

38 BOLI ORDERS

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**In the Matter of
BG Construction, Inc, Respondent,
Case No. 06-20**

**Final Order of Commissioner Val Hoyle
Issued April 13, 2021**

SYNOPSIS

The wage claimant worked for Respondent from December 29, 2018, through January 3, 2019. He earned \$902.34 in wages and was paid nothing. The forum awarded claimant \$902.34 in wages. Respondent's failure to pay claimant was willful and claimant was awarded a total of \$4,320.00 in penalty wages.

The above-entitled case was originally assigned to Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. On November 18, 2020, the case was transferred from ALJ Furnanz to ALJ Cynthia Domas.

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 Benjamin Garrick, acting as Respondent's authorized representative.

After the Agency issued an Amended Order of Determination (AOOD), the Agency moved for Summary Judgment. The ALJ granted the Agency's motion.

Having fully considered the entire record in this matter, I Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion and Order.¹

FINDINGS OF FACT – PROCEDURAL

1) Jeremy Thomas Orwig (Orwig or Claimant) filed a wage claim with the Agency's Wage and Hour Division alleging that Respondent owed him unpaid wages and assigned his wage claim to the Agency. (Ex. A1)

2) The Wage and Hour Division ("WHD") issued Order of Determination No. 19-0300 ("OOD") on April 15, 2019. The OOD alleged that Orwig was employed by Respondent from December 26, 2018, through January 3, 2019, and was owed \$902.34

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

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in unpaid wages. The OOD further alleged that Respondent owed \$4,320.00 in penalty wages, along with interest, to Orwig because more than 30 days had elapsed since the wages became due and owing based on ORS 652-140(1)-(3), ORS 652.150(1)-(2) and OAR 839-001-0479(1)-(2). (OOD)

3) Respondent's registered agent was served with the OOD on April 23, 2019. On May 13, 2019, Respondent filed a document contesting the wage claim and requesting a trial. At the same time, Respondent filed an authorized representative form naming Benjamin Garrick as the authorized representative. (Exs. A5 and A7)

4) On June 4, 2019, the Agency filed an Amended OOD. (AOOD)

5) Respondent filed an Answer to the AOOD and requested a hearing on June 14, 2020. (Answer, Ex. A9)

6) On June 25, 2020, the forum issued a Notice of Hearing to Respondent, to the Agency, and to Orwig setting the time and place of hearing for 9:30 a.m. on January 19, 2021, in Coos Bay, Oregon. Together with the Notice of Hearing, the forum sent a copy of the AOOD, a copy of the OOD, 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. (Notice of Hearing)

7) On October 12, 2020, the forum issued an interim order that stated in part:

"Due to the impact of the COVID-19 outbreak, the forum is taking measures in BOLI contested cases to assist the parties in filing documents and receiving interim orders issued by the forum. BOLI offices may not be staffed for periods of time, and some interim orders may be issued by email only. The Agency indicated by email that it consents to accept filings by email. Respondent did not respond to the ALJ's email asking whether the parties would consent to email service.

"The parties in this case may temporarily file documents by email only, without the need to file the original document with BOLI's Contested Case Coordinator. Email filings must be sent to all parties, the ALJ (kari.furnanz@state.or.us) and BOLI's Contested Case Coordinator (diane.anicker@state.or.us). **Since Respondent has not yet consented to receiving filings by email, the Agency must still send a copy of all filings to Respondent by mail, in addition to sending the email copy.** Parties may still file documents in the manner provided in BOLI's contested case rules, but must also provide courtesy email copies to the other parties and the ALJ as it may be some time before mail is delivered or processed. Any documents filed by email must be submitted no later than 11:59 p.m. PDT on the due date in order to be

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considered timely filed. These provisions will remain in effect until further notice from the ALJ.”

(10/12/2020 Interim Order)

8) On November 18, 2020, the Agency filed a motion for summary judgment, contending it was entitled to judgment as a matter of law. On November 18, 2020, the ALJ issued an interim order transferring the case from ALJ Furnanz to ALJ Domas. (Agency motion for summary judgment, 11/18/2020 Interim Order)

9) On November 18, 2020, the ALJ issued an interim order setting a deadline for a written response by Respondent. Respondent did not file a response. (11/18/2020 Interim Order)

10) On December 17, 2020, the ALJ issued an interim order **GRANTING** the Agency’s motion for summary judgment. The ALJ’s interim order is reprinted below:

“INTRODUCTION

“The Wage and Hour Division (‘WHD’) issued an Order of Determination (‘OOD’) on April 15, 2019. (Agency Ex. 4) The OOD was served on Respondent’s registered agent on April 23, 2019. (Agency Ex. 5) The OOD alleged that Respondent employed Wage Claimant Jeremy Thomas Orwig (‘Claimant’) from December 26, 2018, through January 3, 2019, but failed to compensate him for the work he performed. The alleged amount of unpaid wages was \$902.34 less lawful deductions. The OOD also asserted that Respondent owed \$4,320.00 in penalty wages to Claimant pursuant to ORS 652.140(1)-(3), ORS 652.150(1)-(2) and OAR 839-001-0470(1)-(2) because 30 days had elapsed since the wages became due and owing.

“On May 13, 2019, Respondent filed an authorized representative form naming Benjamin Garrick (‘Garrick’) as Respondent’s authorized representative. (Agency Ex.7) At the same time, Garrick filed a document contesting the wages owed to Claimant. Garrick also requested a hearing or a trial in court.²

“On June 4, 2019, the Division filed an Amended OOD (AOOD) and served Respondent with a copy of both the AOOD and the OOD. (Agency Ex. 8) On June, 14, 2019, Respondent filed an Answer to the AOOD and requested a hearing in court and contested Claimant’s wage claim. (Agency Ex.9) A Notice of Hearing was issued on June 25, 2020, setting the hearing date for January 19, 2021.

² The forum assumes that Respondent was requesting a contested case hearing rather than a court trial. A request for a court trial does not require the employer/respondent to file an Answer but an Answer is required when the employer/respondent requests a contested case hearing.

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“SUMMARY JUDGMENT STANDARD

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

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

‘ORCP 47C. In reviewing a motion for summary judgment, this forum draws 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 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 Derrick's Custom Painting, Inc.*, 37 BOLI 271, 275 (2020).

“The record considered by the forum in deciding this motion consists of: (1) the AOOD, argument made in support of the Agency's motion for summary judgment, and the exhibits submitted with the Agency's motion; and (2) Respondent's response to the ODD and its Answer to the AOOD with supporting documentation.

“ANALYSIS

“LIABILITY FOR UNPAID WAGES

“The Agency alleges that Respondent owes Claimant \$902.34 in unpaid wages pursuant to ORS 652.140(2)(b) for the time period of December 26, 2018, through January 4, 2019. The Agency further alleges that Respondent owes Claimant \$4,320.00 in penalty wages because it did not pay Claimant's wages when he was terminated. The calculations are based on Claimant working 50 hours and 8 minutes at an hourly rate of \$18.00. (Agency Ex. 1, pages 1, 2, 5 and 6)

“In order to prevail in a wage claim case, the Agency must first establish a prima facie case supporting the allegations of its charging document. *In The Matter of Derrick's Custom Painting, Inc.*, 37 BOLI 271, 276 (2020). In this case,

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the elements of the Agency's prima facie case are: 1) Respondent employed the Claimant; 2) the agreed upon pay rate, if other than the minimum wage; 3) the amount and extent of work the Claimant performed for Respondent; and 4) the Claimant performed work for which he was not properly compensated.

"Respondent does not dispute that: 1) it employed Claimant; 2) it agreed to pay Claimant \$18.00 per hour; 3) Claimant performed work of 50 hours and 8 minutes for Respondent from December 26, 2018 to January 4, 2019; and 4) Claimant's wages earned during that time period were \$902.34.³ (Agency Ex. 9, pages 1 through 4) In its Answer, Respondent submitted a paystub with Claimant's last paycheck showing what appears to be mandatory withholding which reduced the final paycheck to \$831.87. (Agency Ex. 9 page 3) The Agency does not object to the withholding amounts. (Motion for Summary Judgment) Respondent withheld the entire wages earned and due Claimant.

"In its Answer, Respondent provided a copy of a check dated June 29, 2018, made out to Claimant in the amount of \$1,336.38. Respondent stated that the check was given to Claimant so Claimant could obtain a bond and license to become a licensed contractor but Claimant failed to do so. (Agency Ex. 9 pages 1, 2 and 4.)⁴ Respondent further maintains that Claimant took a leave of absence shortly after receiving the check for \$1,336.38, but when Claimant wanted to return to work several months later, it was agreed that Claimant must pay back Respondent. Respondent states that Claimant was issued several verbal warnings about his inability to show up for work on time before Respondent terminated Claimant. Respondent alleges that Claimant was told on several occasions after his termination that he would not receive a final paycheck because of the \$1,336.38 Claimant owed Respondent for bonding and insurance. Respondent did not respond to the Agency's Motion for Summary Judgment and did not provide any evidence of an agreement with Claimant to pay back any sums alleged to be owed to Respondent.

"PAYMENT OF FINAL WAGES

"Payment of all wages earned when an employee is terminated, absence a collective bargaining agreement, are due and payable no later than the end of the first business day after the end of employment. ORS 652.140(1).

³ The paystub submitted by Respondent, Ex. A9 Page 3, shows that Claimant earned \$902.40 but Respondent apparently accepted the Agency's calculation of \$902.32 as evidenced by Ex. A9 page 1.

⁴ Ex. A9 is Respondent's Answer to the AOOD. Page 4 of Ex. A9 is a check written to Claimant from Respondent dated June 29, 2018, in the amount of \$1,336.38 with "Bond/Insurance" written on the memo line.

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"In this matter, both the Claimant and the Respondent agree that Claimant was terminated. (Agency Ex. 1, page 2 and Agency Ex. 9, page 1).⁵ The evidence provided indicates that Claimant worked 40 hours per week, Monday through Friday with some work on Saturday. (Agency Ex. 1, pages 1, 5 and 6). Therefore, Claimant was owed his final pay check no later than the close of business on Friday, January 4, 2019.

"ORS 652.610(3) provides that an employer may not withhold, deduct or divert any portion of an employee's wages unless certain criteria is met. The criteria include that the employer is required by law to make the withholding, that deductions are voluntarily authorized *in writing* by the employee, (emphasis added), that the deduction is authorized by a collective bargaining agreement, or that the deduction is authorized by ORS 18.736 (relating to the garnishment of wages). Most of the criteria include that the Claimant must voluntarily agree to the withholding in writing. No evidence has been presented in this case that the Claimant authorized any withholding in writing.

"Therefore, \$902.34 is due Claimant for unpaid wages less lawful withholding. The Agency's Motion for Summary Judgment regarding unpaid wages is **GRANTED**.

"LIABILITY FOR PENALTY WAGES

"The Agency is seeking penalty wages under ORS 652.150(1) and (2) which provide in pertinent part:

'(1) Except as provided in subsections (2) and (3) of this section, if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 * * *, then, as a penalty for the nonpayment, the wages or compensation of the employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced.

(2) If the employee or a person on behalf of the employee sends a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the written notice. If the employee or a person on behalf of the employee fails to send the written notice, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation. * * *

⁵ Exs. A1 and A2, pages 1 and 2 are essentially identical. Therefore, reference is only being made to Ex. A1.

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"In the Matter of Christopher Lee Ruston and Christine M. Stahler, 34 BOLI 56, 64 (2015).

"The forum may award penalty wages when a respondent's failure to pay wages is willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission 'willfully' if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Id.* at 63.

"In this matter, Respondent admitted that it did not provide a final paycheck to Claimant. However, Respondent did provide the Agency with a final paystub showing that Claimant had performed 50.08 hours of work at a rate of \$18.00 per hour, earning \$902.40 but with an adjustment to net pay of minus \$831.87 for a cash advance repayment resulting in a net pay of \$0.00. (Agency Ex. 9, page 3). Although Respondent was given the opportunity to provide documentation supporting its claim that there was an agreement between Respondent and Claimant for repayment of the June 29, 2018, check for bond and insurance, Respondent has not provided any documentation as required by ORS 652.610(3). Therefore, Respondent owes penalty wages in the amount of \$4,320.00⁶ less lawful deductions. The Agency's Motion for Summary Judgment for penalty wages is **GRANTED**.

"FURTHER PROCEEDINGS"

"Because this ruling resolves all of the issues in the AOOD, the hearing scheduled for January 19, 2021, and all associated deadlines are CANCELED. A Proposed Order incorporating this ruling will be issued as soon as possible, and the parties will have the opportunity to file exceptions to the Proposed Order pursuant to ORS Chapter 183 and OAR 839-050-0380.

"IT IS SO ORDERED."

