‘(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)(a) 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].’

“The Formal Charges were issued on November 9, 2017, 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.’

(Agency Ex. 2) (Emphasis in original).

“In support of its motion, the Agency attached an affidavit signed by BOLI’s Contested Case Coordinator, Diane Anicker. In her affidavit, Anicker swore that on November 9, 2017, she served copies of the Formal Charges and Notice of Hearing in this case on both Bravo’s President Dan Kor and Registered Agent Robin Metcalf ‘by preparing and placing said documents into the outgoing Bureau of Labor and Industries mail, via regular and certified mail * * * *’. Anicker further stated that she received delivery confirmation for the certified mailings. The Agency’s motion included copies of the return receipt envelopes delivered to the addresses of Kor and Metcalf with signatures acknowledging delivery. (Agency Exs. 4, 6). Accordingly, the forum concludes that Bravo was served with the Formal Charges on November 9, 2017, making Bravo’s answer due on November 29, 2017. More than 20 days have elapsed since November 29, 2017, and Bravo has not yet filed an answer.

“Based on Bravo’s failure to file an answer in the time set out in the Notice of Hearing, the forum **GRANTS** the Agency’s motion and finds Bravo in default. If Bravo is not granted relief from default, Bravo will not be allowed to participate in any manner in the hearing, including, but not limited to, presentation of witnesses or evidence on Bravo’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).

“NOTICE OF DEFAULT

“Relief from default may be granted if Bravo shows good cause, within ten days after the date of this order, for failing to timely file an answer. Bravo’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.”

(Exs. X6, X8)

7) On December 14, 2017, attorney Kenneth L. Baker submitted a letter to the Contested Case Coordinator stating that he represents Respondents Bravo and Kor. (Ex. X7)

8) The Agency filed Amended Formal Charges on January 22, 2018, to fix typographical errors relating to the identification of Respondent Rios. (Exs. X9-9b)

9) On January 29, 2018, 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 February 13, 2018, and set out the requirements for what each participant must include in their case summary. (Exs. X10, X11)

10) On February 6, 2018, Administrative Prosecutor Kara Cogswell notified the forum, via email, that Mr. Baker recently informed her that "he is withdrawing as counsel and that correspondence to Mr. Kor should be directed to * * * @msn.com." The ALJ issued an interim order on February 6, 2018, stating, in pertinent part:

"* * * Mr. Baker has not filed a document with the forum withdrawing from representation of Kor and/or Bravo. **Therefore, I hereby order Mr. Baker to file a notice of withdrawal with BOLI's Contested Case Coordinator with current contact information (including address, email and telephone numbers) for Kor and Bravo so that the record is clear on this matter. Until such notice is filed, Mr. Baker will remain as counsel of record for Kor and Bravo in this matter.**

"Furthermore, assuming Mr. Baker does withdraw as counsel, other counsel or an authorized representative must appear on behalf of Respondent Bravo as it is a corporation. 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 the limited liability company. OAR 839-050-0110(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). A form letter is attached to this document which may be completed and filed on behalf of Bravo. The letter must be mailed or hand-delivered to the forum at the address listed on the first page of the original Notice of Hearing.

"A corporate respondent who is not represented at the hearing by an attorney or authorized representative, will be found in default and will not be allowed to participate in the hearing. OAR 839-050-0330(3). (In this matter, Respondent Bravo has already been found to be in default.)"

(Ex. X13) (emphasis in original).

11) The Agency moved for a discovery order on January 29, 2018, pursuant to OAR 839-050-0200, requiring Respondent Kor to admit or deny the following request for admission by a specific date or else have the statements be deemed admitted for the purposes of the Agency's action:

"1. Admit or deny that the documents labeled as Exhibit B, pages 1-30, and attached to the Agency's motion to compel are a true and accurate record of text messages that Respondent Kor exchanged with Sairy Miller on or about August 31, 2016, through September 1, 2016."

The Agency accompanied its motion with documentation showing that it had informally sought the admission with an informal request for admission on January 8, 2018. In its motion, the Agency provided a statement indicating the relevancy of the sought after documents and admissions. Respondent did not file a response to the motion.

The forum granted the Agency's motion on February 6, 2018, and ordered Respondent Kor to admit or deny the Agency's Request for Admission no later than noon, Monday, February 12, 2018. The interim order further stated that "[f]ailure to comply with this order may result in sanctions as described in OAR 839-050-0200(11), including deeming the statement set forth above as admitted or refusing to admit evidence contrary to those facts." (Exs. X12, X14)

12) On February 9, 2018, attorney Andrew Teitelman filed a Notice of Representation stating that he represented Respondent Rios in this matter. (Ex. X15)

13) The forum granted Respondent Rios's unopposed motion to extend the case summary deadline to February 20, 2018, in an interim order dated February 9, 2018. (Exs. X16-X17)

14) The Agency filed its case summary on February 20, 2018. (Ex. X19)

15) After the Agency filed a Final Order of Informal Disposition ("FOID") as to the claims involving Respondent Rios, the ALJ issued a FOID on February 22, 2018, disposing of the claims against Respondent Rios. (Ex. X20)

16) On February 14, 2018, the Agency filed a Motion for Discovery Sanctions Against Respondent Daniel Kor. In its motion, the Agency requested that the forum enter an order deeming the statement set forth in the Agency's Request for Admissions to be admitted because Respondent Kor did not reply to the Agency's Request for Admission by the date set forth in the forum's interim order of February 6, 2018. Respondent Kor did not file a response to the Agency's motion.

Since Respondent Kor failed to respond to the Agency's Request for Admission, the forum issued an interim order on February 22, 2018, stating that the facts set forth in the Agency's Request for Admission No. 1 were deemed admitted. See 839-050-0200(11); *In the Matter of Westland Resources Group LLC*, 23 BOLI 276, 281 (2002); *In the Matter of Arthur Lee*, 22 BOLI 99, 103 (2001). (Exs. X18, X21)

17) On February 22, 2018, the ALJ issued an interim order changing the start time of the hearing to 9:30 a.m., and noting that the date and location noted in the Notice of Hearing remained the same. (Ex. X22)

18) The Contested Case Coordinator received a document titled Withdrawal of Attorney from attorney Kenneth Baker stating that he was no longer representing Kor on February 26, 2018. The document did not contain a request to withdraw from representing Bravo. A Certificate of Service attached to the document represented that it was sent to the Agency on February 2, 2018. (Ex. X23)

19) On February 26, 2018, the ALJ granted a request to file a request to withdraw from representing Bravo by email submitted by attorney Kenneth Baker. The request stated that Baker was also no longer representing Respondent Bravo and to send all future notices to Kor. (Ex. X24)

20) At the start of hearing, pursuant to ORS 183.415(7), the ALJ orally informed the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Hearing Record)

21) On the first day of hearing, the ALJ asked Kor if he was the authorized representative for Bravo and Kor responded that he was. The ALJ provided Kor with a form to complete stating that he was the authorized representative. Kor completed the form and filed it with the forum. The ALJ also asked Kor to clarify the mailing address and email address for Bravo and Kor. Kor wrote the addresses on a sheet of paper and the ALJ placed the paper in the forum's file. (Hearing Record; Exs. X25, X26)

22) After the conclusion of the Agency's case, the ALJ informed Kor that he would not be able to present witnesses or exhibits because he had not filed a case summary by the deadline of February 20, 2018. At the time of the deadline, Kor was represented by counsel. During the hearing on February 27, 2018, Kor asked for permission to introduce evidence, asserting that he did not submit a case summary due to the recent resignation of his attorney and an injury to his shoulder. In light of the fact that Kor's attorney submitted a withdrawal notice the day prior to the hearing, the ALJ informed Kor that he could file a motion by March 5, 2018, requesting additional time to submit a case summary. The ALJ also provided a blank case summary form to Kor.

The ALJ issued an interim order on February 28, 2018, which stated, in pertinent part:

"After Kor requested that he be able to do so and after hearing argument from Kor and the Agency, the ALJ issued the following ruling:

- The hearing is temporarily in recess.
- Kor may file a written motion to extend the case summary deadline. The motion must be physically received by BOLI's Contested Case Coordinator no later than **Monday, March 5, 2018, at 5:00 p.m.**, and a copy of the motion must be provided to the Agency by the deadline. A

motion that is mailed prior to the deadline but is not received by the Contested Case Coordinator will be deemed to be untimely filed. As set forth in OAR 839-050-0210(5), Kor's motion must explain why there is "a satisfactory reason" for having failed to file a case summary or that "excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8)." If the motion is based on a medical reason, Kor must include documentation from a medical provider to support the motion. The motion must also be filed with a completed Case Summary Form and exhibits. The ALJ provided Kor with a copy of the Case Summary Form during the hearing and a copy is also attached to this interim order.

- The Agency may file a response to Kor's motion no later than seven days after the motion is filed, in accordance with OAR 839-050-0150.
- If Kor does not file a motion by the deadline or the ALJ denies the motion, the ALJ will issue an interim order informing the parties that the record of the hearing is closed. At that time, the parties will be asked if they would like the opportunity to present closing arguments orally or in writing.
- If Kor files a motion and the ALJ grants the motion, the parties will be contacted by the ALJ to discuss a time for resuming the hearing.
- Because Respondent Bravo Event Services, Inc. is in default, it will not be permitted to file a motion."

(Ex. X27)

23) On March 5, 2018, Kor filed a document captioned "Memorandum in Support Request Extendaed [sic] Time Motion to Request More Time to Prepare a List of Names to be Called as Defendant Witness." The Agency filed a response to the motion on March 6, 2018, objecting to Kor's request to submit a case summary. The Agency's response stated that it did not oppose Kor testifying.

Kor's motion did not include a completed case summary form as required by the ALJ's oral ruling on February 27, 2018, and the interim order of February 28, 2018. Additionally, Kor stated that he needed an extension because his attorney withdrew on "March 2, 2018," and that there was a package to pick up. The forum noted for the record that Kor's attorney filed a Notice of Withdrawal on February 26, 2018. Additionally, Kor stated on the record at hearing on February 27, 2018, that he had a packet in front of him that he had picked up from his attorney's office the previous day. Kor did not include medical documentation with the motion. Kor's motion did not indicate why he could not prepare and file a case summary between the date of the hearing (February 27, 2018) and March 5, 2018. Accordingly, the forum issued an interim order on March 8, 2018, denying Kor's motion and stating, in pertinent part:

"In previous BOLI contested cases in which a party failed to file a case summary,

the forum permitted the respondent to do the following: (1) present the testimony of the respondent and (2) offer testimony or exhibits *solely* for the purpose of impeachment. See, e.g. *Coast 2 Coast LLC*, 35 BOLI 151, 158-59 (2017); *In the Matter of Hey Beautiful Enterprises, Ltd.*, 33 BOLI 189, 193 (2014). Accordingly, the hearing in this matter will reconvene and Kor may testify, subject to cross examination by the Agency. Additionally, if Kor has evidence that satisfies the standards for impeachment testimony or exhibits, he may also offer that evidence. Impeachment evidence is limited to the purposes set forth in Oregon's Evidence Code.²⁰ For example, impeachment evidence includes testimony or exhibits that 'show bias, interest, prejudice, improper motive, a witness's ability to perceive or remember, prior inconsistent conduct, and prior inconsistent statements directly related to a relevant issue and conviction of a crime.' Testimony or exhibits that do not meet these standards will not be admitted. The Agency may present rebuttal testimony and exhibits after the conclusion of Kor's case. The parties will then be given the opportunity to present closing arguments.

"The parties are instructed to email the ALJ at kari.furnanz@state.or.us no later than noon on March 12, 2018, with the parties' availability to continue the hearing on the following dates: March 15, 16, 2018 and April 4-6, 9-13, 16-20, 2018. The parties should indicate in their emails whether they would prefer to appear by telephone or in person. If any party does not email the ALJ with their available dates by the deadline, the ALJ will schedule based on the responses received."

(Ex. X28-X30) (emphasis in original).

24) In response to the interim order of March 8, 2018, Administrative Prosecutor Kara Cogswell sent an email with the Agency's availability, but Kor did not. Based on the response received from the Agency and the availability of BOLI's hearing room, the ALJ scheduled the hearing to resume at 9:30 a.m. on Wednesday, April 4, 2018. The Complainant was permitted to observe and appear by telephone or video. (Exs. X31-X32)

25) On March 16, 2018, Kor emailed the ALJ and provided a new address with a P.O. Box. The ALJ issued an interim order on March 19, 2018, to notify the parties and update the forum's record with the current address for Kor and Bravo. (Exs. X33-X34)

26) On March 21, 2018, Respondent Daniel Kor sent an email to the ALJ indicating that the previous PO Box address he supplied to the forum was incorrect. The ALJ issued an interim order on March 22, 2018, notifying the parties and updating the forum's record with the current address for Kor and Bravo. The interim order included a copy of the forum's interim order of March 13, 2018, which included the date

²⁰ Oregon's Evidence Code is online and the rules for impeachment evidence are primarily located under the section titled "Witnesses" at: https://www.oregonlegislature.gov/bills_laws/ors/ors040.html.

for the continuation of the hearing. (Exs. X33-X34)

27) The hearing resumed at 9:30 a.m. on Wednesday, April 4, 2018, and concluded that day.

28) On July 31, 2018, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of

29) its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Bravo is a corporation that provides personal security services for special events, including alcohol monitoring. Kor is Bravo's President. Rios is the Secretary of the corporation. Kor and Rios are the sole managing members of the corporation. (Exs. X2a, X3, X9, A4, A16, A18)²¹

2) Bravo hired Complainant to work as a security officer and alcohol monitor in March of 2015. Kor supervised her. Complainant worked her last shift at the Pabst Blue Ribbon Festival on August 28, 2016, because she planned to move to North Dakota. She did not receive her final paycheck until September 5, 2016. (Testimony of Complainant; Exs. X9, A8, A9, A18)

3) Complainant enjoyed working for Bravo and liked her co-workers. She planned to come back and work additional shifts when she returned to Portland to visit family and friends in the area. While working at Bravo, she never asked for an advance or loan. (Testimony of Complainant)

4) In August of 2016, Complainant told Kor that she was moving to North Dakota and asked him for a letter of recommendation. On August 15, 2016, Kor signed a letter of recommendation that included the following comments:

“* * * [Complainant] was a wonderful addition to the team. She is a real team player. * * *

“* * * [Complainant] is always on time and ready to work. She is great with customer service and she can work out situations while pleasing the client/customers. She is valuable to our team and she will be a great addition to any company. We wish her the best of luck and [she] is always welcome back to work for us.”

(Ex. A8)

5) While Complainant worked a shift with Kor on August 19, 2016, he asked her if she thought he was good looking. She stopped him from continuing to ask similar

²¹ Factual matters alleged in a charging document that are not denied in the answer are deemed admitted by the answering party. *In the Matter of Charlene Marie Anderson dba Domestic Rescue*, 33 BOLI 253, 258 (2014).

questions because she felt uncomfortable. (Testimony of Complainant; Ex. A5)

6) On August 30, 2016, Kor invited Complainant to go out for drinks at a bar. She did not want to go alone with Kor and did not want to provide the impression that they had more than a professional relationship, so she invited a female co-worker to join them. Kor bought Complainant and the co-worker drinks, and he gambled some money in a video poker machine. While they were sitting at the bar, Kor asked Complainant why she did not ever wear makeup. She responded that she did not think it was necessary. Kor then tried to give her \$100 to buy makeup. She refused. After he repeatedly insisted that she take the money, she agreed to take \$100 in cash from him and understood it was a gift. Aside from the \$100 Kor gave her for makeup, Complainant did not take or borrow any money from him. After some of Complainant's friends arrived at the bar, she left with her friends and Kor stayed at the bar. (Testimony of Complainant)

7) When Kor drove away from the bar, he was intoxicated, upset and angry. He started sending text messages to Complainant. (Testimony of Kor; Ex. A6)

8) The next morning, Kor called Complainant and said he was going to treat her like the "whore" she really was. He told her that if she had sex with him, he would not take \$400 out of her final paycheck. Complainant hung up the phone. (Testimony of Complainant)

9) Kor called Complainant back and she recorded part of their conversation. During that telephone call, Kor told her:

"I'm a very sensitive guy, I really am. * * * I don't really say what's on the top of my head. * * * I've been pretty forward with you. * * * I know that you and I will never do anything. I knew that. * * * I like being in your presence. * * * You're fun to be in the presence with."

Complainant then asked, "If you know we weren't going to do anything, then why would you say something like that to me that like 'oh if you don't want me to take \$400 out of your check then [*unintelligible*]'?"

In response, Kor said, "Because you, when [*unintelligible*] get drunk, you act totally different. You do. * * * * * You took almost \$400 from me. * * * You did." Complainant then told Kor that he must have underestimated how much money he played in the poker machine. He attempted to make some calculations as to how he spent his cash that evening and then said:

"No I know how much money I put in the poker machine. * * * It would be different if I was like dating you or screwing you. * * * I wouldn't care. It wouldn't bother me. * * * Because you know what, it's an investment. [*Recording ended*]"

(Testimony of Complainant, Ex. A11)

10) Kor also sent Complainant multiple text messages over the next several

days which included the following:

<u>Sender of Text</u>	<u>Message</u> ²²
<u>Kor:</u>	"What can you do 4 me? Something that has never been done to you before Yo imagination my dear I can fuck all night all day all week all month it's up to you What country r u from USA born in San Marino California why? R u mexican [sic] "She ask what can you do for me so I told her"
<u>Complainant:</u>	"Wtf [what the fuck] "* * * "Btw u r kinda tripping me out "* * * "If that's how you want to behave before I leave then ok. But your [sic] won't get a response from me other than this cause u want to throw a fit"
<u>Kor:</u>	"* * * I think you have the syphilis in the brain I'm not an expert but you have all the symptoms that's because of all the guys you fucked around with in the past years please seek help "* * * "One more thing the money you borrowed I will deducted [sic] from your check * * *"
<u>Kor:</u>	"I never once disrespected you thought highly of you to last night I saw the rule [sic] you come out dude you are a typical white trash bitch that likes to suck black dick and get black dick up your asshole * * * when I heard the song last night because it is remind me of you so much I'll see about it I'd like to expedite your checks I know you need itso [sic] I can deduct * * *"
<u>Kor:</u>	"* * * compromise with you on paying it back the only team [sic] that you have is worth to me OK for example if Tony had it in massage table I asked you would you do if it is that you give massages I said soda [sic] why so that's the groceries the right there is one item send you a Nympho that's living Occie should I go to drug Mart Art I want to do a tattoo of me do you play cards this play strip poker just be something it's at least I'm thinking of the go station with you tell me what you want it's only fair"
<u>Complainant:</u>	"Wtf"
<u>Kor:</u>	"Choose now or else time is up"

²² The text messages in each box in this table are set forth in the order they were sent or received by Complainant. However, the separate boxes may not be in chronological order.

<u>Kor:</u>	"Thank you for getting back you get all the hours you work that is a definite but we need to compromise on what you borrowed from me and I could just give you money I'll let you walk away with it I know \$400 that's the number I have * * * The threats you know who I amor [sic] what I am capable of doing. [B]ut as now you o [sic] me the funds and I going to deduct it business between you and I no one else but I am open for compromising know they had time to think about this whole thing and still have a heart because I got about 5 min now because [Rios] is texting me now to give her you hours so what do you want to do."
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(Testimony of Complainant; Ex. A9)

11) On September 1, Kor instructed Rios to withhold \$400 from Complainant's wages as repayment for proceeds from a winning lottery ticket that he said Complainant took from him. (Ex. A18)

12) Complainant texted Rios, who handled payroll for Bravo, on September 1. Complainant asked Rios if she could pick up her paycheck. She also told Rios that Kor was "being very unpleasant and unprofessional" and that Complainant did not "want to have correspondence with [Kor] anymore please." Rios responded, "Well I'm still wait [sic] on the both of you since he is saying you took \$400 from him[.] Adv??" Complainant told Rios that Kor lost money in the poker machine "and now he is saying I can pay him back by having sex with him[.] I don't borrow money from anyone. Not even friends. I have told him we would never have any type of sexual conduct weeks ago. * * *"

After additional messages sent back and forth, Rios texted, "* * * sorry what I'm doing you think is fair I just trying get you paid[.]" Complainant thanked Rios and also sent Rios a picture of a text message Kor sent her that said "you are a typical white trash bitch that likes to suck black dick" Rios did not respond to that message, but the following day Rios sent Complainant a message telling her that her paycheck was ready. (Testimony of Complainant; Ex. A10)

13) The earnings record and itemized deduction statement for Complainant's paycheck issued on September 5, 2016, indicates that a deduction of \$300 for a "draw" was made for wages earned for the pay period of July 27 – August 26, 2016. (Ex. A13)

14) When Kor told Complainant that he would reduce her paycheck unless she had sex with him, she felt shocked, belittled, helpless, and insecure. She felt like Kor was bullying and cornering her. It made her feel worthless and like she was a "piece of meat." She had previously been proud of her security certifications and thought she had a professional relationship with Kor. She wondered what she did that caused him to treat her this way. Prior to that, she had enjoyed her work and was proud. (Testimony of Complainant, M. Miller)

15) When Complainant traveled to North Dakota in early September, her finances were tight. After her wages were reduced, she could no longer afford to pay for a hotel to stay in with her young daughter during their drive to North Dakota. When

she had to stop and rest, she was forced to sleep in her car at a rest stop and worried about their safety. If she had the \$300 withheld from her check, she would have rented a room and would not have slept in her car at a rest stop. (Testimony of Complainant)

16) Kor's treatment of Complainant has had a continuing effect on her life. Complainant is wary of men and does not trust her co-workers at her current place of employment. She often asks herself why this happened to her. She wears baggier clothes because she does not want to bring on the type of behavior she experienced from Kor. She does not attend social gatherings with her co-workers because she is afraid someone will take advantage of her like Kor did. (Testimony of Complainant, M. Miller)

Credibility Findings

17) Complainant's testimony was credible, with one exception. She testified that the text messages set forth in Ex. A9 were in chronological order. However, the dates and times between some of the pages in Ex. A9 are out of order, and do not flow from one message or time stamp to the next. Accordingly, her testimony on that one matter was not credited. (Testimony of Complainant; Ex. A9)

18) The testimony of Kor was not credible because he contradicted his prior statements on several occasions. For example, he changed his explanation for the payroll deduction on multiple occasions as follows:

- On or around September 1, 2016, Kor instructed Rios to withhold \$400 "from Complainant's wages as repayment for proceeds from a winning lottery ticket that he alleged [Complainant] took from him." After Complainant told Rios that Kor gave her \$100 to buy makeup, Rios spoke to Kor and he agreed that he gave Complainant \$100 for makeup and instructed Rios to change the deduction from Complainant's paycheck to \$300.
- On December 21, 2016, in Kor's initial response to BOLI, he stated that Complainant "had gotten an advance" of \$300 because she needed the cash to move out of her house and clean up. With his response, he submitted a handwritten note with a date of "Sept 24 2016" purportedly signed by Complainant stating that Complainant "has requested an advance of \$300.00 for a personal loan to be paid from her Bravo check on the 5th of Oct 2016." However, as of September 24, 2016, Complainant had already moved to North Dakota and received her final paycheck on September 5, 2016.
- On January 1, 2017, Kor submitted a supplemental BOLI response in which he stated that Complainant "just grab [*sic*] a hundred [dollar bill] out of my hand and said this is for the makeup." He also said that he made a mistake on the date of the note that he claimed Complainant signed about the advance.

- In the Answer Kor submitted in response to the Formal Charges on November 28, 2017, Kor stated that “on the 28th,” Complainant asked for an “advance of \$400.00” to clean up her house.
- When Kor testified on April 4, 2018, he said that he won \$700 from a poker machine and that Complainant took \$200-300 in cash out of his hand and he “didn’t want to make a scene.”

Moreover, the forum concludes that the note Kor submitted to BOLI’s investigator purportedly containing Complainant’s signature authorizing a draw was forged by Kor. The forum reaches this conclusion for the following reasons. First, Complainant credibly testified that she did not sign the note and offered receipts demonstrating that she traveled from Portland to North Dakota in early September, and was not in Oregon on September 24, 2016, the date written on the note. Second, in Rios’s declaration, she stated that Kor did not provide her with the note at the time he instructed her to withhold a draw from Complainant’s wages and she had no knowledge that such a note existed. (Testimony of Kor; Exs. X3, A6, A14, A15, A17, A18)

19) The testimony of Eric Yates was credible and the forum credited his testimony in its entirety. (Testimony of Yates)

20) Merrie Miller had a natural bias as Complainant’s mother. However, she did not exaggerate her observations of Complainant’s emotional distress and testified in a straightforward manner. Accordingly, the forum finds her to be credible and credits her testimony in its entirety. (Testimony of M. Miller)

CONCLUSIONS OF LAW

1) At all times material herein, Bravo was an employer as defined in ORS 659A.001(4) and employed Complainant.

2) The actions, statements, and motivations of Kor (Complainant’s supervisor) are properly imputed to Respondent. *In the Matter of Leo Thomas Ryder dba Leo’s BBQ Bar & Grill*, 34 BOLI 67, 73 (2015).

3) Bravo subjected Complainant to sexual harassment in violation of ORS 659A.030(1)(b), OAR 839-005-0021, OAR 839-005-0030(1)(a)(A), OAR 839-005-0030(1)(b) and OAR 839-005-0030(7).

4) At all times herein, Kor was an individual and a “person” under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

5) Kor aided and abetted Bravo in this unlawful employment practice in violation of ORS 659A.030(1)(g).