(12/17/2020 Interim Order) The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

11) On March 11, 2021, the ALJ issued a Proposed Order that notified the participants that they were entitled to file exceptions of the Proposed Order within 10 days of its issuance. The Agency filed exceptions on March 19, 2021. Respondent did not file exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent engaged the personal services of Jeremy Thomas Orwig from December 26, 2018, through January 3, 2019, at the agreed rate of \$18.00 per hour. Respondent admitted that Orwig worked 50.8 hours during the time period at

⁶ Calculated at \$18.00 per hour for 8 hours per day for 30 days.

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issue. Respondent unlawfully deducted \$831.87 and deducted mandatory withholdings from Orwig's pay. Orwig was paid nothing and is owed \$902.34. (OOD; Respondent's answer)

2) More than 30 days have passed since the Claimant performed work for Respondent and was not compensate for this work. (AOOD, document filed on 6/14/2019)

3) ORS 652.150 penalty wages are computed as follows: \$18.00/hour x 8 hours x 30 days = \$4,320.00.

CONCLUSIONS OF LAW

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

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

3) Respondent owes Claimant the amounts set out in Findings of Fact #1-- The Merits. ORS 652.330(1)(d), ORS 652.332 (1)

4) Respondent's failure to pay Claimant all unpaid, due and owing wages after Claimant's employment ceased was willful and Claimant is entitled the penalty wages set out in Finding of Fact #3 – The Merits. ORS 652.150.

5) 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 Claimant his earned, unpaid, due and payable wages, ORS 652.150 penalty wages, unlawful deductions, plus interest on all sums until paid. ORS 652.332.

OPINION

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

EXCEPTIONS TO THE PROPOSED ORDER

Agency's Exceptions

The Agency's first exception requests the forum to make a spelling correction in the Order section. The exception is GRANTED as reflected below.

The Agency's second and final exception requests that the cite to ORS 652.140 in Proposed Conclusions of Law #3 be changed to ORS 652.330(1)(d) and ORS 652.332(1), (3) because Proposed Finding of Fact #1 – The Merits pertains to the

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amount of unpaid wages that are due and not the amount of penalty wages due on termination of employment.

This exception is GRANTED as reflected above.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent, **BG 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:

A certified check payable to the Bureau of Labor and Industries in trust for Jeremy Thomas Orwig in the amount of **FIVE THOUSAND TWO HUNDRED TWENTY-TWO DOLLARS and THIRTY-FOUR CENTS** (\$5,222.34) less appropriate lawful deductions, representing \$902.34 in gross earned, unpaid, due and payable wages and \$4,320.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of \$902.34 from February 1, 2019, until paid, and interest at the legal rate on the sum of \$4,320.00 from March 1, 2019, until paid.

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In the Matter of

**PCC Structurals Deer Creek TATC, Respondent,
Case No. ATD-01**

**Final Order of Commissioner Val Hoyle
Issued May 14, 2021**

SYNOPSIS

The Apprenticeship and Training Council decided by a majority vote of the members present that an apprenticeship and training committee was out of compliance with program standards when it failed to pay a registered apprentice at the wage to which he was entitled. The Council ordered the committee to pay the apprentice 50% of the unpaid wages for a total of \$15,425.98, plus interest, and placed the committee on probation for a period of two years.

Pursuant to notice, a hearing was convened virtually on Thursday, March 18, 2021, using the GoToMeeting platform by Administrative Law Judge Kari Furnanz.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Chief Prosecutor Cristin Casey, an employee of the Agency. Respondent PCC Structurals Deer Creek TATC (“PCC”) was represented by its attorney, Melissa Healy.

The Agency called Lisa Ransom, Director of BOLI’s Apprenticeship and Training division, as a witness. PCC did not call any witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X18, (b) Agency exhibits A1-A17 and (c) PCC exhibits R1-R16.

Having fully considered the entire record in this matter, the Apprenticeship and Training Council (“Council”) hereby makes the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.¹

FINDINGS OF FACT – PROCEDURAL

1) Registered apprentice Steven DePue (registration number 1033239) filed a written complaint with BOLI’s Apprenticeship and Training Division (“ATD”) on December 4, 2019. The complaint alleged that PCC was an apprentice training agent

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

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and failed to pay DePue the proper apprenticeship wage pursuant to PCC's registered apprenticeship standards from the date of DePue's registration in the program until his departure on July 24, 2018. The ATD issued a determination letter on April 8, 2020, concluding that DePue's allegations had merit, discussing potential mitigating factors and rendering "Key Findings and Recommendations." (Ex. X2b)

2) On May 14, 2020, PCC submitted a request that the Council revisit the ATD's April 8, 2020, Findings and Recommendations. PCC's submission included a discussion of PCC's position, and requested that the Council review and reverse the Findings and Recommendations issued on April 8, 2020. PCC also submitted a letter to ATD's Director on December 2, 2020, setting forth PCC's position. The letter requested that the Council review its submissions and render a decision. (Exs. A10, A11, R13, R15)

3) At the meeting of the Council on December 17, 2020, PCC appealed the ATD's decision of April 8, 2020, and requested a hearing to show cause. (Ex. R5-R16)

4) On January 26, 2021, BOLI's contested case forum issued a Notice of Hearing setting a virtual hearing to take place at 10:00 a.m. on March 18, 2021. (Ex. X2)

5) The forum issued an Amended Notice of Hearing on February 11, 2021, to correctly reflect that March 18, 2021, fell on a Thursday. (Ex. X3)

6) On February 17, 2021, the ALJ issued an interim order regarding hearing procedures and case summaries. The first portion of the interim order discussed the rules governing the hearing, described the hearing procedures and invited the parties to request a prehearing telephone conference if they wanted to further discuss what to expect at the hearing. The second portion of the order required case summaries to be filed no later than March 4, 2021, and set out the requirements for what each participant must include in their case summary. (Ex. X4)

7) The Agency and PCC timely filed their case summaries on March 4, 2021. (Exs. X7-X8)

8) A prehearing telephone conference was held on March 16, 2021, to discuss the hearing procedures with the parties. (Case Record)

9) 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)

10) After the conclusion of the hearing, the Council deliberated and reached the following determination on a vote of 4-3:

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- PCC is in violation of its registered apprenticeship agreement with DePue pursuant to the April 8 Findings and Recommendation issued by the ATD. DePue was not paid the wage he was entitled to receive in the apprenticeship agreement. Although PCC asserted that DePue was erroneously designated as an apprentice, PCC signed the apprenticeship agreement and affirmatively made the choice to register the agreement with the ATD.
- PCC must pay DePue 50% of the unpaid wages requested by the Agency, plus interest.
- PCC shall be on probation for a period of two years with a higher level of oversight and compliance expectation.

FINDINGS OF FACT – THE MERITS

1) PCC is a registered apprenticeship committee initially approved by the Council on June 17, 2004. It is a single employer program approved to train apprentices in the Millwright Manufacturing Plant Electrician and Limited Maintenance Electrician occupations. (Exs. A9, R12)

2) DePue was originally hired by PCC as a dispatcher at PCC's Deer Creek facility on April 22, 2013. (Exs. A3, A9, R12)

3) On March 4, 2016, PCC and DePue entered into a Council apprentice registration agreement for the occupation of Millwright. The agreement stated that DePue was rated as starting the eighth period of apprenticeship on April 23, 2016. The term of the apprenticeship was for 8,000 hours with a probationary period of 1,000 hours or one year, whichever is shorter. The agreement further reflected that DePue received 8,000 hours of credit for prior experience, and noted 144 hours were required for annual related training. (Testimony of Ransom; Ex. A8)

4) The applicable standards for the Millwright position at the time DePue was registered established a journey level wage rate of \$34.84 per hour. As an eight term apprentice, DePue was entitled to be paid at 94% of the established journey wage, which equals \$32.74 per hour. (Testimony of Ransom; Exs. A9, A12, A13, R12)

4) DePue worked as a registered apprentice from April 23, 2016, to December 10, 2017. The difference between the wages he was paid and the wages to which he was entitled to be paid as an apprentice is \$30,851.96. Half of DePue's unpaid wages equals \$15,425.98. (Testimony of Ransom; ALJ Calculation; Ex. A14)

5) Although DePue was registered as an apprentice, PCC did not regard him as a registered apprentice. PCC's record shows "obvious confusion" as to his status and he did not complete the necessary apprenticeship course during the first year in the apprenticeship program. Although PCC did not consider DePue to be a registered apprentice pursuant to ORS chapter 660, PCC entered into an apprenticeship registration agreement, registered the agreement with the ATD and grouped him with other registered apprentices in correspondence. (Testimony of Ransom; Exs. A8, A9)

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CONCLUSIONS OF LAW

- 1) At all times material herein, DePue was a registered apprentice in PCC's Millwright program. ORS 660.010(1),(9).
- 2) The Apprenticeship and Training Council has jurisdiction over the subject matter and PCC herein. ORS 660.120, 651.060; OAR 839-050-0450, 839-011-0093.
- 3) PCC owes DePue \$15,425.98 in unpaid wages. OAR 839-011-0093(5)(c).
- 4) Under the facts and circumstances of this record, and according to the applicable law, the Apprenticeship and Training Council has the authority to order PCC to pay DePue his earned, unpaid, due and payable wages, plus interest on all sums until paid. ORS 660.120, 651.060; OAR 839-050-0450, 839-011-0093.

OPINION

All matters at issue were resolved by the Council's vote at the Council meeting on March 18, 2021. No further discussion is required as to the merits.

ORDER

NOW, THEREFORE as authorized by ORS 660.120, ORS 651.060, OAR 839-050-0450 and OAR 839-011-0093 and as payment of unpaid wages, the Oregon State Apprenticeship and Training Council hereby orders Respondent **PCC Structurals Deer Creek TATC**, 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 Steven DePue in the amount of **FIFTEEN THOUSAND FOUR HUNDRED TWENTY-FIVE DOLLARS AND NINETY-EIGHT CENTS (\$15,425.98)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.

Additionally, pursuant to OAR 839-011-0093(5)(b), Respondent **PCC Structurals Deer Creek TATC** is placed on probation for a period of two years from the date of the Council decision, which was rendered on March 18, 2021.

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In the Matter of

**J. Gabriel Lopez aka Gabriel Lopez, and
General Labor Services LLC, Respondents,
Case No. 90-20**

**Final Order of Commissioner Val Hoyle
Issued August 19, 2021**

SYNOPSIS

Respondents, an individual and a limited liability company, acted jointly as farm labor contractors without a license on 26 separate occasions in violation of ORS 658.410(1), OAR 839-015-0125, OAR 839-015-0135(1)(c) and (d), and (2). Respondents were assessed \$50,500 in civil penalties for the violations. ORS 658.453(1), OAR 839-015-0508(1).

The above-entitled case was assigned to Cynthia L. Domas designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. A hearing was held on February 9, 2021, by video conferencing using the GoToMeeting App. The hearing was reconvened on February 12, 2021, also using the GoToMeeting App.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adam Jeffries, an employee of the Agency. Respondent J. Gabriel Lopez aka Gabriel Lopez ("Respondent Lopez") represented himself. An authorized representative form was completed and submitted with Respondents' answer authorizing Alma Casarez ("Alma Lopez") to be the authorized representative for Respondent General Labor Services LLC. ("GLS").

The Agency called Hannah Wood, BOLI Compliance Specialist, and K. Paige Shell-Spurling, a bilingual (Spanish and English) BOLI Compliance Specialist, as witnesses.

Respondent Lopez called himself as a witness and Alma Lopez testified as a witness for Respondent GLS.

The forum received the following into evidence:

- a) Administrative exhibits X1 through X13 prior to the hearing on February 9, 2021; Ex. X14 and X15 prior to the hearing on February 12, 2021; and Exs.

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X16 and X17 after the conclusion of the hearing.¹

b) Agency exhibits: A5, A6, A8, A9, A11, and A12.

After the Agency issued a Notice of Intent (“NOI”) and an Amended Notice of Intent (ANOI), the Agency moved for partial summary judgment. (Ex. X8) The ALJ granted the motion for partial summary judgment which is set out below.