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

7) Pursuant to ORS 659A.850(4)(a)(B), 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 Respondents' unlawful practices. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges that Bravo subjected Complainant to unwanted sexual comments and other conduct of a sexual nature from Kor, Bravo's proxy, and that her submission to the conduct was implicitly made a condition of her employment, specifically that Kor made her receipt of all of her final wages subject to her performing sex acts with him. The Agency also alleges that Kor's conduct was sufficiently severe or pervasive to have the purpose or effect of creating a hostile, intimidating or offensive working environment. Additionally, the Agency alleges that Kor aided and abetted the unlawful sexual harassment. The Agency seeks emotional distress damages for Complainant.

LIABILITY OF BRAVO FOR SEXUAL DISCRIMINATION

It is an unlawful employment practice for "[a]n employer, because of an individual's * * * sex * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment." ORS 659A.030(1)(b). Employers are prohibited from using sex as the basis for employment decisions with regard to the "terms conditions or privileges of employment such as benefits and compensation." OAR 839-005-0021(1). "Discrimination because of sex includes sexual harassment * * *." OAR 839-005-0021(2).

Unlawful sexual harassment may take the form of *quid pro quo* harassment or hostile work environment harassment.

1) *Quid Pro Quo* Harassment

Quid pro quo sexual harassment is defined as:

"(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:

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

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

OAR 839-005-0030(1)(a). The Agency's prima facie case in a matter involving OAR 839-005-0030(1)(a) is as follows: (1) Bravo was an employer subject to ORS

659A.001 to 659A.030; (2) Bravo employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Kor engaged in unwelcome conduct (verbal or physical) directed at Complainant because of her sex; (5) Complainant's submission to this conduct was made an explicit or implicit term or condition of her employment, or as the basis of employment decisions affecting her. See *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 167 (2012).

The first three elements are established in that it is undisputed that Bravo is an Oregon employer that employed Complainant, a female, and is a member of a protected class.

With respect to the fourth element, the evidence is undisputed that Kor sent Complainant text messages of a sexual nature. He also propositioned her for sex in two telephone calls. She credibly testified that the sexual overtures in the telephone calls and text messages were unwanted. Accordingly, this element is also established.

Finally, in the text messages and telephone calls, Kor told Complainant that he would not deduct money from her final paycheck, if she had sex with him.²³ After Complainant refused to do so, Kor instructed Rios to deduct \$300 from Complainant's final check, and Rios made the deduction. Therefore, the Agency also established element five by showing that Complainant's rejection of Kor's request was used as the basis for an employment decision affecting her, namely the amount she would be paid.

Therefore, the forum concludes that Bravo violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a)(B) by withholding pay from Complainant's final paycheck following her rejection of Kor's unwelcome sexual conduct.

2) Hostile Work Environment Harassment

OAR 839-005-0030(1)(b) defines hostile work environment sexual harassment as:

"Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment."

The conduct must be sex-based. OAR 839-005-0030(1).

Where the Agency "proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands," the Agency has already established that there was "a change in her terms or conditions of employment that is actionable" under ORS 659A.030. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 753-54 (1998).²⁴ In other words, because the Agency established *quid pro quo*

²³ See Findings of Fact – The Merits, ##8-10.

²⁴ Federal law similar to Oregon's civil rights laws is not binding on the forum, but federal decisions can be instructive in construing and applying similar state law. *Frehoo, Inc.*, 36 BOLI at 67. See also *In the*

harassment based on the negative employment decision following Complainant's refusal to submit to Kor's sexual demand, the Agency has already established a violation of ORS 659A.030. Therefore, it need not separately prove that this same conduct also resulted in a hostile working environment.

In addition to Kor's request for sex which resulted in a *quid pro quo* violation, the Agency also contended that Kor created a hostile working environment when he asked Complainant if he was good looking. The Agency's prima facie case in a hostile environment case consists of the following elements: (1) Bravo was an employer subject to ORS 659A.001 to 659A.030; (2) Bravo employed Complainant; (3) Complainant is a member of a protected class (sex); (4) Complainant was subjected to unwanted conduct because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating a hostile, intimidating or offensive work environment for Complainant; and (6) Complainant was harmed by the unwelcome conduct. See, e.g., *In the Matter of Frehoo, Inc.*, 36 BOLI 42, 63-54 (2017).

Although the Agency established elements 1-4 of this test, Kor's "good looking" question was not sufficiently severe or pervasive to create a hostile working environment. Accordingly, that one incident, by itself, did not support a claim for sexual harassment.

3) Bravo's Responsibility for the Sexual Harassment Violation

The Amended Formal Charges include an allegation of harassment by proxy. If Kor was a proxy for Bravo, then his sexual harassment of Complainant should be imputed to Bravo. OAR 839-005-0030(3) provides that "[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer." See, e.g. *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 122 (2012) (respondent's sole owner was proxy); *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 167 (2012) (respondent's owner, who was also a corporate officer, was respondent's proxy); *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 286 (2009) (corporation liable for harassment by respondent's sole shareholder); *In the Matter of Spud Cellar Deli, Inc.*, 31 BOLI 106, 133 (2010) (respondent was held strictly liable for sexual harassment committed by respondent's owner, president, and manager).

Kor is the President of Bravo and a managing member of the corporation.²⁵ Accordingly, Bravo is strictly liable for his harassment of Complainant.

LIABILITY OF KOR FOR AIDING AND ABETTING

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or

Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 149 (2000) (citing to *Burlington* and stating that "decisions interpreting Title VII are instructive in construing and applying the similar state law").

²⁵ See Finding of Fact – The Merits, #1.

any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so.” Aiding and abetting, in the context of an unlawful employment practice, means “to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.” *In the Matter of Frehoo, Inc.*, 36 BOLI at 69. A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice. *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene*, 34 BOLI 80, 97 (2015). See also *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012).

As set forth above, Bravo’s President and manager, Kor, sexually harassed Complainant. Accordingly, he aided and abetted the harassment of Complainant and is in violation of ORS 659A.030(1)(g). As an aider and abettor, Kor is jointly and severally liable with Bravo for all of Bravo’s unlawful employment practices.

DAMAGES

The Agency seeks damages on behalf of Complainant in the amount of “at least \$100,000” for physical, mental and emotional suffering. Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering sustained. *In the Matter of Frehoo Inc.*, 36 BOLI 42, 71 (2017). The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *Id.*

In determining an award for emotional and physical 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. A complainant’s testimony, if believed, is sufficient to support a claim for mental suffering damages. *Id.*, citing *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 141 (2012).

Complainant and her mother credibly testified that Complainant experienced mental and emotional suffering as a result of Kor’s harassment of her.²⁶ Prior to Kor’s telephone calls and emails threatening a payroll deduction unless Complainant agreed to sex, Complainant enjoyed her job and was proud of her security certifications. Although she was moving to North Dakota, Complainant intended to work shifts when she visited friends and family in the Portland area.

Kor’s text messages and telephone calls caused Complainant to feel like Kor was bullying her. She was shocked, belittled, helpless and insecure, as if she was treated like a “piece of meat.” She doubted herself and wondered what she had done to cause Kor to treat her that way.

²⁶ See Findings of Fact – The Merits, ##14-16.

Complainant planned to rent a room for the night when she traveled with her young daughter to North Dakota. After Bravo withheld \$300 from her paycheck, Complainant could no longer afford to do so and slept overnight in her car at a rest stop with her daughter. This caused her to worry about their safety.

Complainant now wears baggier clothes and avoids social outings with her current co-workers because she worries that someone will take advantage of her the way Kor did. She is wary of men and does not trust her co-workers.

In conclusion, the discriminatory conduct of Bravo and Kor negatively impacted Complainant at the time of the incident and was still ongoing on the date of the hearing. The Formal Charges seek “at least \$100,000” in damages for emotional, mental, and physical suffering. Based on the record, the forum concludes that \$100,000 is an appropriate award.

OTHER REQUESTED RELIEF

In its Formal Charges, the Agency asked that Respondents and Respondents’ managers and supervisors be trained, at Respondents’ expense, “on unlawful harassment and discrimination in the workplace” by “the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to and approved by 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 Respondents and Respondents’ managers and supervisors 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 the violations of ORS 659A.030(1)(b), ORS

659A.030(1)(g), OAR 839-005-0021, OAR 839-005-0030(1)(a), and OAR 839-005-0030(3) by Respondents **Bravo, Inc. and Daniel Kor**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Bravo, Inc. and Daniel Kor** 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 **Sairy Miller** in the amount of:

- 1) ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), representing compensatory damages for emotional and physical suffering experienced by Complainant as a result of Respondents' unlawful employment practices found herein; plus,
- 2) Interest at the legal rate on the sum of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 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 **Bravo Inc. and Daniel Kor** to participate in training on the correct interpretation and application of the Oregon laws pertaining to sexual harassment in the workplace by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency.

In the Matter of
BANYAN BUILT CONSTRUCTION INC,
CASE No. 38-18 & 39-18
Final Order of Commissioner Brad Avakian
Issued September 26, 2018¹

SYNOPSIS

The forum concluded that (1) Respondent was liable for \$592.00 in unpaid gross wages to Claimant Weiland; (2) Respondent was liable for \$3,840.00 in ORS 652.150 penalty wages to Claimant Weiland; (3) Respondent was liable for \$3,255.01 in unpaid gross wages to Claimant Kirk; (4) Respondent was liable for \$3,700.00 in ORS 652.150 penalty wages to Claimant Kirk; and (5) Respondent was liable for \$3,700.00 in ORS 653.055(1) and ORS 652.150 penalty wages to Claimant Kirk. Due to inadequate notice to Respondent in the Agency's Orders of Determination, Respondent was not found liable for \$1,167.22 in unpaid gross wages to Claimant Weiland, and the interim orders regarding Respondent's violations of OAR 839-001-0300 and corresponding penalties were reversed.

The above-entitled case was assigned for hearing to Jennifer Gaddis, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adam Jeffries, an employee of the Agency. Respondent was represented by Mr. Jim Geersten, its authorized representative. Prior to the scheduled date for hearing, the consolidated case was partially resolved by the ALJ's ruling on the Agency's Motions for Summary Judgment. On June 5, 2018, a contested case hearing was held to resolve the remaining issues before the forum, at BOLI's Eugene office, located at 1400 Executive Pkwy, Suite 200, Eugene, Oregon. Claimant Richard Weiland was present throughout the hearing.

The Agency called BOLI Claimant Richard Weiland, BOLI Wage and Hour Investigator Bernadette Yap-Sam and Authorized Representative Jim Geersten ("Representative Geersten") as witnesses. Authorized Representative Jim Geersten was the sole witness for Respondent.

The forum received into evidence Administrative exhibits X1 through X30. The forum also received the following Agency exhibits:

- 1) A1;

¹ The Final Order is reissued to correct an inadvertent error in references to Respondent's legal name.

- 2) A3;
- 3) A5 through A7;
- 4) A9;
- 5) A11; and
- 6) A13 through A15.²

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, On the Merits, and Ultimate³), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 24, 2017, Richard Weiland (“Claimant Weiland”) filed a wage claim with the Agency's Wage and Hour Division alleging that Respondent owed him unpaid wages and assigned his claim to the Agency. (Ex. A1)

2) On August 28, 2017, the Agency issued Order of Determination (“OOD”) #17-1578 in which it alleged that Claimant Weiland was employed by Respondent from April 30, 2017 through May 16, 2017, at the pay rate of \$16 and \$30 per hour and worked a total of 86.5 hours, 9.5 of which were overtime hours, earning a total of \$1,759.22 in straight time and overtime wages. The OOD alleged that Claimant Weiland had not been paid for his work and was owed \$1,759.22 in unpaid wages; \$4,598.40 in ORS 652.150 penalty wages; \$4,598.40 in ORS 653.055(1)(b) civil penalties; and \$1,411.83 in OAR 839-001-0300 civil penalties, plus applicable interest. (Ex. X2a)

3) On October 23, 2017, Respondent, through Representative Geersten, filed an insufficient answer to the OOD #17-1578. On October 24, 2017, the Agency, by and through Mark Lundsten of the Wage and Hour Division, notified Respondent that its answer was insufficient and extended Respondent’s deadline to file its answer and request for hearing to November 3, 2017. Respondent then filed another answer and request for hearing on November 13, 2017. On November 20, 2017, Respondent supplemented its answer and request for hearing. (Ex. X1)

4) On September 8, 2017, and while OOD #17-1578 was pending, Karissa Kirk (“Claimant Kirk”) filed a wage claim with the Agency's Wage and Hour Division alleging that Respondent owed her unpaid wages and assigned her claim to the

² Respondent offered Ex. A15, during its cross-examination of Investigator Yap-Sam. The Agency indicated it had no objection to Respondent offering Ex. A15; the exhibit was received.

³ The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

Agency.⁴

5) On October 13, 2017, the Agency issued OOD #17-2653 in which it alleged that Claimant Kirk was employed by Respondent from April 9, 2017 through May 5, 2017, at the pay rate of \$15.50 per hour and worked a total of 192.25 hours, 35.5 of which were overtime hours, earning a total of \$3,255.01 in straight time and overtime wages. The OOD alleged that Claimant Kirk had not been paid for her work and was owed \$3,255.01 in unpaid wages; \$3,720.00 in ORS 652.150 penalty wages; \$3,720.00 in ORS 653.055(1)(b) civil penalties; and \$3,377.34 in OAR 839-001-0300 civil penalties, plus applicable interest.