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

FINDINGS OF FACT – PROCEDURAL

1) On June 9, 2020, the Wage and Hour Division (“WHD”) issued a NOI to assess civil penalties against Respondents in the amount of \$52,000 for 26 violations of ORS 658.410(1) and (2) and OAR 839-015-0125, acting as a farm labor contractor without a license. (Ex. X2b)

2) On June 19, 2020, Respondent Lopez timely filed an Answer & Request for Hearing. In the answer, Respondent Lopez admitted that he was performing farm labor contractor work without the required license. (Answer; X1a)

3) On September 10, 2020, the forum issued a Notice of Hearing to Respondents and to the Agency, setting the hearing for February 9, 2021. Along with the Notice of Hearing, the forum sent a copy of the NOI, a multi-language warning notice, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required for ORS 183.413, a document entitled “Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum’s contested case hearing rules, OAR 839-050-0000 to 839-050-0445. (Exs. X2; X2a through X2f)

4) On September 24, 2020, the forum issued an interim order requiring that case summaries be filed and setting case filing deadlines. (Ex. X16) The forum issued a second interim order on September 24, 2020. The second order outlined the temporary procedures in place due to Covid-19, including that the parties agreed to filing documents by email. (Ex. X17)

¹ The Interim Order Requiring Case Summaries to be Filed and Setting Case Filing Deadlines dated September 24, 2020, was inadvertently omitted from the administrative exhibits. Also inadvertently omitted from the administrative exhibits was an interim order regarding temporary procedures dated September 24, 2020.

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

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5) On December 4, 2020, the forum issued an interim order regarding the status of the hearing and updated and outlined the hearing procedures in place due to the pandemic. (Ex. X6)

6) On December 23, 2020, the Agency issued an Amended NOI (ANOI) to correct and add various citations and to add additional information. The Agency alleged, among other things, that Respondent Lopez and Respondent GLS were jointly and severally liable pursuant to ORS 658.410(2)(c) and (d) and OAR 835-015-0135(c). (ANOI, Ex. X7)

7) On December 29, 2020, the Agency filed a motion for partial summary judgment. (Ex. X8)

8) On December 29, 2020, the forum issued an interim order setting the timeline for Respondents to file a response to the Agency's motion. Respondents did not file a response. (Ex. X9)

9) On January 8, 2021, the forum issued an interim ruling granting the Agency's motion for partial summary judgment and stating that the hearing scheduled for February 9, 2021, would be held to determine the amount of civil penalties only. The interim order granting the Agency's request for partial summary judgment is set forth below: (Ex. X10)

"INTRODUCTION

"The Wage and Hour Division ('WHD') issued a Notice of Intent to Assess Civil Penalties ('NOI') against Respondents on June 9, 2020. On June 19, 2020, Respondents filed an Answer and Request for Hearing. (Agency Ex. 2) On December 23, 2020, the Agency filed an Amended NOI ('ANOI'). (Agency Ex. 10) The ANOI corrected and added various citations and provided additional information.

"The ANOI alleged that Respondent GLS acted as a farm labor contractor without a valid license in its possession in violation of ORS 658.410(1) and OAR 839-015-0125. The Agency further alleged that the violations occurred on 26 separate occasions between April 1, 2019, and September 8, 2019. The violations occurred during the following 26 week periods ending on 4/06/19, 4/13/19, 4/20/19, 4/27/19, 5/04/19, 5/11/19, 5/18/19, 5/25/19, 6/01/19, 6/08/19, 6/15/19, 6/22/19, 6/29/19, 7/06/19, 7/13/19, 7/20/19, 7/27/19, 8/03/19, 8/10/19, 8/17/19, 8/24/19, 8/31/19, 9/07/19, 9/14/19, 9/21/19, and 9/28/19.

"The Agency alleged that Respondents GLS and Lopez were jointly and severally liable for civil penalties for the 26 alleged violations of ORS 658.410(1) pursuant to ORS 658.453(1)(a); OAR 839-015-0507; OAR 839-015-0508(1)(a) and OAR 839-015-0135(1)(c). The Agency sought a civil penalty of \$2,000 per violation for a total civil penalty of \$52,000. The ANOI also alleged aggravating

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factors in regard to the civil penalties sought. OAR 839-015-0510(1) through (4) However, the Agency requested that the amount of civil penalties be determined at hearing.

“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)(a)(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 draws 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 Derrick’s Custom Painting, Inc.*, 37 BOLI 271, 275 (2020).

“The record considered by the forum in deciding this motion consists of: (1) the ANOI, argument made in support of the Agency’s motion for summary judgment, and the exhibits submitted with the Agency’s motion; and (2) Respondents’ Answer to the NOI. Respondents did not file a Response to the Agency’s Motion for Partial Summary Judgment nor did they file an answer to the ANOI.

“ANALYSIS

“Respondent GLS had a farm labor contractor license that expired on March 31, 2019. (Ex. A-3) The Agency is seeking partial summary judgment on the issue that GLS committed 26 violations of ORS 658.410(1) between April 1, 2019, and September 23, 2019,³ while unlicensed. The Agency further seeks partial summary judgment on the issue that Respondents Lopez and GLS are jointly and severally liable for the 26 violations. ORS 658.453(1)(a), OAR 839-015-0135(1)(c), OAR 839-015-0507, and OAR 839-015-0508(1)(a).

³ Although the Agency states in its argument that the time period is from April 1, 2019, through September 23, 2019, in its ANOI, the Agency alleges an ending date of September 28, 2019. The Agency assessed one violation per week and the end of the week for September 23, 2019, a Tuesday, is September 28, 2019. Pursuant to OAR 839-050-0320, the forum takes official notice of the calendar year 2019.

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“In order for a person to act as a labor contractor, they must obtain a license from the Commissioner of the Bureau of Labor and Industries. ORS 658.410(1) A labor contractor license may only be issued to certain specified individuals, corporations, and limited liability companies (LLC). ORS 658.410(2) GLS was registered with the Oregon Secretary of State as an LLC from 2014 through November 14, 2019. (Ex. A-11) OAR 839-015-0135 further provides for licensure and at subsection (1)(c) states in pertinent part:

‘* * * [T]he licensed majority shareholder or majority shareholders and the licensed corporation or the majority member(s) of a limited liability company and the licensed limited liability company are jointly and severally liable for all violations of the corporation or limited liability company and its agents when acting as a labor contractor.’

“Respondents provided an Answer and Request for Hearing. (Ex. A-1) In the Answer, Respondent Lopez requested a hearing regarding civil penalties. He admitted that he was performing contract work with an expired license. Lopez stated that he attempted to renew his license but was unable to do so because of issues with the IRS. In order for licensure, an applicant must be in compliance with the provisions of OAR 839-015-0140(1) which considers the character, competence and reliability of the applicant. OAR 839-015-0145 sets out factors to be considered in regard to character, competence and reliability and in particular the timeliness of paying all debts (subsection 3) and failing to comply with federal, state, or local laws including those related to income taxes (subsection 10). Respondent Lopez stated that due to his family situation, he decided to continue working with his only client.

“The Agency provided the license application for Respondents showing that they were applying for a farm labor license. The applicant was Respondent Lopez and the business name was GLS, a domestic limited liability company. (Ex. A-2 pps. 2-5) Respondent GLS was licensed from March 8, 2017, through March 31, 2018, (License #35486). Respondent GLS was also licensed from March 27, 2018, through March 31, 2019, (License #41017). (Ex. A-2 p.1)

“On January 15, 2019, WHD sent Respondents a letter advising them that License #41017 was expiring on March 31, 2019, and that Respondents must apply for renewal of the license at least 30 days before the license expired. The letter also advised Respondents that they could be liable for civil penalties if they continued to operate without a valid license. (Ex. A-5) WHD sent another letter to Respondents dated April 1, 2019, telling them that their license had expired on March 31, 2019, and that it was no longer lawful for them to act as a farm/forest labor contractor. The letter further stated that Respondents could be liable for civil penalties if they continued acting as a farm labor contractor. (Ex. A-6)

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“With its motion, the Agency provided a copy of an “offer” to supply temporary workers for vineyard work at a rate of at least \$12 per hour. The contract was between GLS and Stirling Wine Grapes, Inc. (Stirling) and signed by Respondent Lopez and Fox Stirling, a representative of Stirling. The contract was dated April 6, 2018. (Ex. A-7)

“ORS 658.405(4)(B) provides:

“Farm labor contractor” includes any person that: . . .

* * *

“For an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another person in the production or harvesting of farm products; * * *”

“Along with the contract, the Agency provided invoices from GLS to Stirling Fox of Stirling. The first set of invoices produced by the Agency cover the pay period of January 2019 through April 5, 2019. (Ex. A-8 pps. 1-13). The Agency submitted a second set of invoices involving the same parties that covered the pay period of March 31, 2019, through September 23, 2019. (Ex. A-9, pps. 1-30). Respondent GLS filed articles of dissolution on November 4, 2019, after the date of the violations. (Ex. A-11 p. 2)

“Under OAR 839-015-0507 each violation is a separate offense and each day’s continuing violation is a separate and distinct violation. The Agency has alleged one violation per week for a total of 26 separate violations.

“The uncontroverted evidence is that Respondents provided farm labor contractor services on 26 separate occasions while unlicensed.

“GLS was formed as a limited liability company with the Oregon Secretary of State although Respondent Lopez stated in his answer that he was “previous owner” and “sole proprietor”. (Ex A-2) On the License Application submitted by Respondent Lopez dated March 22, 2018, he stated that he owned 100% of the company and that no other person had a financial interest in the company. (Ex. A-2 p. 3) OAR 839-0135(1)(c) provides that a license may only be issued to:

* * * [T]he majority shareholder or majority shareholders of a corporation or member(s) owning a majority of a limited liability company that is authorized to do business in Oregon by the Office of the Secretary of State and to the corporation or limited liability company. Under this form of licensing, except as provided in subsection (3), the licensed majority shareholder or majority shareholders and the licensed corporation or the majority member(s) of a limited liability company and the licensed limited

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liability company are jointly and severally liable for all violations of the corporation or limited liability company and its agents when acting as a labor contractor* * *.'

"Respondent Lopez stated in the Answer that he continued to provide farm labor contractor services to his one client, Stirling, after Farm Labor License #41017 had expired. (Ex. A-1) The Agency produced evidence that Respondent GLS continued to provide farm labor contractor services to Stirling continuously from at least January of 2019 through September 23, 2019, and that a large portion of the services were provided without the requisite license. (Exs. A-8 and A-9) The Agency has provided sufficient evidence that Respondent Lopez should be held jointly and severally liable with Respondent GLS for the 26 violations of ORS 658.410(1).

"Therefore, the Agency's motion for partial summary judgment is GRANTED. The hearing scheduled for February 9, 2021, will be held to establish the amount of civil penalties only.

"IT IS SO ORDERED."

(Ex. X10) The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

10) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

11) The Agency objected to Alma Lopez being allowed to testify at the hearing held on February 9, 2021. The Agency objected because Respondent Lopez did not file a case summary and, therefore, Alma Lopez was not listed as a witness. The ALJ sustained the Agency's objection and Alma Lopez was not allowed to testify. (Hearing Record)

12) The hearing was reconvened on February 12, 2021, to have Respondent Lopez affirm his previous testimony as he was not previously under oath at that time. The ALJ revised her ruling regarding the Agency's objection to the testimony of Alma Lopez and allowed her to testify. The objection was overruled because Alma Lopez was the duly appointed authorized representative for Respondent GLS and because the ALJ had discretion to allow testimony not disclosed in the case summary pursuant to OAR 839-050-0210(5). As such, she was allowed to testify even though Respondent GLS did not file a case summary. See *In the Matter of Hey Beautiful Enterprises, Ltd.*, 33 BOLI 189, 193-194 (2014).

13) On July 27, 2021, the ALJ issued a Proposed Order that notified the participants that they were entitled to file exceptions of the Proposed Order within 10

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days of its issuance. The Agency filed exceptions on July 30, 2021. Respondent did not file exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, GLS was an active domestic limited liability company registered with the Oregon Secretary of Business Registry. (Ex. X8)

2) On January 15, 2019, the Agency sent a letter to Respondent Lopez and Respondent GLS advising them that their farm labor contractor license was going to expire on March 31, 2019. The letter advised Respondents that if a timely application for license renewal was not received, that they could not operate as a farm labor contractor after March 31, 2019. The Agency also advised Respondents that if they did operate as a farm labor contractor while unlicensed that they could be subject to civil penalties. (Ex. A5; Testimony of Wood)

3) On April 1, 2019, the Agency sent Respondents Lopez and GLS a letter advising them that their farm labor contractor license had expired on March 31, 2019, and that if they continued to operate as farm labor contractors, they could be subject to criminal and civil penalties. (Ex. A6; Testimony of Wood).