6) On November 30, 2017, Respondent, through Representative Geersten, filed an answer and request for hearing, in response to OOD #17-2653. (Ex. X10)

7) On April 5, 2018, the forum issued Notices of Hearing in both cases. OOD #17-1578 was assigned Hearings Case No. 38-18. OOD #17-2653 was assigned Hearings Case No. 39-18. The time and place for hearing was set for 9:30 a.m. on May 22, 2018, at BOLI's Eugene office. Together with the Notice of Hearing, the forum sent a copy of the NOI, 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-X2f, X11, X11a-Xf)

8) On April 11, 2018, the forum issued an order entitled "Interim Order Requiring Case Summaries to be Filed and Setting Prehearing Conference Date." (Exs. X3, X12)

9) On April 11, 2018, the Agency filed its Motion to Consolidate Case Nos. 38-18 and 39-18. Representative Geersten stated, in an email to the ALJ and the Agency, that he would be filing an objection to the Agency's motion, on behalf of Respondent. Respondent did not file a timely response. The Agency's motion was granted and the cases were consolidated via interim order, issued on April 20, 2018. (Exs. X4, X6, X7, X13-X15)

10) On April 13, 2018, the Agency filed its Motion for Partial Summary Judgment on, then unconsolidated, Case No. 38-18. Respondent filed a timely response to the Agency's motion on April 20, 2018. On April 26, 2018 the ALJ issued an Interim Order Ruling on Agency's Motion for Partial Summary Judgment, granting it in part and denying it in part:

"On April 13, 2018, the Agency filed a Motion for Partial Summary Judgment. Pursuant to OAR 839-050-0150, a '...nonmoving participant must file a written response to a written motion within seven days after service of the motion, unless the administrative law judge orders otherwise.' Respondent timely filed its

⁴ This claim was resolved in the forum's interim order of May 17, 2018, granting summary judgment to the Agency. (Findings of Fact – Procedural #13)

Objection to Agency Motion for Partial Summary Judgment on April 20, 2018. Based on the evidence before the forum, the Agency's motion is **GRANTED in part** and **DENIED in part**.

I. SUMMARY JUDGMENT STANDARD

"Pursuant to OAR 839-050-0150(4)(a), a motion for summary judgment may be made by either participant, to seek an accelerated decision to all or part of the issues raised in the pleadings. 'The motion may be based on the following conditions: (A) Issue or claim preclusion; (B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings; or (C) Such other reasons as are just.' *Id.* In its motion, the Agency asserts that no genuine issue as to any material fact exists on several issues.

'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.*'

"*In the Matter of X Wall Incorporated*, 35 BOLI 133, 134 (2016) (*emphasis added*). For purposes of this order, the forum relied upon: (1) the Order of Determination and Proof of Service relevant to Claimant Weiland's wage claim, (2) Respondent's Answer relevant to Claimant Weiland, (3) the Agency Motion for Partial Summary Judgment and attached exhibits, and (4) Respondent's Objection to Agency Motion for Partial Summary Judgment.

A. Alleged Theft is not an Affirmative Defense for Unlawful Withholding of Wages

"As discussed in Section B. of this order, it is undisputed that Respondent is liable for at least \$440.37 in unpaid wages to Claimant Weiland. In Respondent's Answer and its Employer Response Form, Authorized Representative Geersten ('Representative Geersten') alleged that Claimant Weiland stole approximately \$1,000 worth of tools from Respondent; Representative Geersten stated that he withheld payment of \$440.37 of Claimant Weiland's wages because of the alleged theft. Representative Geersten reiterated this statement in his responsive filing to the Agency's Motion. Oregon law does not allow an employer to withhold any portion of an employee's wages, except under very specific circumstances, which are detailed in ORS 652.610(3). Alleged theft by an employee is not a lawful circumstance. The forum's precedent also directly addresses this issue. In *J & S Moving & Storage, Inc.*, the forum concluded that an employer may not withhold an employee's wages based on allegations, even if confirmed, that the employee stole from the employer. *In the Matter of J & S Moving & Storage, Inc.*, 31 BOLI 286, 302

(2012). Accordingly, alleged theft is not an affirmative defense available to Respondent as a matter of law.⁵ The Agency's motion on this issue is **GRANTED**.

"B. Respondent's Liability for Unpaid Wages

"In a wage claim case, the Agency has the burden of proving 1) that the respondent employed the claimant; 2) any pay rate upon which the respondent and the claimant agreed, if other than minimum wage; 3) that the claimant performed work for the respondent for which he or she was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this case these elements are, generally, undisputed. Representative Geersten admitted [sic] that Respondent employed Claimant Weiland and that he withheld \$440.37 from Claimant's wages. Representative Geersten stated in Respondent's Answer⁶ that 'there is no denial that I have not paid his last check for \$447, pending the return of the stolen company tools valued in excess of \$1,000.' This is largely consistent with his statements in Respondent's Objection, filed April 20, 2018, and the Employer Response Form, submitted as an exhibit by the Agency. (Agency Motion, Exhibit 6).⁷ Respondent submitted attachments to his Employer Response Form that substantiate the rate of pay and the amount owed to Claimant Weiland. *Id.* Accordingly, there is no genuine issue of fact regarding Respondent's obligation to pay at least \$440.37 in unpaid wages, plus interest. The Agency's motion on this issue is **GRANTED**.

"C. Respondent's Liability for Penalty Wages

"The Agency also sought penalty wages for Claimant Weiland, in an amount to be determined at hearing. A respondent must pay penalty wages when it has 'willfully fail[ed] to pay any wages or compensation of any employee whose employment ceases * * *.' ORS 652.150 and *In the Matter of Farwest Hatchery LLC*, 33 BOLI 176, 185 (2014). 'Willfulness does not imply or require blame, malice, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent.' *In the Matter of Coast 2 Coast, LLC*, 35 BOLI 151, 172 (2017). In Respondent's Objection, Representative Geersten argued that Respondent should not be subject to 'penalties and fines connected

⁵ Although not available to Respondent as an affirmative defense, it is conceivable that Respondent could offer evidence about the alleged theft for other purposes at hearing. This order addresses evidence of the alleged theft offered as an affirmative defense only.

⁶ The forum takes official notice of Respondent's Answer, filed in this matter on November 20, 2017, and regarding 'Subject: Case 17-1578.' The forum also takes official notice that the Order of Determination #17-1578 filed against Respondent addresses Claimant Weiland's wage claim.

⁷ Mr. Geersten stated in Respondent's Answer that Claimant Weiland was owed \$447. In Respondent's Objection to the Agency's motion, Mr. Geersten cited an amount of \$440. However, both the Employer Response Form and the accompanying paystub for Claimant Weiland show the amount, for work performed between May 7, 2017 and May 13, 2017, to be \$440.37.

with the \$440 final check,' based on the Agency's failure to provide him with the relevant statute.⁸

"By Representative Geersten's admission, however, he intentionally withheld at least \$440.37 in wages from Claimant Weiland. Whether or not it was understood that Respondent might owe penalty wages, as a result of that action, is irrelevant. The standard is if a respondent intentionally withheld wages, not if a respondent knew such conduct was unlawful. 'Employers have a duty to know the laws that regulate employment in this state.' *In the Matter of Abdul Rahim Ghaffari*, 35 BOLI 38, 47 (2016), *appeal pending*; see also *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 169 (2006).

"The applicable deadlines by which an employer must provide an employee their final paycheck are outlined in OAR 839-001-0420. Although it is unclear if the parties agree on Claimant's exact last date of work, there is no dispute that Respondent failed to timely pay Claimant Weiland his final wages. In Respondent's Answer, Representative Geersten stated '[t]here is no denial that *I have not paid* his last check for \$447, pending the return of the stolen company tools...' (*emphasis added*) (Respondent's Answer, November 20, 2017). Respondent filed its Answer roughly six months after Claimant's final month of work for Respondent. Respondent is liable for penalty wages in an amount to be determined at hearing. The Agency's motion on this issue is **GRANTED**.

"D. Respondent's Liability for Civil Penalties

"Finally, the Agency also sought a civil penalty, pursuant to ORS 30.701 and OAR 839-001-0300(3), for Respondent's issuance of a dishonored check for wages to an employee. In support of its argument the Agency provided a Notice of Dishonored Check, which included a copy of the check itself. (Agency Motion, Exhibit 4). The check represents that it was issued by Banyan Built Construction, Inc, to Claimant Weiland, for the amount of \$911.83, and notes that it is for 'Pay Period 04/30-05/06.' (*Id.* at p. 4-5). This is consistent with Claimant Weiland's paystub, which notes the same pay period and amount of net pay. (Agency Motion, Exhibit 5).

"In Respondent's Objection, Representative Geersten disputed the Agency's allegation that Claimant Weiland was never paid the wages material. Pursuant to ORS 30.701(2) and OAR 839-001-0300(4)(a), a civil penalty may only be awarded against Respondent if Claimant Weiland, or Claimant's assignee, made written demand for the wages not less than 30 days before commencing an action and Respondent failed to pay Claimant the wages, and any accrued interest, before the commencement of that action. Based on documentation provided by the Agency, written demand was made on June 9, 2017. (Agency Motion, Exhibits 1 and 2). A wage claim action commences when a respondent is served with the order of determination by certified mail. *In*

⁸ The forum notes that ORS 652.150 is cited in the Order of Determination, issued August 28, 2017.

the Matter of John Hatcher, 14 BOLI 289, 294 (1996). The forum takes official notice that Respondent was served with the Order of Determination in this matter on September 20, 2017; Claimant Weiland's assigned action commenced on that date. On October 23, 2017, Representative Geersten submitted a handwritten note to the Agency stating, 'This [*illegible*] mentions two other checks that were returned. We paid a check cashing service for those checks, and are in the process of getting the documentation of payment. Should have it by hearing date.' (Agency Motion, Exhibit 3, p. 1).

"As stated above, when a motion for summary judgment has been filed, 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. If Respondent paid Claimant Weiland the \$911.83 in wages, such a payment would constitute an affirmative defense, at least in part, to the Agency's allegations in this matter. An affirmative defense is defined as '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. A few examples of defenses...recognized by Oregon courts include discharge in bankruptcy, duress, fraud, *payment*, release, statute of frauds.' *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC*, 35 BOLI 68, 125 (2016) (*emphasis added*). Respondent argued the affirmative defense of payment in its Answer stating, 'Mr. Weiland did cash his pay checks in question and was paid his wages.' (Respondent's Answer, November 20, 2017).

"In contested case hearings, respondents bear the burden of proof for any asserted affirmative defenses. See generally *In the Matter of Scott Miller*, 23 BOLI 243, 259 (2002) and *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005). While Respondent claimed in its Objection that Claimant Weiland received payment for the \$911.83, Representative Geersten offered no proof that this ever occurred.⁹ In the context of a violation of ORS 30.710(2) and OAR 839-001-0300(4)(a), Respondent failed to prove its affirmative defense that payment was made to Claimant Weiland. Respondent is then liable for a civil penalty, based on its issuance of a dishonored check with no subsequent payment being made. However, because there may be evidence offered at hearing the [sic] mitigates the amount of the civil penalty, under OAR 839-001-0300(5), I will deny the Agency's request to impose \$1,411.83. The Agency's motion on this issue is **GRANTED in part** and **DENIED in part**.

"IT IS SO ORDERED."

(Exs. X5, X8, X20)

11) On April 25, 2018, the ALJ issued an order entitled "Interim Order re: Instructions for Filing Documents and Contested Case Process." (Ex. X19)

⁹ Based on the Agency's assertion, in its motion, that the balance remains outstanding it also appears no such proof was provided to the Agency.

12) On April 26, 2018, Representative Geersten emailed the ALJ, copying the Agency, and asked for clarification on the contested case process. The ALJ issued an order entitled “Interim Order re: Instructions for Filing Documents and Contested Case Process” in response to the email, later that day. The ALJ also included a sample Case Summary form for Respondent. (Exs. X21, X22)

13) On May 1, 2018, the Agency filed a Motion for Summary Judgment on the issues involving Claimant Kirk’s wage claim, previously identified as unconsolidated Case No. 39-18. Respondent failed to file a timely response. On May 17, 2018, the ALJ granted the Agency’s motion, in its entirety; the order stated:

“On May 1, 2018, the Agency filed its second Motion for Summary Judgment, specifically in regard to Case No. 39-18.¹⁰ Pursuant to OAR 839-050-0150, a ‘* * *nonmoving participant must file a written response to a written motion within seven days after service of the motion, unless the administrative law judge orders otherwise.’ As noted in the Notices of Hearing and the Division 50 Contested Case Rules, ‘...all filings, correspondence and documents must be transmitted to the administrative law judge, through the Contested Case Coordinator at this address: Bureau of Labor and Industries, ATTN Contested Case Coordinator, 1045 State Office Building, 800 N.E. Oregon Street, Portland, OR 97232-2162.’ Respondent failed to file a timely response to the Agency’s motion.¹¹ Based on the evidence before the forum, the Agency’s motion is **GRANTED**.