4) Between April and September of 2019, Respondents continued to operate as a farm labor contractor by providing workers to Stirling on 26 separate occasions. Respondents were unlicensed during this time period. (Testimony of Wood; Ex. A9)

5) Respondents received approximately \$325,000 from Stirling for providing workers to Stirling while unlicensed. (Testimony of Wood; Ex. A9)

6) On June 30, 2015, Respondent Lopez signed a compliance agreement with the Agency when it was discovered that Respondents were assisting an unlicensed farm labor contractor. (Testimony of Shell-Spurling; Ex. A11)

7) On August 3, 2018, Respondent Lopez signed a compliance agreement with the Agency for a lapse in worker's compensation coverage. Under the agreement, Respondent Lopez agreed to comply with all labor contractor requirements prescribed by Oregon law. (Testimony of Shell-Spurling; Ex. A12)

8) Respondent Lopez worked without a labor contractor's license because he had no money and had no other option available to him. On September 1, 2018, Alma Lopez, the wife of Respondent Lopez, suffered a home accident that resulted in her being in a wheelchair for two years. Mrs. Lopez was on daily dialysis. The couple have a disabled, 10-year old son. (Testimony of Respondent Lopez)

9) The invoices are correct that Respondent made over \$300,000 but that most of the money went to pay his employees. Lopez kept insurance to protect his employees even though he did not have a current license. (Testimony of Lopez)

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10) Respondent Lopez admitted that the violations were true and he took full responsibility for what happened. (Testimony of Lopez)

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents Lopez and GLS herein. ORS 658.405 to 658.503.

2) Respondents committed 26 violations of ORS 658.410(1) and OAR 839-015-0125 by supplying workers to Stirling during the time period of April 1, 2019, through September 23, 2019, while they did not have a valid farm labor contractor's license.

3) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess a civil penalty, not to exceed \$2,000 per violation, against Respondents for their violations of ORS 658.410, ORS 658.453(1)(a) and OAR 839-015-00508(1)(a).

4) Respondents committed prior violations of the farm labor laws and entered into compliance agreements with the Agency. The Agency advised Respondents of the ramifications if they continued to operate as a farm labor contractor without a farm labor license. However, Respondents continued to operate as a farm labor contractor after their license expired. These factors support assessing a higher civil penalty.

OPINION

The summary judgment order issued on January 8, 2021, determined that Respondents violated ORS 658.410(1) when respondents acted as farm labor contractors without a license. The remaining issue to be determined is the amount of civil penalties.

In regard to the magnitude of the penalties for violations of ORS 658.410(1) OAR 839-015-0512 provides in pertinent part:

“(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

“(2) For purposes of this rule, ‘repeated violations’ means violations of a provision of law or rule which have been violated on more than one contract within two years of the date of the most recent violation.

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"(3) When the Commissioner determines to impose a civil penalty for acting as a labor contractor without a valid license the minimum civil penalty shall be as follows:

- (a) \$500 for the first violation;
- (b) \$1,000 for the first repeated violation;
- (c) \$2,000 for the second and each subsequent repeated violation."

The criteria to be considered in determining an appropriate civil penalty are found at OAR 839-015-0510 and are:

"(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

"(c) The magnitude and seriousness of the violation;

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating and aggravating circumstances presented by the contractor or other person for the purpose of determining the amount of the civil penalty to be imposed."

Respondent Lopez had been a licensed farm labor contractor for several years and had entered into two consent orders for violations of the farm labor contracting laws. (Ex. A11; A12)

Respondent Lopez was aware of the violations. Prior to the expiration of his farm labor contractor license, Respondent Lopez was given notice of the consequences of continuing to provide farm labor contractor services. (Ex. A5; A6)

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Under OAR 839-015-0520(1)(i) acting as a farm labor contractor without a license is consider such a serious violation that it is grounds for suspending, revoking or refusing to renew a license. It provides:

“The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to deny or refuse to renew a license application or to suspend or revoke a license: * * *

(i) Acting as a labor contractor without a license;”

Respondent Lopez testified that he knew that his farm labor license was expiring but made the choice to continue working as a farm labor contractor after the license expired.

Respondents failed to take any measures to prevent or correct the violations but continued to work without the requisite license for 26 weeks.

No evidence was presented that any person suffered a monetary loss as the results of Respondents’ violations. The forum considers this to be a mitigating factor. In prior cases the forum has assessed a lesser civil penalty when no prior violations existed.⁴

In this matter there were two prior violations of the farm labor contractor law. Prior violations are considered to be one of several aggravating factors, and, therefore, a higher civil penalty is warranted.

A civil penalty of \$1,000 is assessed for the first violation of ORS 658.410(1) that occurred on or about April 6, 2019. A civil penalty of \$1,500 is assessed for the first repeated violation of ORS 658.410(1) that occurred on or about April 13, 2019. A civil penalty of \$2,000 is assessed for the 24 remaining repeated violations thereafter for a total civil penalty of \$50,500.

Respondents are jointly and severally liable for these violations. ORS 658.410(2)(c) and (d) and OAR 839-015-135(1)(c).

EXCEPTIONS TO THE PROPOSED ORDER

Agency’s Exceptions

Agency exceptions 1 through 4 concern the placement of punctuation marks in Respondent GLS’s name. The Agency’s exceptions 1-4 are GRANTED as is reflected

⁴ See *In the Matter of Tomas Benitez*, 19 BOLI 142,160 (1999) for a discussion of prior cases involving the assessment of civil penalties. The forum notes that there have been few reported farm labor cases since *In the Matter of Mountain Forestry, Inc.*, 29 BOLI 11 (2007). The last reported case was *In the Matter of Erick Espinoza Farm Labor Contractor, LLC and Erick Espinoza-Juarez, Individually*, 35, BOLI 2 (2016). The Espinoza case dealt with license revocation and did not assess civil penalties.

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throughout.

The Agency's 5th exception concerns a correction to an OAR cite in Procedural Proposed Finding of Fact #12. The Agency's exception is GRANTED and the cite has been corrected. The Agency's 6th exception concerns a correction to a case cite in Procedural Finding of Fact #12. The Agency's exception is GRANTED and the cite has been corrected.

The Agency's 7th and 8th exceptions concern corrections to ORS and OAR cites in the Proposed Opinion. The Agency's exceptions are GRANTED and the cites have been corrected.

The Agency's 9th exception regards the wording in #4 of the Proposed Conclusions of Law. The Agency's exception is GRANTED and the wording has been changed to address the Agency's concerns.

The Agency's 10th exception concerned the reference to Proposed Finding of Fact #4 in the Exceptions Notice portion of the proposed order. The Agency's exception is GRANTED. Proposed Finding of Fact #4 has been changed to reference the second interim order issued on September 24, 2020, regarding the implementation of temporary procedures due to COVID-19 that included allowing the parties to file documents by email.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453 and as payment of the penalties assessed for violations of ORS 658.410(1) the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **J. Gabriel Lopez aka Gabriel Lopez and General Labor Services LLC.**, jointly and severally, 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 FIFTY THOUSAND FIVE HUNDRED DOLLARS (\$50,500), plus any interest thereon that accrues at the legal rate of interest thereon between the date ten days after the issuance of the Final Order and the date Respondents comply with the Final Order.

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In the Matter of

**Grand Management Services, Inc,
Respondent, Case Nos. 46-18, 47-18
(Consolidated)**

**Final Order of Commissioner Val Hoyle
Issued September 9, 2021**

SYNOPSIS

The forum concluded that Respondent unlawfully terminated two complainants due to their opposition and complaints related to the Oregon Safe Employment Act ("OSEA"), in violation of ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e). The forum also concluded that Respondent violated ORS 659A.199, ORS 659A.030(1)(f) and OAR 839-005-0125(1)(a)(A) when it terminated the complainants. The forum awarded one complainant \$60,000.00 in emotional and mental suffering damages and out-of-pocket expenses of \$699.93. The forum awarded the second complainant \$15,000.00 in emotional and mental suffering damages. The forum declined to award lost wages to the complainants due to the lack of sufficient evidence that the complainants attempted to mitigate their damages.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 28-31, 2019, 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 Adam Jeffries, an employee of the Agency. Complainants, Esther Mascolo ("Esther M")¹ and Moses Mascolo ("Moses M"), were present throughout the hearing. Respondent Grand Management Services, Inc. ("GMS") was represented throughout the proceeding by Attorneys Sean Ray and Charlotte Hodde. Richard Nored and Kristen Smith (owners of GMS) were also present.

The Agency called the following individuals to testify as witnesses:

- Lloyd Perez, Senior Investigator, BOLI Civil Rights Division
- Moses M, Complainant

¹ Because there were several witnesses with the same last name, all individuals with the last name of Mascolo will be referred to by their first names and last initial.

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- Michael Lowe (by telephone)
- Esther M, Complainant
- Dennis Mesford of Servpro Gresham (by telephone)

GMS called the following individuals to testify as witnesses:

- Jesse Wolf (by telephone)
- Frank Messina, Environmental Specialist, Oregon Department of Environmental Quality
- Kristin Smith, Property Manager and Owner of GMS
- Sharon Peak, Operations Manager at GMS (by telephone)
- Jerry Mascolo ("Jerry M"), Southern Regional Manager at GMS
- Joseph Mascolo ("Joseph M"), Maintenance Coordinator at GMS
- Richard Nored, Owner of GMS

The forum received into evidence: (a) Administrative exhibits X1 through X36; (b) ALJ exhibit ALJ1 (diagram of units B1 and B2 requested by the ALJ), (c) Agency exhibits A1-A26, A27,² A29, A31, A33, A39, pages 1-2 of A41, A42-43 (except for handwriting on the documents), A45, A47, A50-52, A55, pages 3-4 of A56, A58-A61, A62A, A63, pages 5 and 10 of Ex. A64,³ A66-A67, A77-A78 and (d) GMS exhibits R4, R14, R19-R22 and R24.

Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.⁴

FINDINGS OF FACT – PROCEDURAL

1) Esther M filed a complaint with the Agency's Civil Rights Division on November 13, 2017, citing ORS 654.062 and alleging that she believed GMS retaliated against her for reporting and opposing workplace health and safety hazards by terminating her employment. (Exs. A1, A25)

2) Moses M filed a complaint with the Agency's Civil Rights Division on November 15, 2017, citing ORS 654.062 and alleging that he believed GMS retaliated against him for reporting and opposing workplace health and safety hazards by terminating his employment. (Exs. A8, A19)

² Exhibits A27 and A29 were received for jurisdictional purposes only.

³ The Agency also offered pages 6-9 and 11-15 of Ex. 64 as evidence, and GMS objected. Because these pages contained lengthy notes authored by Moses M and Esther M, the ALJ informed the parties that a ruling on these pages of Ex. 64 would be addressed in the Proposed Order. Given that both Moses M and Esther M testified at trial, the forum finds pages 6-9 and 11-15 to be cumulative of their testimony and other evidence, and will not receive those pages of Ex. A64 into evidence.

⁴ The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

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3) On February 9, 2018, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") for Case No. OSEMOS171113-71528 in which it found substantial evidence of an unlawful employment practice (discharge of Esther M) on the basis of an opposition to a health and safety hazard in violation of ORS 654.062. (Ex. A27)

4) On February 9, 2018, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") for Case No. OSEMOS171115-71548 in which it found substantial evidence of an unlawful employment practice (discharge of Moses M) on the basis of an opposition to a health and safety hazard in violation of ORS 654.062. (Ex. A29)

5) On October 25, 2018, the forum issued Notices of Hearing in Case Nos. 46-18 and 47-18 to GMS, the Agency, Esther M and Moses M, stating the time and place of the hearing as February 26, 2019, 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. (Exs. X2, X8)

6) The Formal Charges in Case No. 46-18 alleged that GMS unlawfully retaliated against Esther M by terminating her employment on the basis of (1) Esther M's opposition to and reporting of hazardous working conditions, in violation of ORS 654.062(5)(a),(b) and OAR 839-004-0016(1)(e),(a). (Ex. X2b)

7) The Formal Charges in Case No. 47-18 alleged that GMS unlawfully retaliated against Moses M by terminating his employment on the basis of Moses M's opposition to and reporting of hazardous working conditions, in violation of ORS 654.062(5)(a),(b) and OAR 839-004-0016(1)(e),(a). (Ex. X8b)

8) On October 26, 2018, the Agency served the Notices of Hearing and Formal Charges in Case Nos. 46-18 and 47-18 on GMS. GMS filed answers to the Formal Charges in each case on November 15, 2018. (Exs. X2a, X3, X8a, X10)

9) A prehearing telephone conference was held on November 28, 2018. Administrative Prosecutor Adam Jeffries participated in the conference on behalf of the Agency. Sean Ray, GMS's attorney, appeared on behalf of GMS. Prior to the conference, GMS filed a motion to postpone the hearing and the Agency filed a motion to consolidate Case Nos. 46-18 and 47-18. Both parties stated that they did not oppose either motion. Accordingly, GMS's motion to postpone and the Agency's motion to consolidate were granted.

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During the conference, the following case schedule was set:

- “Any discovery motions must be filed on or before **April 5, 2019.**
- Any dispositive motions must be filed on or before **April 26, 2019.** Responses to dispositive motions are due on **May 3, 2019.**
- The hearing will begin on **Tuesday, May 28, 2019, at 9:00 a.m.** The parties’ case summaries must be filed **no later than May 14, 2019.**”

(Exs. X4-X6, X11-X13)

10) The Agency filed a Motion to Compel Discovery on April 5, 2019. GMS filed a timely response on April 12, 2019. The ALJ issued an interim order on April 18, 2019, stating, in pertinent part:

“OAR 839-050-0200 states: ‘The administrative law judge has the discretion to order discovery by a participant in an appropriate case.’ ‘Any discovery request must be reasonably likely to produce information that is generally relevant to the case.’ OAR 839-050-0200(7). The Agency’s motions pertain to the following discovery requests:

<u>Agency Discovery Request</u>	<u>Date Sent to Respondent</u>
First Request Production	February 15, 2019
Second Request for Production	April 2, 2019
Second Set of Interrogatories	April 2, 2019

“Agency RFP Nos. 4 and 5

“The Agency first requests that Respondent be required to produce all remaining documents responsive to Requests for Production Nos. 4 and 5 from its First Request for Production. Those requests seek the following documents:

‘[A] copy of all disciplinary notices, adverse written comments, documentation of refusals to accept telephone or written communications and/or write ups Respondent created concerning [each Complainant’s] employment with Respondent in 2017.’

“Respondent objected to the terms ‘adverse written comments’ and ‘refusal’ as vague, but stated that it would produce documents that could be located in a reasonable search. Respondent provided some responsive documents, but the Agency believes that additional responsive documents (call logs and disciplinary notices) have not yet been produced and requests that Respondent produce all responsive documents on or before April 23, 2019. In its response to the motion, Respondent states that this is the first time that it became aware that the Agency expected to receive call logs, and that ‘nothing in

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a call log would evidence a “refusal to accept telephone or written communications.”” It also states that call logs are created by third parties and Respondent did not ‘create’ them and, therefore, the logs would not be responsive to the requests.

“Based on the information provided by Respondent, the forum concludes that call logs would not be responsive to the requests. If Respondent has any additional documents that are responsive to Request Nos. 4 and 5, it must produce those documents on or before April 23, 2019, or alternatively, inform the Agency that it was not able to locate any additional responsive documents.

“Agency RFP Nos. 6-9, 12-14

“The Agency also seeks production of all documents responsive to its Request Nos. 6-9 and 12-14 on or before April 23, 2019. The requests were also contained within the Agency’s First Request for Production. In response to the requests for production, Respondent objected that some of the requests were overly broad or contained vague terms, but stated that it would produce relevant documents. It did not specifically address these requests when responding to this discovery motion. The forum concludes that the requests seek documents subject to discovery under OAR 839-050-0200, and Respondent must produce any additional responsive documents on or before April 23, 2019, or, alternatively, inform the Agency that it was not able to locate any additional responsive documents.

“Agency RFP Nos. 17-19 and Interrogatory Nos. 10-11

“Request Nos. 17-19 and Interrogatory Nos. 10-11 were contained within the second set of requests the Agency sent to Respondent on April 2, 2019. At the time of the filing of the motion and response, Respondent’s time for responding to the requests and interrogatories had not yet passed. However, Respondent did not object to the motion and the forum concludes that Agency’s requests seek documents subject to discovery under OAR 839-050-0200. Respondent must produce any additional responsive documents on or before April 23, 2019, or alternatively, inform the Agency that it was not able to locate any additional responsive documents.

“Conclusion

“The Agency’s motions are GRANTED in part and DENIED in part, as explained above.”

(Exs. X14, X18-X19)

11) The Agency filed Amended Formal Charges in Case Nos. 46-18 and 47-18 on April 9, 2019, to assert violations of ORS 659A.030(1)(f) and OAR 839-005-

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0125(2)(a)(A), (b), (c); and ORS 659A.199(1) and OAR 839-010-0100(1). Additionally, the Amended Formal Charges in both cases referred to GMS as an “active domestic business corporation.” On April 16, 2019, GMS filed an Amended Answer in each case denying the newly asserted violations. (Exs. X15-X16, X20-21)

12) On May 6, 2019, 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 May 14, 2019, and set out the requirements for what each participant must include in their case summary. The Agency and GMS timely filed their case summaries on May 14, 2019. On May 17, 2019, the Agency filed an addendum to its case summary. GMS filed an addendum to its case summary on May 24, 2019. (Exs. X22-X24, X29, X31, X36)

13) GMS filed a Motion to Amend Answers on May 10, 2019. On May 17, 2019, Administrative Prosecutor Adam Jeffries sent an email to the ALJ stating that the Agency did not object to the motion. The ALJ issued an interim order granting GMS’s motion on May 17, 2019. (Exs. X25 – X28, X30)

14) On May 21, 2019, the Agency filed a motion to cross-examine two individuals who signed declarations that GMS filed with its case summary. On May 22, 2019, GMS submitted a response in opposition to the motion. The ALJ issued an interim order on May 22, 2019, which stated, in pertinent part:

“ORS 839-050-0260(9) indicates that a party may offer into evidence a declaration that was served on the opposing party 10 days prior to hearing ‘unless cross-examination is requested of the declarant * * * no later than five days prior to hearing.’ In this case, the Agency timely filed a request for cross-examination of two individuals who signed declarations (Frank Messina and Jesse Wolf). Accordingly, if Messina and Wolf are not available for cross-examination by the Agency at hearing, the declarations will not be received into evidence unless the forum determines that:

- ‘(a) The contents of the [declarations] are otherwise admissible; and
- ‘(b) The [Agency] would not be substantially prejudiced by the lack of cross-examination.’

ORS 839-050-0260(10). At this time, the forum does not have sufficient information to conclude whether the conditions above have been met. Accordingly, if Messina and Wolf do not appear at hearing for cross-examination and Respondent offers their declarations into evidence, the parties will be provided with the opportunity to address whether these conditions have been met.”

(Exs. X32-X33)

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15) The Agency filed Second Amended Formal Charges on May 24, 2019, in each case to add references to the Oregon Safe Employment Act (OSEA) and other health and safety ruled including OAR 340-248-0010 through OAR 340-248-0280. Pursuant to OAR 839-050-0140(2)(b), GMS's answers to the Amended Formal Charges were deemed to be its answers to the Second Amended Formal Charges. (Exs. X34-X35)

16) 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)

17) During the hearing, the Agency offered Ex. A54 into evidence, which was a typed timeline of events prepared by Esther M. After GMS's objection, the ALJ ruled that Ex. A54 would not be admitted into evidence for the following reasons:

- The first two paragraphs of the document referred to events in the past tense, suggesting that the timeline was not updated contemporaneously while the events were occurring.
- Many of the timeline entries did not indicate the source of the information.
- There were several self-serving statements and/or characterizations of events (such as stating that Smith "scolded" Esther M), rather than a description of the facts.

(Hearing Record)

18) The ALJ requested that the parties provide a diagram showing the layout of Units B1 and B2. In response to that request, the parties submitted a diagram that both the Agency and GMS agreed was an accurate depiction of the layout of the units. The diagram was marked as ALJ1 and received into evidence. (Hearing Record, Ex. ALJ1)

19) In emails sent November 10, 2020, the Agency and GMS's counsel informed the forum that the Agency and GMS agreed to receive filings (including the Proposed Order, exceptions to the Proposed Order and the Final Order) from the parties, the Contested Case Coordinator and the ALJ by email, because of challenges associated with the COVID-19 virus. (Forum File)

20) On December 29, 2020, 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. After obtaining an extension of time from the forum, the Agency and GMS timely filed exceptions on January 29, 2021.

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FINDINGS OF FACT – THE MERITS

Background

1) GMS is a property management company formed in 1996 and headquartered in Coos Bay, Oregon. GMS manages the Riverview Terrace Apartments in Cascade Locks, Oregon. Riverview Terrace is a 515-family property which is subsidized by the Rural Development Agency of the United States Department of Agriculture. There are income limits set by the federal government that determine who may live at the property. (Testimony of Nored, Smith; Ex. A9)

2) Richard Nored and his daughter, Kristin Smith, are the owners of GMS. Smith is a licensed property manager. Nored is a registered civil and environmental engineer and has been a licensed general contractor for about 16 years. Although Nored is retired, he assists Smith in operating GMS. Nored and the federal government own Riverview Terrace. (Testimony of Nored, Smith)

3) In May of 2017, Michelle Gibbens, the Northern Regional Manager of GMS, hired Esther M as a part-time onsite manager of the Riverview Terrace Apartments. GMS and Esther M executed a Site Manager Employment Agreement on July 26, 2017. Among other things, the agreement provided that Esther M agreed to the following management and operation activities on behalf of GMS:

- “Maintain a telephone line at your residence, or at least a working cell phone number, at all times. Be available to answer questions from other management personnel.”
- “Maintain adequate time at the apartment complex to be aware of ongoing maintenance needs. Maintain 20 regularly scheduled office hours each week * *
- Esther M’s scheduled hours were Monday through Friday 8 am – 12 pm during May 2nd – August 14th. Scheduled hours from August 15th to May 1st were from 12 pm to 4 p.m. Monday through Friday.
- “Communicate with the regional manager and proper central office staff regularly to report maintenance activities at the complex.”

The contract further provided that “[a]bsence from work without notifying your supervisor will be considered a voluntary resignation.” Esther M received a gross monthly salary of \$975 per month. Additionally, GMS provided Esther M with a Riverview Terrace apartment unit (Unit B2) to live in with her family on the site, which had a rental value of \$893 per month. There was also a separate office on the property for Esther M to use to perform her job duties. Esther M worked four hours a day Monday through Friday. Esther M did not receive a write up or discipline prior to her termination. (Testimony of Esther M, Smith; Exs. X2b, X3, X41, A67)

4) On July 24, 2017, Gibbens hired Moses M to perform maintenance work at Riverview Terrace on an hourly basis, as needed. Moses M was employed full time

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as a maintenance worker at a different apartment complex for another employer, and performed his work at Riverview Terrace in the evenings and on weekends. (Testimony of Moses M; Exs. X8b, X10)

5) Joseph M and Jerry M are the older brothers of Moses M, and were also employed by GMS. They both worked for GMS for a number of years before GMS hired Esther M and Moses M. Joseph M was the maintenance coordinator for GMS. Jerry M was the Southern Regional Manager and holds a general contractor license. Jerry M was the former site manager and part-time maintenance manager at Riverview Terrace, and lived in Unit B2 when he worked there. The father of the Mascolo brothers also previously worked for GMS. (Testimony of Joseph M, Jerry M, Nored)

6) Esther M, Moses M and their two children occupied Unit B2 at Riverview Terrace. For a portion of August 2017, Esther M and Moses M also had a lease on another apartment in Troutdale, Oregon, and were in the process of moving out of the Troutdale apartment and into Unit B2. In June of 2017, Esther M provided notice of intent to vacate the Troutdale apartment on August 31, 2017. (Testimony of Moses M, Esther M; Ex. A67)

Water Leak in Unit B1

7) Unit B1 was located directly next door to Unit B2. Each unit was two stories tall. The hot water closets in each unit were located on the first floor, directly adjacent to one another and separated by the wall between the units. On the evening of August 2, 2017, the tenant of Unit B1 contacted Esther M and told her that there was a water leak. Esther M went into Unit B1 and saw water leaking above the hot water tank from the nipple that connected the supply line to the tank. Moses M also reviewed the situation and confirmed that there was a leak at the nipple, and also that the supply line shutoff valves were not working. Moses M placed a bowl under the leak. (Testimony of Esther M; Ex. ALJ1)

8) Esther M placed a maintenance request and discussed the leak with her regional manager, Gibbens, on the following day. Gibbens coordinated with Esther M, who placed an order for the parts needed for the repair on August 4, 2017. (Testimony of Esther M)

9) On the morning of August 8, 2017, Unit B1's tenant told Esther M that more water was visible. Esther M went into Unit B1 and observed there was more water and that the area under the water heater was also wet. Esther M did not know where the water was coming from. There was water on the floor and not near the nipple located at the top of the water heater tank. Moses M was at his fulltime job off site and not available, so Esther M called Gibbens. Gibbens told Esther M that she would obtain approval for a plumber to come to Unit B1. Later that morning, Gibbens sent Esther M a Maintenance Request Approval authorizing Chinook Plumbing to repair the leaking water heater in Unit B1. (Testimony of Esther M; Ex. A13)

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10) On August 11, 2017, Jesse Wolf of Chinook Plumbing reviewed and repaired the water leak in Unit B1. He discovered that the actual leak was under the concrete floor in the hot water closet and noticed that the concrete was wet. Wolf was unsure how long the leak had been going on because it would not have caused any problems until it came up through the concrete floor. Wolf made three to five holes in the concrete floor to locate the origin of the leak. (Testimony of Wolf; Exs. A13, pp. 32-35; R21)