“I. SUMMARY JUDGMENT STANDARD

“As previously stated in the forum’s April 26th order, pursuant to OAR 839-050-0150(4)(a), a motion for summary judgment may be made by either participant, to seek an accelerated decision to all or part of the issues raised in the pleadings. ‘The motion may be based on the following conditions: (A) Issue or claim preclusion; (B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings; or (C) Such other reasons as are just.’ *Id.* In its motion, the Agency asserts that no genuine issue as to any material fact exists on several issues.

‘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.*’

¹⁰ Case Nos. 38-18 and 39-18 were previously consolidated via an interim order, issued April 20, 2018.

¹¹ Respondent emailed a document entitled ‘Response and Objection to Any and All Summary Judgment’ on May 7, 2018. However, this document was not properly filed with the Contested Case Coordinator and therefore was not considered.

"In the Matter of X Wall Incorporated, 35 BOLI 133, 134 (2016) (*emphasis added*). For purposes of this order, the forum relied upon: (1) the Order of Determination and Proof of Service relevant to Claimant Kirk's wage claim, (2) Respondent's Answer relevant to Claimant Kirk, and (3) the Agency's Motion for Summary Judgment and attached exhibits.

"A. Respondent's Liability to Claimant Kirk for Unpaid Gross Wages and Overtime Compensation"

"In a wage claim case, the Agency has the burden of proving 1) that the respondent employed the claimant; 2) any pay rate upon which the respondent and the claimant agreed, if other than minimum wage; 3) that the claimant performed work for the respondent for which he or she was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this case Respondent and the Agency are in agreement that Respondent employed the claimant. Representative Geersten acknowledged her employment in Respondent's Answer, stating:

'Banyan shows no wages were unpaid. All wages worked were paid for at the proper time and proper amount.'

(Respondent's Answer). While Respondent's Answer is silent as to whether it disputes Claimant's rate of pay or the extent of work performed, it is clear Respondent does dispute that her wages were unpaid. Factual matters alleged in a charging document and not denied in Respondent's answer will be deemed admitted by Respondent, and the failure of Respondent to raise an affirmative defense in its answer is a waiver of such a defense. OAR 839-050-0130(3). Since Respondent did not contest the rate of pay nor the extent of work performed, in its Answer, any defense regarding those issues has been waived.

"If Respondent paid Claimant Kirk, however, such payment would constitute an affirmative defense to the issue of nonpayment. An affirmative defense is defined as '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. A few examples of defenses...recognized by Oregon courts include discharge in bankruptcy, duress, fraud, *payment*, release, statute of frauds.' *In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC*, 35 BOLI 68, 125 (2016) (*emphasis added*). Respondent argued the affirmative defense of payment in its Answer stating, '[a]ll wages worked were paid for at the proper time and proper amount.' (Respondent's Answer, November 24, 2017). Respondent bears the burden of proof for any asserted affirmative defenses in contested case hearings. See generally *In the Matter of Scott Miller*, 23 BOLI 243, 259 (2002) and *In the Matter of Gary Lee Lucas*, 26 BOLI 198, 210 (2005). Since Respondent failed to submit a response to the Agency's Motion for Summary Judgment, the forum turns to the Agency's motion to determine if it has met its burden.

“The Agency asserted that Respondent failed to pay Claimant ‘for dates worked from April 10, 2017 to May 5, 2017,’ issuing her four separate returned checks and, for her final week of work, failing to issue a check to her at all. A synopsis of the Agency’s argument for wages owed is as follows:

Dates Worked	Regular Hours	Rate of Pay	OT Hrs ¹²	Rate of Pay	Gross Wages Owed	Net Wages Owed	Check Issued and No.	Check NSF
4/9/17-4/15/17	27.50	\$15.50	N/A	N/A	\$426.25	\$344.29	1855	Y
4/9/17-4/15/17	same as above	same as above	same as above	same as above	same as above	same as above	(reissued) 1881	Y
4/16/17-4/22/17	49.25	\$15.50	N/A	N/A	\$763.38	\$578.97	1865	Y
4/23/17-4/29/17	40.00	\$15.50	32	\$23.25	\$1,364.00	\$954.08	1885	Y
4/30/17-5/6/17	40.00	\$15.50	3.5	\$23.25	\$701.38	not provided	N/A	N
TOTALS	184.25		35.5		\$3,255.01			

“In support of the Agency’s assertion that Respondent owes Claimant Kirk \$3,255.01 in unpaid wages, the Agency submitted a copy of Claimant’s timecard showing hours worked for April 30, 2017 through May 6, 2017, as well as itemized earning statements, copies of dishonored checks, and notices from her financial institution that Respondent’s checks were returned for insufficient funds, for hours worked for April 9, 2017 through April 29, 2017. (Agency Motion, Yap-Sam Declaration, Exhibit 1, p. 6-15). The Agency also included a copy of text messages between Claimant Kirk and a contact labeled ‘Jim Banyan,’ in which ‘Jim’ acknowledged that Claimant Kirk is owed wages.¹³ The Agency included a sworn declaration in which Claimant Kirk stated that ‘Jim’ was Jim Geersten. (Agency Motion, Kirk Declaration and attached Exhibits). Based on the evidence before the forum, the Agency’s Motion for Summary Judgment on Respondent’s liability for \$3,255.01 in unpaid gross wages to Claimant Kirk for work performed from April 9, 2017 through May 6, 2017 is **GRANTED**.

“B. Respondent’s Liability for Penalty Wages under ORS 652.140 and ORS 652.150

“The Agency also sought penalty wages for Claimant Kirk, in an amount of \$3,720.00. A respondent must pay penalty wages when it has ‘willfully fail[ed] to pay any wages or compensation of any employee whose employment ceases * * *.’ ORS 652.150 and *In the Matter of Farwest Hatchery LLC*, 33 BOLI 176, 185 (2014). ‘Willfulness does not imply or require blame, malice, perversion, or moral

¹² ‘OT Hrs’ refers to overtime hours worked.

¹³ In the text messages, ‘Jim’ did not specify an amount of wages owed. However, he did acknowledge owing wages and indicated that he could not secure funds to bring Claimant’s bank account balance out of the negative.

delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent.’ *In the Matter of Coast 2 Coast, LLC*, 35 BOLI 151, 172 (2017).

“The applicable deadlines by which an employer must provide an employee their final paycheck are outlined in OAR 839-001-0420. Wage and Hour Investigator Yap-Sam notified Respondent on September 14, 2017 that it owed \$3,255.01 in unpaid gross wages. (Agency Motion, Yap Sam Declaration and attached Exhibits). To date, Respondent has not paid Claimant Kirk her wages owed. (Agency Motion, Kirk Declaration). Pursuant to ORS 652.150, if a respondent-employer willfully fails to pay an employee’s wages whose employment ceases, as a penalty for the nonpayment, the wages shall continue from the due date thereof at the same hourly rate for eight hours per day for 30 days. Based on Claimant’s regular rate of pay of \$15.50, Respondent is liable for \$3,720.00 in penalty wages. The Agency’s motion on this issue is **GRANTED**.

“C. Respondent’s Liability for Penalty Wages under ORS 653.055(1) and ORS 652.150

“An employer’s failure to pay overtime wages to an employee entitles the employee to a civil penalty, in addition to penalty wages awarded under ORS 652.150. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 190 (2007). The civil penalty is computed in the same manner as ORS 652.150 penalty wages (hourly rate x eight hours per day x 30 days). ORS 653.055 and ORS 652.150. Respondent is liable for a civil penalty in the amount of \$3,720.00 to Claimant Kirk. The Agency’s motion on this issue is **GRANTED**.

“D. Respondent’s Liability for Statutory Damages under OAR 839-001-0300

“Finally, the Agency also sought a civil penalty, pursuant to ORS 30.701, ORS 652.195, and OAR 839-001-0300(3), for Respondent’s issuance of dishonored checks to Claimant Kirk for her wages. In support of its argument the Agency provided copies of the dishonored checks, Claimant’s corresponding itemized earning statements, and the notices of ‘Returned Check Deposit’ from Claimant’s financial institution (Agency Motion, Yap Sam Declaration Exhibit 1, p. 7-15).

“Pursuant to ORS 30.701(2) and OAR 839-001-0300(4)(a), a civil penalty may only be awarded against Respondent if Claimant Kirk, or Claimant’s assignee, made written demand for the wages not less than 30 days before commencing an action and Respondent failed to pay Claimant the wages, and any accrued interest, before the commencement of that action. Based on documentation provided by the Agency, written demand was made by Claimant Kirk on May 19, 2017 and then, again, by her assignee, the Agency via Investigator Yap Sam, on September 14, 2017. (*Id.*, Exhibit 2). A wage claim action commences when a respondent is served with the order of determination by certified mail. *In the Matter of John Hatcher*, 14 BOLI 289, 294 (1996). The

forum takes official notice that Respondent was served with the Order of Determination in this matter;¹⁴ on November 24, 2017, Representative Geersten submitted a Request for Hearing to the Agency.

“As stated above, when a motion for summary judgment has been filed, 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. Respondent has failed to prove its affirmative defense that payment was made to Claimant Kirk. Respondent is liable for a civil penalty, based on its issuance of the dishonored checks with no subsequent payment being made. Unlike Claimant Weiland, who may have received the full amount of his wages from the check cashing company¹⁵ without holds or penalties, there is no mitigating evidence to consider, under OAR 839-001-0300(5). Claimant Kirk, to date, has still not been paid her wages and the text messages, exchanged between Claimant Kirk and Authorized Representative Geersten, relay the financial distress she was under for at least almost a month as she attempted to obtain the wages to which she was entitled. The Agency sought \$3,377.54 in statutory penalties for Respondent’s issuance of the dishonored checks.¹⁶ ‘Pursuant to ORS 30.701, an employer that issues a dishonored check to an employee for payment of wages due is liable to the employee for damages in an amount equal to \$100 or triple the amount for which the check is drawn, whichever is greater, in addition to the amount for which the check was drawn. The amount of damages may not exceed the amount for which the check was drawn by more than \$500.’ OAR 839-001-0300(2). Based on the evidence before the forum, Respondent is liable for \$3,377.54.

Check No.	Check Amount	Statutory Penalty	Total Penalty
1855	\$344.29	\$500	\$844.29
1865	\$578.97	\$500	\$1,078.97
1885	\$954.08	\$500	\$1,454.08
TOTAL			\$3,377.54

“The Agency’s motion on this issue is **GRANTED**.

“IT IS SO ORDERED.”

(Exs. X16, X29)

14) On May 3, 2018, Respondent filed its Motion for Total Dismissal of Claim

¹⁴ Respondent was served by substituted service on October 22, 2017.

¹⁵ It was unclear from the Agency’s Motion for Partial Summary Judgment, filed on April 13, 2018, if Claimant Weiland suffered any penalty for cashing Respondent’s dishonored check.

¹⁶ The Agency did not seek a statutory penalty for Check No. 1881, which was a reissuance of dishonored Check No. 1855, plus \$10 to cover a bank penalty imposed on Claimant Kirk.

#38-18. (Ex. X23)

15) On May 3, 2018, Respondent also filed a Request for 30 Day Postponement. (Ex. X24)

16) On May 4, 2018, the Agency filed its Response to Respondent's Request for Postponement and Motion for Dismissal. (Ex. X25)

17) On May 8, 2018, the ALJ granted Respondent's Request for 30 Day Postponement, via interim order. (Ex. X26)

18) On May 8, 2018, the ALJ issued an interim order denying Respondent's Motion for Dismissal of Claim #38-18. The Interim Order – Ruling on Respondent's Motion for Dismissal of Claim #38-18 found:

“On May 3, 2018, Respondent filed a ‘Motion for TOTAL Dismissal of Claim #38-18’¹⁷ (‘Respondent's Motion’). The Agency timely filed its response (‘Agency's Response’) on May 4, 2018. Since Respondent failed to establish a basis for his Motion for Dismissal under OAR 839-050-0150(1), Respondent's Motion is hereby **DENIED**.