11) Esther M sent an email to Smith, Peak, Gibbens and Nored on August 11, 2017, at 8:48 a.m., informing them that when drywall was exposed in Unit B1 on August 10, 2017, mold was growing and there was visible dampness after a “slow and continuous leak that has been occurring over the space of many weeks/months.” Esther M observed mold in Unit B1, but she did not know if it was black mold, and believed it needed to be tested. She sent additional emails with updates throughout the day. At 4:31 p.m., her email update stated that the carpets in Units B1 and B2 were very wet and that she needed “approval to get a restoration company to come out, and test the air quality/mold on the interior wall” between Units B1 and B2. Peak responded in two emails, stating, “Go ahead. If you can find someone to extract the water go ahead. * * * You should need to check for mold at this point[.]”⁵ The mention of mold did not raise a health or safety concern to Smith because it was not black mold. Because Smith was hiring a restoration company (Servpro), she thought that Servpro would take care of any mold concerns. Servpro did not test for mold and Esther M did not follow up to ask why that had not been done. (Testimony of Esther M, Smith; Ex. A13, pp. 31-34)

12) Dennis Mesford from Servpro went to Riverview Terrace on August 12, 2017, to review the water damage situation. (Testimony of Mesford)

13) On August 14, 2017, GMS authorized Servpro to evaluate the damage in Unit B1 and to test the vinyl, drywall and rubber base in the affected area. Mesford went back to Riverview Terrace that day and took samples from Unit B1 for asbestos testing. He observed that the bottom of the walls in Units B1 and B2 were 100% saturated. Mesford prepared an estimate recommending, among other things, that wet drywall be removed and that holes be drilled into the wall cavity to allow for drying. Later that day, Esther M emailed the estimate from Servpro to Nored, Smith, Peak, Gibbens and Jerry M. Smith approved Servpro to do restoration work based on the estimate. (Testimony of Mesford, Esther M, Smith; Exs. X2b, X3, A33, A56, pp. 3-4)

14) Esther M sent an email to Peak, Nored, Smith and Gibbens on August 14, 2017, which stated, in part, that Servpro was at the property that morning and that the drywall, vinyl floor and rubber base would be tested for asbestos. She told them that if the results were positive, then an abatement company would need to perform an

⁵ The time of Peak's first email response was 4:22 p.m., which would have been prior to Esther M's email. Esther M credibly testified that her computer was on Eastern Standard Time and the time stamps on her emails were sometimes off by three hours.

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abatement. Esther M also requested that GMS provide alternate lodging for the residents of Units B1 and B2 “during the time/process of restoration.” In response, GMS paid for Esther M and her family to stay at the Best Western hotel in Cascade Locks on August 14 and 15, and paid for the residents of Unit B1 to stay at the same hotel on August 14-19, 2017. Smith personally made the hotel reservations. Smith found it to be difficult to find lodging because Cascade Locks was a viewing area for the upcoming solar eclipse on August 21, 2017.⁶ (Testimony of Esther M, Smith; Ex. A13, pp. 30-31)

15) Esther M also emailed Nored individually on the morning of Monday, August 14, 2017, with an update. In the email, Esther M told Nored that Moses M “examine[d] the problem and found out in time that it was not the water heater leaking, but a supply line leak and took measures to mitigate the damage of water to the property.” In the email, Esther M also informed Nored that Unit B1 had been airing out and that in Moses M’s “professional opinion,” there would not be mold growth in the unit. Nored responded that the repairs “followed a good approach.” Esther M also told Nored that water went into Unit B2 and caused damage to her bedroom furniture and asked for compensation. Nored suggested that the furniture be repaired instead of replacing it. (Testimony of Esther M; Ex. A9, p. 23)

16) Later in the morning on August 14, Esther M received a call from Jerry M, the Southern Regional Manager for GMS. Jerry M asked why Moses M was not repairing the water heater inlet line in Unit B1 himself. Based on Jerry M’s experience during his time as the maintenance manager of Riverview Terrace, Jerry M concluded that Moses M should have investigated and assessed the damage in Unit B1 in his maintenance role. (Testimony of Esther M, Jerry M)

17) After the telephone call from Jerry M, Esther M called Wendy Pearsall, her direct supervisor. Esther M asked Pearsall why Jerry M questioned her about Moses M not performing the work when no one else at GMS had expressed concerns. Esther M told Pearsall that Moses M was not certified to remove mold based on the size of the area and that it was illegal for Moses M to do the work. (Testimony of Esther M)

18) At 4:50 p.m. on August 14, 2017, Esther M emailed Nored, Smith, Peak, Gibbens and Jerry M with an update. She told them that the residents of Unit B1 had been without hot water since August 10. She also said that mold “was visible” on the drywall in Unit B1. She requested that her family and the residents of Unit B1 be housed elsewhere. (Testimony of Esther M; Ex. A13, pp. 39-40)

Asbestos Test Results

19) “Asbestos fibers in the air pose a significant health threat to employees, tenants, the public and the environment.” The Oregon Department of Environmental

⁶ The forum takes official notice that a total solar eclipse occurred in the region on August 21, 2017. (Official Notice)

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Quality ("DEQ") has rules regarding the handling and removal of asbestos containing material. If asbestos containing material is "friable," it will easily release fibers into the air when crushed or broken up in a person's hands. Only DEQ licensed asbestos abatement contractors and certified asbestos workers can remove and dispose of friable asbestos containing materials. Asbestos containing material is "nonfriable" when it has a binder that holds the asbestos fibers within a solid matrix and will not allow asbestos fibers to release easily, unless mishandled, damaged or in a badly worn or weathered condition. An example of a nonfriable project is one that involves removing mastics that are fully enclosed within a petroleum-based binder and are not hard, dry or brittle. DEQ does not require DEQ licensed asbestos abatement contractors or certified asbestos workers to remove nonfriable asbestos. However, nonfriable materials must remain in nonfriable, predominantly whole pieces during the removal and disposal process. (Testimony of Messina; Exs. A13, p. 62, R19)

20) Neither Esther M, Moses M, Joseph M or Jerry M had received training regarding on the proper handling of asbestos. (Testimony of Smith, Jerry M, Joseph M)

21) On August 15, 2017, Mesford informed Esther M and Moses M that materials from Unit B1 tested positive for asbestos and that there would need to be an abatement by a licensed abatement contractor. He also told them that Servpro was a general contractor and was not licensed to do asbestos abatement work. (Testimony of Mesford; Ex. A56, pp. 3-4)

22) Esther M reviewed the asbestos report, which indicated that the black mastic used to glue the tiles to the hot water closet floor in Unit B1 tested positive for asbestos, specifically "3% Chrysotile." After reviewing further information and talking to Mesford, Esther M learned that if the test was positive over a certain percentage, then an abatement company needed to perform the work. (Testimony of Esther M; Ex. A13, pp. 5-9)

23) Esther M forwarded the asbestos test results to Joseph M, the maintenance coordinator for GMS. Esther M also telephoned Joseph M about the results at about 1:30 p.m. Joseph M told her that he had already received the results and asked Esther M why Moses M was not doing the maintenance work himself. Joseph M did not perceive Esther M to be reporting health and safety hazards in the workplace. (Testimony of Esther M, Joseph M; Exs. A13, pp. 5-9, A50, p. 3)

24) Esther saw the test results as a "red flag" because it indicated that there was greater than 1% asbestos in the mastic glue. (Testimony of Esther M)

25) Esther M told Moses M that Servpro would not complete their work until after an asbestos abatement team completed their work and sealed the area. (Testimony of Esther M; Ex. A62A, p. 18)

26) Smith emailed Esther M at 3:39 p.m. on August 15, 2017, stating, "Esther, it sounds like we have hired Servpro for all repairs. We also have arranged a hotel for

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you through Saturday. Please let me know if you need anything additional from our end. Thank you!" (Ex. A9, p. 27)

27) Esther M responded to Smith's email later that day, writing:

"Moses and I want to thank you for the stay between 8/14-8/15 at the Best Western. When I was told about that stay throughout Saturday through Jerry[,] Moses and I already had made arrangements so that we can be elsewhere as we did not know what was going to be occurring. We also observe the Sabbath – and it would cause a great inconvenience for us to be going back and forth on that day.

"We are also glad that a decision was made to go with Servpro, and that the things that were already in place to be done prior – are moving forward. For this situation was not overnight, but was something that was occurring under the concrete for over many weeks/months slowly creating the mold that was visible when the plumber cut the drywall (as I was informed not only by the plumber, but Servpro Restoration and Kennedy Restoration). If it was not for Moses['s] diagnosis, the plumber would of came in and replaced the water heater and eventually would have had an increase of water damage but continued the leak. I continued throughout the entire time to keep everyone informed, and to the directive that was given to me by upper management.

"From my understanding, we are awaiting on the abatement side as to when will the opening of walls/drying out process/removal of floors can be taken place and then putting things back together. We do not believe this will all be done by Saturday, but towards the end of the month. I would appreciate during that process that [the residents of Unit B1], my family and I – be housed elsewhere for that is not an environment that anyone should be dealing with. I hope that you can understand and want to thank you again."

At that point in time, Esther M believed that the environment in Units B1 and B2 was in violation of Oregon health and safety laws for the following reasons:

- She reviewed the test results stating tile mastic glue tested positive for asbestos and understood there is a health concern if it was friable.
- She saw what she believed to be mold in Unit B1.
- The carpets in both Units B1 and B2 were wet and the units smelled bad.
- Unit B1 did not have hot water available.
- Esther M witnessed the plumber drilling and breaking the floor tile in Unit B1 on August 11, 2017, which caused her to believe that asbestos was in the air in Unit B1.

(Testimony of Esther M; Exs. A9, pp. 26-27, A 39, pp. 5-6)

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28) Smith became confused when she learned that the hotel reservations she made for Esther M were canceled. At this time, Smith was not aware that Esther M and Moses M still had a lease on another apartment in Troutdale. At 9:41 a.m. on August 16, 2017, Smith sent an email to Esther M with a subject line reading "RE: B1 – work done on 8/11/2017." The email stated:

"We are discussing these issues and will get back to you today. I have been told [hotel] reservations have been cancelled for you and your family that we had arranged. Our plan yesterday was that Servpro was going to be arranging for the abated in the next couple of days and would be removing anything harmful that might be in the apartments. It looks like [h]ot water will be restored in both units after today. It was discussed at the meeting yesterday that both your family and [the B1 tenant] would be back in the unit Saturday and would live through the repairs. Do you have a timeline from Servpro yet as that would be helpful in planning this out[?] Hotel rooms at the [B]est [W]estern were almost \$200 for 1 room, 1 night so that is certainly a concern.

"Again, we are working on getting you an answer today. It sounds like you are staying elsewhere this week. Thank you."

Smith's reference to "harmful" was referring to asbestos. At that point, Smith hoped the residents of Unit B1 and B2 would be back in their apartments by the following Saturday. At the time she sent the email, Smith thought that Servpro would be able to do the abatement and restoration work right away in the proper manner. Her assumption was that Servpro intended to do the abatement. She later learned that from Mesford that Servpro subcontracted out for abatement, and that the abatement subcontractor was not available for six weeks. Smith considered part of Esther M's duties as a property manager to minimize costs and get the residents back into their units quickly. (Testimony of Smith; Exs. A9, pp. 25-26, R4)

29) Esther M replied to Smith's email at 11:27 a.m. on August 16, 2017, stating, in part:

"* * * Fans are not to be in place because of the drywall/floors being opened and needing to have the harmful contaminants contained by the abatement company.

"As for stay, thank you once [again] for the past two night[s]. I completely understand the concern with hotel stays * * * and my family and I are able to stay elsewhere throughout this week avoiding any stays throughout this week.

"I will continue to update for you further and thank you."

The email was also sent to Nored, Pearsall, Peak, Joseph M, Gibbens, Jerry M and a recipient named "Rob." The reference to "harmful contaminants" was meant to refer to the asbestos in the black mastic glue on the tiles in the water heater closet of Unit B1.

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Esther M understood at that time that the asbestos needed to be contained by an abatement company. (Testimony of Esther M; Ex. A9, pp. 25)

30) In a telephone call at around 11:00 a.m. August 16, 2017, Smith and Peak called Esther M to touch base and let her know that GMS had hired Servpro. Smith asked Esther M why Moses M was not doing more work, such as setting up dehumidifiers and extracting the water. Smith thought those things should have been done before the asbestos results on August 15 and that if Jerry M or Joseph M had been handling the situation, it would have been taken care of without her even having to be involved. Esther M responded that Moses M could not perform asbestos abatement work because he was not certified to do so and that the work must be performed by a professional abatement team.

Smith told Esther M that Pearsall and Gibbens told her that Esther M was acting "litigious" and that things were not happening in the correct manner. Smith decided to raise the issue directly and asked Esther M what she thought Smith was doing wrong and why Smith was hearing that Esther M wanted to sue GMS. Esther M told Smith that she liked her job and that it was not her intention to question GMS's actions. (Testimony of Esther M, Smith, Peak)

31) At 12:36 p.m. on August 16, 2017, Smith notified Esther M in an email that they should move their murphy bed from the wall because "abatement would be taking place asap." Based on this statement, Esther M believed that GMS would not be using the Servpro's abatement company because Servpro's abatement company was not available for at least a week. Esther M told Moses M about Smith's email. Later that day, Moses M told Esther M that he learned that GMS notified Servpro that it would not be needed for restoration work. (Testimony of Esther M; Ex. A13, p. 49, Ex. 62A, p. 25)

32) Smith and Peak spoke to Mesford of Servpro by telephone on August 16, 2017. After Smith said that GMS decided to hire Servpro for the restoration and repair work, Mesford told her that the portion of his company handling abatement was booked out for six weeks. Smith told him that six weeks was not acceptable because GMS was paying for displaced tenants to stay in a hotel. Mesford responded that the owner can remove the items in question, bag them up and then dispose of them. He explained that the cove bases and vct tiles needed to be removed. Mesford said that once those items were removed, then Servpro could start "the next day." Smith also learned from Mesford that no one had arranged for dehumidifiers to be placed in the units, so she asked Mesford to bring them over that day. Mesford also told her that a murphy wall bed was wet and attached to the wall in Unit B2 and needed to be removed so that there was air flow. (Testimony of Smith, Peak)

33) After speaking to Mesford, Smith requested that Jerry M and Joseph M travel to Riverview Terrace to place their "eyes on the problem" and assess the situation in Units B1 and B2. They agreed to go to the property to help Moses M and they were also concerned about the complaint from Unit B1's tenant that she had no hot water for five days. Joseph M and Jerry M intended to determine if the tile in each unit could be

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removed easily. If the tile was not easily removable, they planned to let Smith know and she would hire another abatement company to do the work more quickly than it could be done by Servpro's abatement subcontractor. Smith emailed Mesford on August 16, 2017, at 12:45 p.m. stating in part:

"[T]hank you for speaking with me today. I have arranged for the rubber base and glue along with 4" of the drywall underneath to be removed and properly disposed. I have also arranged for the vct [t]ile flooring in the water closets to be removed and properly disposed of. We will also be removing the murphy bed [in Unit B-2] to expose the wet carpet and padding."

(Testimony of Smith, Joseph M; Ex. A77, R14)

34) Jerry M believed that Moses M needed help and guidance. While Joseph M and Jerry M were driving to Riverview Terrace, Jerry M understood that the resident of Unit B1 had been without hot water for five days. Jerry M was shocked and concerned because the resident of Unit B1 was elderly and had a daughter with a disability who lived with her. The plan was to assess Units B1 and B2, and see what they could do to get the residents back into their apartments without wasting more time. Joseph M and Jerry M brought tools with them. They planned to return to the Coos Bay area that night. (Testimony of Jerry M)

35) Sometime between 3:00 and 5:00 p.m., Esther M and Moses M called Joseph M while they were at their other apartment in Troutdale. Joseph M and Jerry M were driving and on their way to Riverview Terrace. Joseph M was vague in responding to Esther M's questions because he did not know all the details and did not know the plan for what work was going to be done in Units B1 and B2. Joseph M told Esther M that if she continued to listen to Moses M, she would have problems in her job because Moses M allowed the hot water in Unit B1 to be turned off for so many days. Because Esther M was inexperienced in property management, Joseph M was concerned that she could have problems in her job if she continued to listen to Moses M. Joseph M said that Moses M should allow them access and should not get in their way. Moses M told him not to come and that Moses M would not let anyone in to Unit B2 because they were not certified to remove asbestos. Esther M also told them that they should not perform any work because they did not have an asbestos abatement certification. (Testimony of Esther M, Moses M, Joseph M)

36) After the telephone call with Joseph M, Moses M believed that someone from GMS was going to do the repair work instead of a certified abatement contractor. This caused him to worry about the health and safety of his family. He concluded that the tile in Unit B2 also had asbestos in it because Units B1 and B2 were built at the same time. He knew that asbestos was hazardous and believed that asbestos "fibers stay around forever." He decided that he needed to go to the Riverview Terrace apartments to prevent Joseph M and Jerry M from tearing up "hot" asbestos tile. He brought his neighbor from the Troutdale apartment, Michael Lowe, with him. (Testimony of Esther M, Moses M)

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37) The tenant of Unit B1 gave Joseph M permission to enter the unit. Joseph M and Jerry M arrived at Unit B1 at approximately 6:30 or 7:00 p.m. on August 16, 2017. Based on the reports he heard, Jerry M believed the walls would be soaked with water. Joseph M expected the drywall to be off the wall and damaged. Upon arrival in Unit B1, they observed that the drywall was dry. Jerry M knocked on the wall. It was solid and he did not notice any soft spots. The water heater was in the living room. The floor of the closet was moist, but not saturated. Jerry M saw that a hole had been cut out of the floor to fix a water line. The floor tiles were “floating” or sitting loose above the floor and were “somewhat saturated” and “movable.” Joseph M picked up the loose, wet tiles with his hands and handed them to Jerry M. The tiles were whole and did not break apart. Without using tools, Joseph M reached down and grabbed them with his bare hands. He did not disturb the mastic glue. Jerry M placed the tiles in a double black bag, which he understood was required before disposing of it properly at a DEQ site.

It took Joseph M about 10 minutes to pick up the tiles and they were in Unit B1 for approximately 20 minutes. Jerry M wore gloves, but did not cover his mouth and did not put down any plastic covering. Nored told Joseph M to bring the tiles back to GMS so that they were disposed of properly. Jerry M was not concerned about the asbestos in Unit B1 because it was encapsulated in a petroleum base and was sealed. Joseph M was not concerned about the asbestos because he could remove the tile with his bare hands without any tools. Joseph M and Jerry M were not certified to remove asbestos, and they did not consider the work they performed that evening to be “asbestos abatement.” (Testimony of Jerry M, Joseph M)

38) While in Unit B1, Jerry M cut out a little bit of drywall to so that he could fit in a replacement piece. He noticed a couple of inches of mildew what looked like a greyish black spider web on the back side of the drywall piece he cut out. Although Jerry M is not certified to assess whether there is mold or mildew, he did not believe it was black mold because he was told by mold testers in the past that black mold is not common in this geographical area. Jerry M noticed that there was moisture on the floor that they tracked in and out of Unit B1 on their shoes. The water tilted towards the front door. (Testimony of Jerry M)

39) Joseph M observed the additional work that needed to be done in Unit B1, but did not have time to perform the work that evening. In his opinion, the carpet pad should have been ripped out, carpet shampooed, and there should have been a blower in the unit. New vinyl should have been installed and the water heater put back in place. Finally, the unit needed to be cleaned to be ready for the tenant to move in. (Testimony of Joseph M)

40) Moses M arrived at Riverview Terrace while Joseph M and Jerry M were finishing up their work in Unit B1. Moses M pulled his car into the parking spot behind Joseph M's vehicle. Moses M changed the locks to Unit B2, then placed a FaceTime video call to Esther M. He told her “look who I found here” and they both saw Joseph M and Jerry M walking in and out of Unit B1. Moses M yelled at Joseph M and told him

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that he was changing the locks to Unit B2 and would not allow Joseph M and Jerry M to enter the unit because they were not certified to do the work. Moses M said he was recording what was taking place to make sure Joseph M and Jerry M would not do anything wrong. In response, Joseph M told Moses M to “go for it” and that he had nothing to hide. Jerry M did not speak to anyone at Riverview Terrace that night, aside from Joseph M. Joseph M and Jerry M did not enter Unit B2 that evening, and had no plans to return to Riverview Terrace. (Testimony of Jerry M, Joseph M, Moses M, Esther M)

41) At around 7:00 or 7:30 p.m., Moses M attempted to place a telephone call to an OSHA hotline. He later learned he had been connected to DEQ instead. He reported that his landlord “attempted to remove mold and asbestos from his apartment” and that he “refused access to his apartment due to his concern that a licensed contractor was not proposed for removal.” Moses M also told DEQ that asbestos had been detected in the flooring and cove base of the removal area, and that unlicensed workers were removing drywall that had mold and asbestos in it. He reported that the “workers were hired by the owner and refuse to quit the work” and were “currently at the location.” (Testimony of Moses M; Ex. A45, p. 2)

42) After leaving Riverview Terrace, Joseph M called Peak and recommended that GMS terminate Moses M for insubordination. He told Peak that Moses M was rude, extremely agitated, belligerent, combative and had prevented access to Unit B2 by changing the locks. He also said that Moses M threatened to sue his brothers and GMS if they went into Unit B2. Peak was concerned about Moses M changing the locks because he was not a tenant, but instead lived in a unit provided to Esther M as part of the compensation for her site manager position. Joseph M explained that he accessed Unit B1 with Jerry M, and that they assessed the situation and took care of it. He said it was not a big deal and that they were returning to Coos Bay. (Testimony of Joseph M, Peak)

Activities of Esther M and Moses M on August 17, 2017⁷

43) On the morning of August 17, 2017, Esther M and Moses M exchanged text messages about finding a lawyer. They were trying to gather information about their rights. Esther M had a “gut feeling” that she was about to be terminated and began looking to see if she could rent a home for the same amount of money that she could rent an apartment. Moses M was scared that he and Esther M would be fired and evicted from Unit B2. No one at GMS was aware that Esther M and Moses M were attempting to contact a lawyer that morning. (Testimony of Moses M, Esther M; Ex. 62A, p. 24)

⁷ Smith did not receive responses from text messages sent to Moses M's cell phone and a voicemail message left for Esther M. Accordingly, there is no evidence that either Smith, Peak or Nored were aware of the activities of Moses M and Esther M on August 17, 2017. Therefore, the events that occurred that day at Riverview Terrace and at GMS's headquarters in Coos Bay will be discussed in separate sections.

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44) Esther M began working at 8:00 a.m. At 8:21 a.m. she called Pearsall, her supervisor, to provide an update of what occurred at Riverview Terrace on the previous evening. The spoke for approximately 16 minutes. She told Pearsall that Joseph M and Jerry M were “doing work that they should not be doing” because they were not certified to remove asbestos. Pearsall told Esther M that she would be meeting with Smith and that she would raise the issues that Esther M mentioned. Pearsall also told her to continue to document and take notes, and that she would call Esther M back after she spoke to Smith. (Testimony of Esther M; Exs. A50, A58)

45) From 8:00 a.m. to noon, Esther M continued to perform her management duties, which included speaking to residents, meeting with rental applicants, sending emails, filing documents and walking around the grounds of the property. She also responded to an email from GMS about Direct TV service and spoke to a person on the telephone about Direct TV at 9:32 a.m. When her shift ended at noon, she left Riverview Terrace. (Testimony of Esther M; Ex. A50, p. 1)

46) In the late morning of August 17, 2017, Moses M spoke to Tom Hack from DEQ. Hack discussed the asbestos rules with Moses M and told him and that if the floor tiles were whole, then the owner of the property (GMS) could remove them. Hack followed up the telephone call with an email to Moses M, which attached DEQ guidance documents and included a Fact Sheet titled “Asbestos Advisory for Building Owners and Operators.” Moses M left his full-time job early that afternoon and arrived at Unit B2 at around 3:00 or 3:30 so that he could test the tile in Unit B2 to see if it was friable and would crack, or if it would stay whole. Esther M agreed that Moses M should attempt to remove the tiles from Unit B2. Moses M believed he had “contained” the closet area with the tile in it. He wore a facemask and rubber gloves. Using a three-inch putty knife, he attempted to remove a floor tile and it cracked, leading him to believe it was friable. Moses M took photographs of the water heater closet and the chipped tile. He admitted that he believed the tile was “hot” for asbestos and that he knowingly chipped the tiles so that he could “prove a point.” (Testimony of Moses M, Esther M; Exs. A13, pp. 59-71, A66)

47) Immediately after Moses M visited Unit B2 and attempted to remove the tiles, Esther M and Moses M began drafting an email to Nored and Smith. The email stated:

“We have found out that law states that work can be done by anyone in-house * *
* if they follow proper procedure, but if the flooring tiles do not remain intact upon removal by said person then abatement must be done by a certified contractor; the ratio given was 1/10, meaning if 1 tile was cracked or disturbed then abatement must be done.

“As seen in the pictures of our unit, right past the threshold into the water heater closet, 2 tiles were attempted to be removed as the procedure states but both cracked.”