I. LEGAL STANDARD FOR MOTIONS TO DISMISS

“A Motion to Dismiss must be based upon: ‘(a) Lack of jurisdiction over the subject matter or person; (b) Insufficiency of process or service of process; or (c) Failure to state a claim upon which relief can be granted.’ OAR 839-050-0150(1). In support of its motion, Respondent made statements that Claimant Weiland's wage claim was fraudulent and attached various exhibits. Specifically, Respondent provided instructions on how to file a wage claim with the Bureau of Labor and Industries and a sample wage claim form (Respondent's motion, Ex. 1); Claimant Weiland's wage claim form in this matter (*Id.*, Ex. 2); a letter from ‘STP Management Group’ acknowledging a payment was made in the amount of \$936.83 on March 16, 2018 and referencing Check #1896¹⁸ (*Id.*, Ex. 3); a copy of Check #1896 (*Id.*, Ex. 4); and a copy of a time card and an unidentified week long calendar, listing work performed by day (*Id.*, Ex. 5). There was no explanation for how the exhibits supported Respondent's allegation of fraud. Respondent also failed to articulate or offer a substantive basis for its Motion for Dismissal of Case No. 38-18, pursuant to OAR 839-050-0150(1). When evaluating a motion to dismiss, the forum views the evidence in the light most favorable to the non-moving party. *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 131 (2006). Since Respondent failed to substantiate the basis of its

¹⁷ Respondent's motion did not have a valid ‘postmark,’ as defined by the United States Postal Service. Therefore, the date of filing was when Respondent's motions were received by the Contested Case Coordinator, which was May 3, 2018. OAR 839-050-0040(1). A postmark is an official United States Postal Service (‘USPS’) ‘imprint applied in black ink on the address side of a stamped’ piece of mail. (USPS Handbook PO-408, §1-1.3 ‘Postmarks’). ‘A postmark indicates the location and date the Postal Service accepted custody of a mailpiece, and it cancels affixed postage.’ *Id.*

¹⁸ The material dishonored check in this matter was also Check #1896.

motion, and viewing the evidence and argument in the light most favorable to the Agency, Respondent has failed to meet its burden. Respondent's Motion for Dismissal of Case No. 38-18 is **DENIED**.

"IT IS SO ORDERED."

(Ex. X27)

19) On May 8, 2018, the ALJ issued an Interim Order re: Filing Documents by Mail. (Ex. X28)

20) Respondent timely submitted its Case Summary, in two documents, on May 17, 2018. (Exs. X9, X17)

21) The Agency timely submitted its Case Summary on May 22, 2018. (Ex. X30)

22) At the start of hearing, the ALJ orally informed the Agency and Respondent of the issues to be addressed, the matters to be proven, and the procedures governing the conduct of the hearing. (Hearing Record)

23) The hearing concluded and the record closed on June 5, 2018.

24) On July 30, 2018, the ALJ issued a proposed order that notified the Agency and Respondent that they were entitled to file exceptions to the proposed order within ten days of the order's issuance. The parties timely filed their exceptions on August 9, 2018.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an active domestic business corporation doing business in the State of Oregon. (Ex. A11)

2) Claimant Weiland was employed by Respondent, from April 30, 2017 through May 16, 2017. (Testimony of Complainant; Exs. A1, A3, A13)

3) The Agency and Respondent agreed that Claimant Weiland worked for Respondent and agreed upon his rates of pay. (Testimony of Claimant, Geersten)

4) For the pay period of April 30, 2017 through May 6, 2017, Claimant Weiland worked a total of 49.5 hours, 9.5 of which were overtime hours. His rate of pay was at times \$16/hour and at times \$30/hour. He earned \$1,167.22 in total gross wages during the pay period, resulting in a net amount of \$911.83. (Testimony of Complainant, Yap-Sam, Geersten; Exs. A1, A5)

5) Respondent issued Claimant Weiland Check No. 1896, dated May 12, 2017, in the amount of \$911.83 as payment for work performed by Claimant Weiland between April 30, 2017 through May 6, 2017. (Testimony of Complainant, Geersten;

Ex. A6)

6) At some point prior to May 24, 2017, Claimant Weiland cashed the check at a check cashing service, called Ace Cash Express. (Testimony of Complainant)

7) Ace Cash Express notified both Claimant Weiland and Respondent that the Respondent had insufficient funds available to fund the check; Ace Cash Express pursued debt collection against both Claimant Weiland and Respondent. (Testimony of Complainant, Geersten; Exs. A14, A15)

8) For the pay period of May 7, 2017 through May 13, 2017, Claimant Weiland worked a total of 32 hours, none of which were overtime hours. His rate of pay was \$16/hour. He earned \$512.00 in total gross wages during the pay period, resulting in a net amount of \$440.37. (Testimony of Complainant, Yap-Sam, Geersten; Exs. A1, A7)

9) Claimant Weiland worked one day during the pay period of May 14, 2017 through May 20, 2017. On May 16, 2017, he worked a total of 5 hours, none of which were overtime hours. His rate of pay was \$16/hour. Claimant Weiland earned \$80.00 in total gross wages during the pay period. (Testimony of Complainant, Yap-Sam; Exs. A1, A13)

10) Claimant Weiland documented that he worked at "Corum" for five hours, for Respondent, on May 16, 2017 on his personal calendar. (Testimony of Complainant; Ex. A13)

11) Respondent did not provide any record of Claimant Weiland's termination date, nor did it record it on its Employer Response form. (Ex. A7; Hearing Record)

The facts related to the award on behalf of Claimant Kirk are contained within the Interim Order – Ruling on Agency's (Second) Motion for Summary Judgment. (Ex. X29)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Claimant Weiland in the State of Oregon. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondent herein. ORS 652.332(1) and ORS 653.040.

3) Respondent is liable for \$592.00 in unpaid gross wages and \$3,840.00 in ORS 652.150 penalty wages to Claimant Weiland.

4) Respondent is liable for \$3,255.01 in unpaid gross wages, \$3,700.00 in ORS 652.150 penalty wages, and \$3,700.00 in ORS 653.055(1) and ORS 652.150 penalty wages to Claimant Kirk.

5) The Agency failed to give proper notice to Respondent, in either OOD #17-

1578 or OOD #17-2653, of its intent to rely upon ORS 30.701, ORS 652.110(1), or ORS 652.195. ORS 652.332(1).

6) Respondent is not liable for \$1,167.22 in unpaid gross wages to Claimant Weiland, based on the Agency's failure to give proper notice. ORS 652.332(1).

7) The interim orders regarding Respondent's violations of OAR 839-001-0300 and corresponding penalties are reversed. ORS 652.332(1).

OPINION

The forum's rulings on the Agency's Motion for Partial Summary Judgment and the Agency's (Second) Motion for Summary Judgment resolved most of the Agency's allegations against Respondent. Upon review of the Wage and Hour Division's OODs issued in this case, however, the forum reverses its findings regarding violations of OAR 839-001-0300. This opinion will address the allegations of OAR 839-001-0300 violations first, concerning both Claimants Weiland and Kirk, followed by the remaining violations that only concern Claimant Weiland.

RESPONDENT'S LIABILITY FOR CIVIL PENALTIES, PURSUANT TO OAR 839-001-0300, TO CLAIMANTS WEILAND AND KIRK

In the forum's two interim orders regarding the Agency's Motions for Summary Judgment in this matter, the forum found that Respondent violated OAR 839-001-0300 by issuing dishonored checks to both Claimant Weiland and Claimant Kirk. Upon review of the Agency's OODs, however, it is clear that the charging instrument lacked sufficient notice to Respondent about the statutes and subsections involved in the Agency's allegations. Pursuant to ORS 183.415(1), "* * * persons affected by actions taken by state agencies have a right to be informed of their rights and remedies with respect to the actions." To that end an OOD, which serves as notice of the allegations made against a respondent by the Agency, *must* include:

"(a) A reference to the particular sections of the statutes or rules involved;

(b) A short and concise statement of the basis for the amounts determined to be owed to each wage claimant;

(c) A statement of the party's right to request a contested case hearing and to be represented by counsel at such a hearing, and of the employer's right to a trial in a court of law, provided that any request for a contested case hearing or trial in a court of law must be received by the commissioner in writing within 20 days after receipt by the party of the order of determination;

(d) A statement that the employer must, within 20 days after receipt of the order of determination, either pay in full the wage claim and any penalties assessed, or present to the commissioner a written request for a contested case hearing or a trial in a court of law as provided in this section;

(e) A statement that failure to make a written request to the commissioner for a contested case hearing or a trial of the claim in a court of law within the time specified shall constitute a waiver of the right thereto and a waiver of the right to a trial by jury; and

(f) A statement that unless the written requests provided for in paragraph (c) of this subsection are received by the commissioner within the time specified for making such requests, the order of determination shall become final.”

ORS 652.332(1) (emphasis added). In support of its allegations regarding Respondent’s issuance of dishonored checks to the claimants, the Agency simply cited OAR 839-001-0300.

In its Motions for Summary Judgment, the Agency argued for the application of ORS 30.701 and ORS 652.195 to the facts of this matter, however, neither OOD included either of these statutes. Further, the Agency did not cite the “particular sections” of OAR 839-001-0300 that supported its allegation of Respondent’s specific unlawful conduct or the basis for its recommended penalty, as required by ORS 652.332(1)(a) and (b). The absence of adequate notice is prejudicial, in and of itself, to a respondent. *Villanueva v. Board of Psychologist Examiners*, 39 P.3d 238, 241, 179 Or. App. 134 (2002). Based on the Agency’s failure to provide adequate notice to Respondent of its reliance upon ORS 30.701 and ORS 652.195, as well as particular sections of OAR 839-001-0300, the forum must reverse its findings in regard to those violations. Although Respondent’s conduct may have constituted violations of said statutes, notice to Respondent was inadequate, and it is not liable for civil penalties under OAR 839-001-0300 to either Claimant Weiland or Claimant Kirk.

RESPONDENT’S LIABILITY FOR UNPAID WAGES TO CLAIMANT WEILAND

In a wage claim case the Agency has the burden of proving 1) that the respondent employed the claimant; 2) any pay rate upon which the respondent and the claimant agreed, if other than minimum wage; 3) that the claimant performed work for the respondent for which he or she was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). The parties were not in dispute on the first two elements, regarding Respondent’s employment of Claimant Weiland or his rate of pay (Findings of Fact – The Merits #3).

Pay Period: April 30, 2017 through May 6, 2017

There was no dispute by the parties as to the hours worked and the amount owed to Claimant Weiland for this time period. (Findings of Fact – The Merits #4) Respondent issued Check No. 1896, dated May 12, 2017, to Claimant Weiland in the amount of \$911.83 as payment for work he performed between April 30, 2017 through May 6, 2017. (Findings of Fact – The Merits #5) At some point prior to May 24, 2017, Claimant Weiland cashed the check at a check cashing service, called Ace Cash Express. (Findings of Fact – The Merits #6) Both Claimant Weiland and Respondent

were notified by Ace Cash Express that the check cashing company had learned that Respondent had insufficient funds available for the check; Ace Cash Express pursued debt collection against both Claimant Weiland and Respondent. (Findings of Fact – The Merits #7) Claimant Weiland did not make any payments toward collection of the debt; however, he was repeatedly contacted by a debt collector seeking payment.

The Agency argued that, although Claimant Weiland received his wages via Ace Cash Express, Respondent still had not paid Claimant Weiland his wages in a lawful method, due to Respondent's issuance of the dishonored check. Specifically, the Agency argued that ORS 652.110(1) set forth the method by which employees shall be paid; it states:

“A person engaged in any business or enterprise of any kind in this state may not issue, in payment of or as evidence of indebtedness for wages due an employee, any order, check, memorandum or other instrument of indebtedness unless the instrument is negotiable and payable without discount in cash on demand at some bank or other established place of business in the county where the employee lives or works and where a sufficient amount of funds have been provided and are or will be available for the payment of the instrument when due. The person shall, upon presentation and demand, pay the instrument in lawful money of the United States.”

This case presented the unique question of a respondent's liability for unpaid wages when a dishonored check, issued by the respondent as payment of wages, was arguably *made* negotiable by a third party. Unfortunately, the forum cannot reach the question in this case.

Just as the Agency failed to comply with ORS 652.332(1), in regard to its allegations of OAR 839-001-0300 violations, so too did it fail to cite its reliance on ORS 652.110(1) to support its theory regarding unpaid wages for pay period April 30, 2017 through May 6, 2017. The Agency directly relied upon ORS 652.110(1), at hearing, but failed to give Respondent adequate notice of its intent to do so. Based on the Agency's inadequate notice to Respondent, Respondent is not liable for unpaid wages during the April 30, 2017 through May 6, 2017 pay period.

Pay Period: May 7, 2017 through May 13, 2017

The wages earned during this pay period were the subject of the forum's order entitled “Interim Order – Ruling on Agency's Motion for Partial Summary Judgment,” issued on April 26, 2018. The order has been reproduced in its entirety, above, and no detailed discussion is necessary here. At hearing, the Agency argued that gross amounts of wages should be ordered.¹⁹ The parties agreed the amount of unpaid gross wages due Claimant Weiland was \$512.00, resulting in a net amount of \$440.37. (Findings of Fact – The Merits #8) Respondent is liable for \$512.00 in unpaid wages for the pay period of May 7, 2017 through May 13, 2017.

¹⁹ In its Motion for Partial Summary Judgment, the Agency sought the net amount of unpaid wages, \$440.37, to be awarded.

Pay Period: May 14, 2017 through May 20, 2017

At hearing, Respondent disputed that Claimant Weiland was entitled to any wages for the pay period of May 14, 2017 through May 20, 2017. The Agency alleged that Claimant Weiland worked a total of five hours, during this pay period, on May 16, 2017. (Findings of Fact – The Merits #9) In support of its allegation, the Agency offered Claimant Weiland’s personal calendar, which contained his independent documentation of the hours and locations he had worked, for Respondent. (Findings of Fact – The Merits #10) Respondent, through Representative Geersten, claimed that Claimant Weiland’s last day was May 13, 2017 but offered no proof to support this claim. The forum has previously acknowledged that independent documentation by a claimant can corroborate the claimant’s testimony as to work they performed. *In the Matter of C.S.R.T., LLC, and Robert P. Sabo*, 33 BOLI 263, 270 (2014) and *In the Matter of Hey Beautiful Enterprises, Ltd.*, 33 BOLI 189, 202 (2014). Claimant Weiland’s personal calendar reflected that he worked at “Corum,” which was the job location he worked at for Respondent, from 8 a.m. to 1 p.m.²⁰ (Findings of Fact – The Merits #10)

An employer has a duty to keep records regarding work performed by employees:

“In a wage claim case, it is primarily the employer’s responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee’s responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate.”

In the Matter of Abdul Rahim Ghaffari, 35 BOLI 38, 61 (2016), *aff’d without opinion*, *Ghaffari and United Gem & Carpets, Inc. v. Bureau of Labor and Industries*, 289 Or App 158 (2018). Respondent kept no such records nor did it offer any records as evidence. (Findings of Fact – The Merits #11) Based on the evidence, Respondent is liable for \$80.00 in unpaid gross wages to Claimant Weiland for the pay period of May 14, 2017 through May 20, 2017. Combining that amount with Respondent’s liability for the prior pay period, Respondent is liable for a total amount of \$592 in unpaid wages to Claimant Weiland.

RESPONDENT’S LIABILITY FOR PENALTY WAGES TO CLAIMANT WEILAND, UNDER ORS 652.150

If an employer willfully fails to pay any wages to an employee whose employment ceases, then, as a penalty for the nonpayment, the employee’s wages 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. ORS 652.150(1). In its Interim Order – Ruling on

²⁰ Claimant’s calendar did not reflect the undisputed hours he worked for Respondent, from May 1, 2017 through May 4, 2017. This was not addressed by the Agency at hearing and there is not enough evidence for the forum to make a reasonable inference as to why this would be.

Agency's Motion for Partial Summary Judgment, the forum previously concluded that Respondent was liable for penalty wages, based on Respondent's admitted willful withholding of Claimant Weiland's wages. (Findings of Fact – Procedural #10)

The Agency argued at hearing that Respondent should be liable for \$4,598.40 in penalty wages, based on the weighted average of Claimant Weiland's rate of pay, from April 30, 2017 through May 20, 2017. This amount included the \$1,167.22 gross amount of wages, for April 30, 2017 through May 6, 2017.²¹ Since Respondent is not liable for wages for the April 30, 2017 through May 6, 2017 pay period, and Claimant Weiland's rate of pay for the remaining two pay periods was constant at \$16/hour, it is not necessary to calculate the penalty wages due by a weighted average.

As noted above, when calculating the penalty wages owed, the forum must consider the date the action commenced. In its Interim Order – Ruling on Agency's Motion for Partial Summary Judgment, the forum noted that "a wage claim action commences when a respondent is served with the order of determination by certified mail." *In the Matter of John Hatcher*, 14 BOLI 289, 294 (1996). The forum took official notice that Respondent was served with the Order of Determination #17-1578 on September 20, 2017 (Findings of Fact – Procedural #10); Claimant Weiland's assigned action, therefore, commenced on that date. Since September 20, 2017 is over 30 days from Claimant Weiland's termination of employment with Respondent, Respondent is liable for \$3,840 in penalty wages to Claimant Weiland ($\$16 \times 8 \text{ hours/day} = \$128.00 \times 30 \text{ days} = \$3,840.00$). ORS 652.150(1)(a).

RESPONDENT'S LIABILITY FOR CIVIL PENALTIES TO CLAIMANT WEILAND, PURSUANT TO ORS 653.055(1)(B)

At hearing, the Agency also argued for an award of civil penalties, based on Respondent's failure to pay overtime wages. ORS 653.055(1)(b) states "any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected...for civil penalties provided in ORS 652.150." The Agency also relied upon the forum's prior precedent which held "an employer's failure to pay overtime wages to an employee entitles the employee to a civil penalty, in addition to penalty wages awarded under ORS 652.150." *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 190 (2007). Since Claimant Weiland did not work any overtime hours during the pay periods for which Respondent is liable for Claimant Weiland's wages, a civil penalty pursuant to ORS 653.055(1)(b) is inappropriate. Respondent is not liable for ORS 653.055(1)(b) civil penalties.

AGENCY'S EXCEPTIONS

The Agency filed three exceptions.

First, the Agency requested an additional jurisdictional basis be added to the

²¹ The gross amount of \$1,167.22 corresponded to the net amount of \$911.83, on Check No. 1896, that Claimant cashed at Ace Cash Express.

Proposed Conclusions of Law, specifically, ORS 652.332(1). This exception is GRANTED.

In its second exception, the Agency asserted that “ORS 652.332(1)(a) does not require the Agency to cite in the OOD to statutes or rules the Agency may raise in response to an affirmative defense raised by a Respondent under which the Agency is not raising a claim.” (Agency Exceptions, p. 3) The Agency misidentifies its reliance on ORS 652.110(1) as a rebuttal argument. The Agency acknowledged that it bears the burden of proof that Claimant was not paid for the work he performed for Respondent. On its face, the evidence in the record demonstrates that Claimant was compensated for the work he performed; albeit by a third party. For the Agency to allege that such a method of payment does not satisfy the payment element, the Agency must give notice of the legal theory on which it relies to Respondent. To not do so puts a respondent, especially a pro se respondent, at a severe disadvantage.

The Agency likened its use of ORS 652.110(1) to its use of ORS 652.610(3), in its rebuttal argument to Respondent’s assertion that theft is an affirmative defense to the nonpayment of wages. However, Respondent was not denying that it failed to pay the wages in that circumstance. The parties were in agreement that the Agency could prove the element of payment. Respondent was arguing, erroneously, that it shouldn’t have to pay Claimant Weiland due to Claimant’s alleged theft. The burden of proof had appropriately shifted to Respondent, to prove such a claim, and the Agency then appropriately rebutted the argument with its own alternate legal argument. The Agency’s exception is DENIED and its request to include further conclusions of law is DENIED.

Finally, the Agency argued that it should not be required to cite the statutes involved in its allegation of passing a dishonored check because (1) ORS 652.332(1)(a) does not require it to do so and (2) it relied upon the forum’s orders regarding the Agency’s Motions for Summary Judgment and believed the matters had been resolved. The Agency requested that the findings in the forum’s interim orders on the Agency’s Motions for Summary Judgment be reinstated. (Agency Exceptions, p. 6-10) The Agency’s second argument regarding its reliance on the forum’s interim orders on this issue is not unexpected. The optimum result would have been for the forum to deny the Agency’s motions at the time of filing. However, the forum has an obligation to correctly apply the law in a contested case. ORS 183.417(8). An erroneous ruling should be corrected and conclusions of law are not final until a Final Order is issued. ORS 183.417(8) and OAR 839-050-0420(2), (3). Ultimately, the Agency is responsible for its charging document and its notice to a respondent of the allegations.

The notice requirement of ORS 652.332(1)(a) is the substantive argument. As cited above, ORS 652.332(1) mandates that the OOD must include:

“(a) A reference to the particular sections of the statutes or rules involved;

(b) A short and concise statement of the basis for the amounts determined to be owed to each wage claimant;

(c) A statement of the party's right to request a contested case hearing and to be represented by counsel at such a hearing, and of the employer's right to a trial in a court of law, provided that any request for a contested case hearing or trial in a court of law must be received by the commissioner in writing within 20 days after receipt by the party of the order of determination;

(d) A statement that the employer must, within 20 days after receipt of the order of determination, either pay in full the wage claim and any penalties assessed, or present to the commissioner a written request for a contested case hearing or a trial in a court of law as provided in this section;

(e) A statement that failure to make a written request to the commissioner for a contested case hearing or a trial of the claim in a court of law within the time specified shall constitute a waiver of the right thereto and a waiver of the right to a trial by jury; and

(f) A statement that unless the written requests provided for in paragraph (c) of this subsection are received by the commissioner within the time specified for making such requests, the order of determination shall become final."

The Agency argued that "[a]t the OOD stage, such claims, like ORS 652.110(1) and ORS 652.610(3) in this matter, are not involved and are therefore not required to be cited in the OOD * * * " (Agency's exceptions, p. 5) The Agency went on to state that "its [1] reference to OAR 839-001-0300 in its Motions for Summary Judgment and [2] the forum's references to specific sections of OAR 839-001-0300 in its Interim Orders provided adequate notice to the Respondent pursuant to ORS 652.332(1)." (Agency's exceptions, p. 6-7) ORS 652.332 does not apply to the cumulative arguments made during the course of a contested case, however. Rather, the statute specifically mandates what the OOD *itself* shall include. The Agency relied on the OOD as its charging document, and therefore as its notice of the allegations against Respondent, for purposes of the contested case hearing. The Administrative Procedures Act requires the Agency to provide Respondent with "[a] reference to the particular sections of the statutes and rules involved * * * " in the allegations against it. ORS 183.415(2)(c).

The Agency's arguments do not acknowledge the significance ORS 30.701 and ORS 652.110(1) have to the Agency's allegations. The notice requirement for contested case hearings mandates citation to all administrative rules and statutes that are substantially relevant to the charges. *Villanueva v. Board of Psychologist Examiners*, 175 Or App 345, 27 P3d 1100 (2001), *adh'd to on recons* 179 Or App 134, 39 P3d 238 (2002). The statutory citation for what is, substantively, a violation of ORS 30.701 is substantially relevant to the charges. Similarly, the legal theory on which the Agency relies to prove an element for which it bears the burden of proof, such as ORS 652.110(1), is substantially relevant to the charges. The Agency's exception is DENIED.

RESPONDENT'S EXCEPTIONS

Respondent filed several exceptions.

Respondent first argued that it was impossible for employers to keep abreast of the law governing the payment of wages, that it was the Agency's responsibility to assist employers in this area and that Respondent was directed by an agency employee to refuse to pay to Claimant Weiland. (Respondent's Exceptions, p. 1) There is no evidence in the record to corroborate Respondent's arguments. Respondent's first exception is DENIED.

Respondent also took exception to the finding that Claimant Weiland's last day of work was May 16, 2017. However, Respondent presented no evidence to the contrary. "When the law imposes on the employer the burden of keeping track of what work was performed for what periods of time and by which employees and when the evidence is what the employer has not met this obligation, the fact-finder can draw reasonable inferences about the work performed, including the hours spent performing various tasks. Making such an inference is not, as respondent asserted, pure speculation. This has long been the law." *In the Matter of Hard Rock Concrete, Inc.*, 33 BOLI 77, 108 (2014), *aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries*, 278 Or App 625 (2016). Respondent failed to produce any records that Claimant Weiland ended his employment on May 13, 2017, as it claimed. Based on the evidence in the record and the findings in this order, Respondent's second exception is DENIED.

Third, Respondent argued that the boilerplate language on the bureau's standard Wage Claim form bound the agency from seeking penalties against Respondent. (Respondent's Exceptions, p. 1) Respondent misunderstands the purpose and context of the referenced form and Respondent's argument is not well taken. Respondent's third exception is DENIED.

Respondent's remaining exceptions concerned the contested case involving Claimant Kirk, Case No. 39-18. Respondent first argued that the Agency violated Respondent's rights by failing to hold a hearing on Case No. 39-18. Respondent's unlawful conduct regarding Claimant Kirk was resolved prior to hearing. (Findings of Fact – Procedural #13) Respondent also made the same arguments regarding Claimant Kirk's last date of employment and the boilerplate language in the Wage Claim form, as it did in regard to Claimant Weiland's case. There is no evidence to support Respondent's arguments, they are not well taken and Respondent's exceptions regarding Case No. 39-18 are DENIED.

ORDER

A. NOW, THEREFORE, as authorized by ORS 652.332(3), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Banyan Built Construction Inc** to deliver to the Fiscal Services Office 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 Claimant **Richard Weiland** in the amount of FOUR THOUSAND FOUR HUNDRED THIRTY TWO DOLLARS and ZERO CENTS (\$4,432.00), less appropriate lawful deductions, representing \$592.00 in gross earned, unpaid, due and payable wages, and \$3,840.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of \$592.00 from May 16, 2017 until paid, and interest at the legal rate on the sum of \$3,840.00 from June 15, 2017, until paid, plus

2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant **Karissa Kirk** in the amount of TEN THOUSAND SIX HUNDRED NINETY FIVE DOLLARS and ONE CENT (\$10,695.01), less appropriate lawful deductions, representing \$3,255.01 in gross earned, unpaid, due and payable wages, \$3,720.00 in ORS 652.150 penalty wages, and \$3,720.00 in ORS 653.055(1) and 652.150 penalty wages, plus interest at the legal rate on the sum of \$3,255.01 from May 5, 2017, until paid, interest at the legal rate on the sum of \$3,720.00 from June 6, 2017, until paid, and interest at the legal rate on the sum of \$3,720.00 from June 6, 2017, until paid.

In the Matter of
D & B CRAIG, INC. AKA DAIRY QUEEN,
CASE No. 54-18
Final Order of Commissioner Brad Avakian
Issued October 5, 2018

SYNOPSIS

Prior to a contested case hearing on this matter, the forum granted the Agency's Motion for Summary Judgment in its entirety, resolving all issues. The forum concluded that Respondent was liable for: (1) employing minors without an Annual Employment Certificate, in violation of ORS 653.307 and OAR 839-021-0220(2); (2) employing a minor under 14 years of age without a valid Employment Permit, in violation of ORS 653.320 and OAR 839-021-0246(1); (3) failing to keep records pursuant to ORS 653.307 and OAR 839-021-0170(1)(a)-(g); and (4) failing to pay a minor employee the minimum wage, in violation of ORS 653.025 and OAR 839-020-0010. Due to aggravating factors in the case, the forum awarded the Agency \$11,900.00 in civil penalties.

The above-entitled case was assigned for hearing to Jennifer Gaddis, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Respondent was represented by Carrie Warden, the authorized representative for Respondent ("Representative Warden"). After the Agency issued an Amended Notice of Intent to Assess Civil Penalties ("NOI"), the Agency moved for and was granted summary judgment.

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, On the Merits, and Ultimate¹), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 9, 2018, the Agency filed a Notice of Intent to Assess Civil Penalties ("NOI") against Respondent, alleging violations of ORS 651.060(4), ORS 653.025, ORS 653.307, ORS 653.320, OAR 839-020-0010, OAR 839-021-0170(1)(a)-

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

(g), OAR 839-021-0175(3), OAR 839-021-0220(2) and OAR 839-021-0246(1). (Ex. X2a)

2) On May 21, 2018, Representative Warden filed Respondent's Answer and Request for Hearing. (Ex. X1)

3) On July 2, 2018, the forum issued a Notice of Hearing to Respondent and the Agency, which stated the time and place of the hearing as August 14, 2018, beginning at 9:30 a.m., at BOLI's Eugene office, located at 1400 Executive Parkway, Suite 200, Eugene, Oregon. With the Notice of Hearing, the forum also sent a copy of the Agency's NOI, 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. (Exs. X2, X2a-2f)

4) On July 5, 2018, the forum issued an "Interim Order Requiring Case Summaries to be Filed and Setting Prehearing Conference Date." (Ex. X3)

5) On August 13, 2018, the Agency filed its Amended NOI against Respondent, removing its allegation of violations of ORS 651.060(4) and OAR 839-021-0175(3). The forum issued the Amended NOI to Respondent and also sent a copy of 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. (Exs. X5, X5a-5g)

6) On August 14, 2018, the Agency timely filed its Case Summary. No Case Summary was filed by Respondent. (Ex. X8)

7) On August 13, 2018, the Agency filed its Motion for Summary Judgment. The forum issued its Interim Order Requiring Respondent's Written Response to Summary Judgment Motion on August 14, 2018. Respondent's response to the Agency's motion was due August 20, 2018; Respondent failed to file a response. On August 23, 2018, the forum issued an interim order granting the Agency's Motion for Summary Judgment, in its entirety, and canceling the contested case hearing. The order stated:

"On August 13, 2018, the Agency filed its Motion for Summary Judgment. Pursuant to OAR 839-050-0150, a '* * *nonmoving participant must file a written response to a written motion within seven days after service of the motion, unless the administrative law judge orders otherwise.' On August 14, 2018 the forum issued an interim order requiring Respondent to submit its response to the Agency's motion no later than August 20, 2018.² Respondent failed to file a

² The interim order was issued by ALJ Kari Furnanz on behalf of ALJ Jennifer Gaddis.

timely response. Based on the evidence before the forum, the Agency's Motion for Summary Judgment is **GRANTED** in its entirety.

"I. SUMMARY JUDGMENT STANDARD

"Pursuant to OAR 839-050-0150(4)(a), a motion for summary judgment may be made by either participant, to seek an accelerated decision to all or part of the issues raised in the pleadings. 'The motion may be based on the following conditions: (A) Issue or claim preclusion; (B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings; or (C) Such other reasons as are just.' *Id.* In its motion, the Agency asserts that no genuine issue as to any material fact exists on several issues.

"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.*' In the *Matter of X Wall Incorporated*, 35 BOLI 133, 134 (2016) (emphasis added). For purposes of this order, the forum relied upon: (1) the Agency's Amended Notice of Intent to Assess Civil Penalties, (2) Respondent's Answer and (3) the Agency's Motion for Summary Judgment and attached exhibits.

"A. Respondent's Liability for Employing Minors without an Annual Employment Certificate, in Violation of ORS 653.307 and OAR 839-021-0220(2)

"Pursuant to ORS 653.307(2), 'An [sic] employer who hires minors shall apply to the bureau for an annual employment certificate to employ minors. The application shall be on a form provided by the bureau and shall include, but need not be limited to: (a) The estimated or average number of minors to be employed during the year; (b) A description of the activities to be performed; (c) A description of the machinery or other equipment to be used by the minors.' According to the Agency's motion Ms. Warden, on behalf of Respondent, provided information that she had employed 22 minors between March 1, 2017 and November 17, 2017. (Agency's motion, Ex. H) She later amended Respondent's response, indicating that Respondent had employed 19 minors. (Agency's motion, Exs. M and J) Respondent's last employment certificate to employ minors expired on February 28, 2017. (Agency's motion, Ex. B) Before that time, Respondent had obtained employment certificates as far back as 1996. *Id.* Respondent is liable for employing minors without an annual employment certificate, in violation of ORS 653.307 and OAR 839-021-0220(2). The Agency's Motion for Summary Judgment on this issue is **GRANTED**.

“B. Respondent’s Liability for Employing a Minor under 14 Years of Age without a Valid Employment Permit, in Violation of ORS 653.320 and OAR 839-021-0246(1)”

“Generally speaking, ‘no child under 14 years of age shall be employed or permitted to work in, or in connection with, any place of business.’ ORS 653.320(2). The bureau may make an exception to the general rule, if an employer obtains a validated Employment Permit, pursuant to OAR 839-021-0246(1). To ‘employ’ an individual is to ‘suffer’ or ‘permit’ that individual to work. A respondent may be liable for employing an individual if it ‘knows or has reason to know a worker was performing work in that business and could have prevented it from occurring or continuing.’ *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration*, 25 BOLT [sic] 12, 38-39 (2003). In this case, it is clear that Respondent was aware that an 11 year old boy was working for Respondent, by bussing tables in its restaurant. (Agency’s motion, Ex. C) Respondent is liable for employing a minor under the age of 14yo without a valid employment permit, in violation of ORS 653.320 and OAR 839-021-0246(1). The Agency’s Motion for Summary Judgment on this issue is **GRANTED**.

“C. Respondent’s Liability for Failure to Keep Records Pursuant to ORS 653.307 and OAR 839-021-0170(1)(a)-(g)”

“As previously stated, an employer is required to keep specific records, regarding its employment of minor employees. ORS 653.307 and OAR 839-021-0170(1)(a)-(g). Although the evidence demonstrates that Respondent employed 11 year old Dominic Duckett, by permitting him to work, Respondent admitted that it did not keep the required records. (Agency’s motion, Ex. L) Respondent is liable for failure to keep records pursuant to ORS 653.307 and OAR 839-021-0170(1)(a) through (g). The Agency’s Motion for Summary Judgment on this issue is **GRANTED**.

“D. Respondent’s Liability for Failure to Pay the Minimum Wage, in Violation of ORS 653.025 and OAR 839-020-0010”

“Although Respondent unlawfully employed 11-year-old Dominic Duckett, Respondent did not pay Mr. Duckett the minimum wage, as required by law. Respondent stated Mr. Duckett was not an employee, despite knowing that Mr. Duckett would bus tables for the restaurant. (Agency’s motion, Ex. H) Except in particular circumstances, no employer shall employ or agree to employ any employee at wages computed at a rate lower than those listed in ORS 653.025(1). Respondent is liable for failure to pay the minimum wage, in violation of ORS 653.025 and OAR 839-020-0010. The Agency’s Motion for Summary Judgment on this issue is **GRANTED**.

“E. Respondent’s Liability for Civil Penalties, Pursuant to ORS 653.370(1), OAR 839-019-0010 to OAR 839-019-0025

“In its motion, the Agency argues for: a) \$8,900 in civil penalties for Respondent’s violations of ORS 653.307 and OAR 839-021-0220(2); b) \$1,000 for Respondent’s violation of ORS 653.320 and OAR 839-021-0246(1); c) \$1,000 for Respondent’s violation of ORS 653.307 and OAR 839-021-0170(1)(a)-(g); and d) \$1,000 for Respondent’s violation of ORS 653.025 and OAR 839-020-0010. The Agency sought a total of \$11,900 in civil penalties. In support of its motion, the Agency argued the following aggravating factors: (1) Respondent previously held annual employment certificates for the employment of minors, and knew it was required to do so, but failed to do obtain one during the relevant time period; (2) The magnitude and seriousness of the violations are more egregious in this case because it impacted at least 19 minors; (3) The violation impacted an eleven-year-old minor; (4) Respondent allowed an 11-year-old boy to work for an indeterminate amount of time; and (5) Respondent had ample opportunity to comply with the law and it would not have been difficult to do so. Pursuant to [sic] chapter 653, it is the policy of the State of Oregon ‘to establish minimum wage standards for workers at levels consistent with their health, efficiency and general well-being.’ Certainly, these standards could not be more important than when they apply to the employment of minors. The forum agrees that there are aggravating factors in this case and that Respondent’s disregard of the relevant statutes and rules governing the employment of minors is particularly egregious. Based on Respondent’s unlawful conduct, Respondent is liable for **ELEVEN THOUSAND NINE HUNDRED DOLLARS** (\$11,900.00) in civil penalties. The Agency’s motion on this issue is **GRANTED**.

“IT IS SO ORDERED.”

(Exs. X6, X7, X9)

8) On September 17, 2018, the ALJ issued a proposed order that notified the Agency and Respondent that they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an active domestic business corporation doing business in the State of Oregon. (Ex. X5)

2) At times material herein, Representative Warden was the President, Secretary and Registered Agent of Respondent. (Ex. X5)

3) Respondent employed at least 19 minors between March 1, 2017 and November 17, 2017. (Ex. X9)

4) Respondent's last employment certificate to employ minors expired February 28, 2017. Before that time, Respondent had obtained employment certificates as far back as 1996. (Ex. X9)

5) Respondent was aware that an 11-year-old boy was bussing tables in Respondent's restaurant. Respondent did not have a valid employment permit for the 11-year-old boy. Respondent did not pay the 11-year-old boy minimum wage. (Ex. X9)

6) Respondent did not keep records of its minor employees.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent D&B Craig, Inc. aka Dairy Queen was an employer, as defined in ORS 653.010(3).

2) At all times material herein, Respondent employed minors without an annual employment certificate, in violation of ORS 653.307 and OAR 839-021-0220(2).

3) At all times material herein, Respondent employed a minor under the age of 14yo without a valid employment permit, in violation of ORS 653.320 and OAR 839-021-0246(1).

4) At all times material herein, Respondent failed to keep records pursuant to ORS 653.307 and OAR 839-021-0170(1)(a)-(g).

5) At all times material herein, Respondent failed to pay the minimum wage to an 11-year-old employee, in violation of ORS 653.025 and OAR 839-020-0010.

6) Aggravating factors, as set out in the forum's Interim Order granting the Agency's Motion for Summary Judgment, warrant higher civil penalties in this matter.

7) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. ORS 653.065, ORS 653.301 and OAR 839-021-0220(2).

8) Pursuant to ORS 653.370(1) and OAR 839-019-0010 to OAR 839-019-0025, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to assign liability to Respondent and award civil penalties to the Agency. The sum of money awarded below is an appropriate exercise of that authority.

OPINION

All allegations in the Agency's Amended NOI were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required.

ORDER

A. NOW, THEREFORE, as authorized by ORS 653.065, ORS 653.370(1) and OAR 839-019-0010 to OAR 839-019-0025, and to eliminate the effects of **Respondent's** violations of ORS 653.025, ORS 653.307, ORS 653.320, OAR 839-020-0010, OAR 839-021-0170(1)(a)-(g), OAR 839-021-0220(2) and OAR 839-021-0246(1), and as payment of the civil penalties awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent D&B Craig, Inc. aka Dairy Queen**, 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 the amount of:

1) ELEVEN THOUSAND NINE HUNDRED DOLLARS and ZERO CENTS (\$11,900.00) representing civil penalties incurred as a result of Respondent's violations; plus

2) Interest at the legal rate on the sum of ELEVEN THOUSAND NINE HUNDRED DOLLARS and ZERO CENTS (\$11,900.00) from the date the Final Order is issued until paid.