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The email was sent at 4:31 p.m. (Testimony Moses M, Esther M; Ex. A16, p. 91)

GMS Meetings on August 17, 2017

48) In the early morning of August 17, 2017, Joseph M came to Smith's office and told her that there had been an incident in the parking lot of Riverview Terrace on the 16th at about 6:00 p.m. He said that he had a confrontation with Moses M, and that Moses M changed the locks to prevent him from entering Unit B2. Joseph M described a yelling match between brothers and said that Moses M was mad that his brothers were at the property. Although Smith recalled hearing that Moses M mentioned concerns about his brothers not being certified, she interpreted the situation as a "fight between brothers" and that the little brother (Moses M) did not want to be told what to do by his big brother. She worried about how this would affect the Mascolo family.

Joseph M also told Smith that Esther M and Moses M had exaggerated the water problem in Unit B1. He told Smith that the walls were "bone dry" and it looked like the water had impeded just a very small area. The carpet had been laid back. They easily removed the cove base and tiles that had been saturated by simply pulling them up, and bagged them up. Their plan was to replace a small section of the pad, shampoo the carpet and put it back. He also said that there was no drywall work to be done. They would lay a new vinyl floor in the closet, put back the water heater and restore hot water. She understood that Joseph M and Jerry M were not on the property long. Smith did not believe that Joseph M and Jerry M did anything wrong when they removed the tiles from Unit B1. (Testimony of Smith)

49) After Jerry M and Joseph M reported that the apartment was dry and not underwater, Smith decided that it was no longer necessary to use Servpro for restoration work. (Testimony of Smith)

50) Smith attempted to reach Esther M by telephone "all morning long." Smith called the Riverview Terrace office phone and left a voicemail. Esther M did not return her message. GMS uses a voice over internet system called "Mixie" that connects all of GMS's offices for audio calls and instant messages. Smith was not aware of any problems with the telephone or the Mixie system at Riverview Terrace. Smith sent an email to Pearsall, Esther M's supervisor, at 9:36 a.m. asking if Esther M had called in to be absent from work.⁸ Jerry M and Joseph M told Smith that Esther M and Moses M shared a cell phone and provided Smith with the number. Smith sent three text messages to that number between 9:09 a.m. and 12:12 p.m., but received no response. Smith concluded that Esther M was not at work. Because of the incident in the parking lot the previous day, Smith was concerned. She understood that Joseph M and Jerry M thought that Esther M and Moses M made the damage in Unit B1 into a "bigger issue" than it really was, and she could not reach Esther M to hear her side of the story. Smith

⁸ Smith testified that Pearsall told her that she had not spoken to Esther M that morning. However, the call logs for Riverview Terrace show that Esther M and Wendy Pearsall spoke at 8:21 a.m. for 16 minutes. Accordingly, the forum disregarded Smith's testimony on this point because it is not supported by other credible evidence.

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concluded that Esther M was absent and in breach of her employment agreement. Smith told Nored that she had been unable to reach Esther M at work that morning. (Testimony of Smith; Ex. R24)

51) Joseph M also spoke to Nored on the morning of August 17, 2017. Joseph M told Nored that there had been a major confrontation at Riverview Terrace and recommended that Moses M be fired. Nored told Joseph M to calm down and said that Moses M “is your brother.” He told Joseph M there was no reason to be upset, and that Joseph M should try to resolve the issues with Esther M. (Testimony of Nored, Joseph M)

52) Peak attended a meeting in the office on the morning of August 17, 2017, with Nored and Smith. Peak told Nored that Moses M changed the locks to Unit B2. Pearsall was not at this meeting. (Testimony of Peak)

53) By midafternoon, it became increasingly clear to Nored that people could not get ahold of Esther M and he concluded that she abandoned her position. He did not ask Esther M’s supervisor, Pearsall, whether Esther M was at work that day. Nored also concluded that nothing had been done in either Unit B1 or B2 by Esther M and Moses M, and the repair issues had gone on way too long. He felt that Moses M locked him out of his own apartment by changing the locks to Unit B2, which prevented other GMS employees from entering the unit to address the damage. Nored believed that Esther M and Moses M exaggerated the damage to the units and that they wanted GMS to follow “much greater procedures” than were necessary. In his experience, materials containing asbestos were usually covered up and not removed. Nored decided to terminate both Esther M and Moses M for “no cause” rather than due to a breach of Esther M’s employment agreement. (Testimony of Nored)

Termination Notification

54) At 4:20 p.m. Nored sent an email to Esther M and Moses M, which read:

“Moses and Esther Mascolo

“This is official notice of your **no-cause termination of employment with Grand Management Services, Inc.**

“Your final date of employment will be August 25, 2017, and we will expect that you will be vacated from our apartment at Riverview Terrace by that date. We need your time sheets immediately, addressed to the attention of Sharon Peak, and no further maintenance should be assigned to Moses Mascolo. Esther Mascolo will be paid through August 25, but we would prefer that you close and lock the office, and do no further work after the date of this notice. Your paycheck will be delivered and waiting by August 25, 2017.

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"Upon leaving the premises, please deliver all keys in your possession to [the tenant] in unit C4.

"Thank you for your service, and we wish you the best for the future."

(Emphasis in original). Esther M and Moses M saw this email after they sent their 4:31 p.m. email, and Esther M's the email account "refreshed." (Testimony of Esther M; Ex. A16, pp. 88, 90)

55) Smith was not aware of the terminations until she received Nored's email at 4:31 p.m. (Testimony of Smith)

56) Esther M asked Nored for an extension of time to stay in Unit B2 longer, until August 31, 2017, because she has a family with children. Nored responded that GMS "cannot permit your extension. I gave you an extra few days from your employment agreement, and Rural Development has notified us that you must follow the time frame that I allowed." (Testimony of Esther M; Ex. A16, pp. 88, 90)

57) Esther M wanted to get her job back and sent an email to Nored and Smith on August 30, 2017, which stated:

"We would like to start off by apologizing deeply for the way the emergency water leak at Riverview Terrace unfolded. I truly believe that there was a miscommunication and misunderstanding along the way. We know that such behavior reflected badly not only on me as site manager, but on you and the company as a whole and we are sincerely sorry for that.

"We know we let you and the company down and understand your disappointment. I take full responsibility for my not responding to your call on Thursday[,] August 17, 2017[,] and understand that my behavior did not meet the standards you and this company expect (or deserve) from [your] employees. I was not aware that I was "Not Available" on Mixie. I had been having trouble with the phone lines and the computer, and had not had the time to set up the other monitor, and threaten to be fired multiple times, so I discussed the situation with [Pearsall]. I can promise that this will never happen again if given the opportunity. I let myself down, but more importantly I let you, and the company down. I regret the whole incident and am deeply embarrassed to have put us in this situation.

"Our concern was for the property itself, to avoid further damage and to properly follow procedures to get the work done properly and professionally, to the well being of [the resident of Unit B1], and that of our family as we were affected by this water leak."

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The email continued and contained a list of “improvements/contributions” that Moses M and Esther M made to Riverview Terrace “over the last two months.” The email concluded:

“[GMS] has invested time in me and I would like to show forth my capabilities, and value to the company.

“We know this lapse in judgment was a bad one, but keep in mind my track record up until now and the extenuating circumstances leading to our Notice of Termination. This job has been a very important part of my life and it would be unfortunate to end in this manner due to a momentary bad decision. If there is anything else that I can do to fix things and regain your trust, please let me know.
* * * Thank you for your time in this matter.”

Esther M admitted that she was being honest in the email and agreed with all of the statements she made. (Testimony of Esther M; Ex. A16, pp. 85-86)

Results of DEQ Investigation

58) Frank Messina of the Air Quality Regional Operations department at DEQ was assigned to investigate the complaint received from Moses M on August 17, 2017. Messina did not go to the property, but conducted telephone interviews of Moses M, Jerry M, Mesford and Nored. He also reviewed photographs and the asbestos testing results provided to him by Mesford. Messina’s investigation resolved or closed on September 11, 2017. He determined that the removal of building materials for the purpose of reaching broken water pipes in Unit B1 was an exempt activity under two subsections of Oregon’s asbestos regulation, OAR 340-248-0250. His primary conclusion was that the project was exempt under OAR 340-248-0250(1)(e) because black mastic glue was a petroleum-based binder and non-friable. Secondly, he determined the project was exempt under OAR 340-248-0250(1)(f) because it involved removing less than three square feet or three linear feet of asbestos-containing material to get to something else to perform repair work. His determination was based only on DEQ regulations. Messina was not aware if there were OSHA regulations that applied. (Testimony of Messina; Exs. R19, R20)

Effect of Termination on Esther M

59) When Esther M received the termination email from Nored, she was shocked and distraught. She felt that she handled everything properly, and that she was terminated and losing her family’s home because she “had an opposition or a concern.” Her family had nowhere to stay and their situation felt unstable. The family of four stayed in one bedroom in the Lowe family’s apartment for six weeks. During those six weeks, 11 people from two families lived in an 1100 square foot apartment. After Esther M and Jerry M found a new apartment to move into, the new apartment had fleas and a water intrusion. (Testimony of Esther M, Moses M)

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60) Esther M did not immediately attempt to find work after her termination because she was busy locating a new apartment, packing and moving into the new apartment, and addressing the mold and flea problems in the new apartment. She also did not have a car for a period of time because it broke down and she could not afford to fix it. Since she did not have a car, she had to limit her search to jobs within walking distance of her new apartment. In May of 2018, she could not find a job that presented the unique situation provided by Riverview Terrace that allowed her to work part time on site with her children nearby. She made inquiries for jobs at Costco and a library but was told they were not hiring. She submitted an online inquiry to Amazon, but there were not any positions available. She also applied to Lowe's and a gymnastics facility. She could not find any jobs where she could work onsite part time and educate her children. Esther M has only one document showing that she attempted to seek work – a screenshot dated January 19, 2019, for a warehouse position with Amazon (Ex. A55). Although she claimed she looked for site manager positions and none were available, Esther M could not provide a name of any property she looked into for a site manager position. Before her GMS position, Esther M last worked in 2009. The GMS position was the only job she had held in the past ten years. (Testimony Esther M; Exs. A43, A55)

61) The following expenses were incurred by Esther M and Moses M when they moved out of Unit B2:

Moving truck rental for move out of Unit B2	\$191.04
Moving truck rental for move out of temporary storage	\$120.70
Fuel for moving truck	\$36.00
Moving supplies	\$74.19
Storage rental	\$278.00

<u>Total moving expenses</u>	<u>\$699.93</u>
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(Testimony of Moses M; Exs. A59, A63)

Effect of Termination on Moses M

62) After Moses M was terminated from his part-time maintenance position at GMS, he was depressed, scared and afraid. He was worried about where the family would live because their lease on the Troutdale apartment was ending in a few days and the rental market was tight. It was difficult to find a place to live that he could afford. He did not know what to do and did not feel that he could approach his family for help because of his disagreement with Joseph M and Jerry M. (Testimony of Moses M)

63) Moses M continued to work in his full-time maintenance position at Guardian Management. He did not look for another position to replace his part-time maintenance position at GMS. He had originally taken the part-time GMS position to "help out," not to earn additional income. (Testimony of Moses M)

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Credibility

64) Multiple witnesses presented by both the Agency and GMS made statements about the requirements for the removal of asbestos. However, none of those witnesses were trained in asbestos removal and they were not certified to perform asbestos abatement work. In contrast, the forum found Messina from DEQ to be knowledgeable about asbestos regulations and what is required to remove asbestos, and found his testimony to be credible. Accordingly, to the extent the testimony of witnesses conflicted with information provided in Messina's testimony, the forum disregarded that testimony.

65) When testifying, Esther M gave long narrative statements that were often not responsive to the questions asked, and she had to be reminded by the ALJ to answer the questions asked. She frequently provided her interpretations and conclusions rather than stating the facts that she observed. On cross examination, she was argumentative when responding to questions from GMS's counsel and often did not provide direct answers to questions. Accordingly, the forum disregarded her testimony when it conflicted with other credible evidence on the record. (Testimony of Esther M)

66) Similarly, Moses M also provided longer narrative answers that were not always responsive to the questions asked. It appeared as if he was attempting to control his testimony, rather than provide honest, responsive answers. Additionally, Moses M became argumentative, rude and aggressive when cross examined. For example, when questioned about whether his testimony conflicted with a previous statement, his face became red and he raised his voice. Instead of answering the questions posed by GMS's counsel, he responded, "What I said was accurate. Can you get that?" This display of his temper is similar to Joseph M's description of Moses M's attitude during the altercation in the parking lot on August 16, 2017. Accordingly, the forum disregarded Moses M's testimony when it conflicted with other credible evidence on the record. In particular, the forum found Joseph M's description of Moses M's behavior in the Riverview Terrace parking lot on August 16, 2017, to be more credible.

67) In Smith's testimony, she discussed "demands" made by Esther M when negotiating her employment contract. Smith said she found the "demands" to be a "red flag" and described Esther M as "difficult." However, the contract negotiations did not appear relevant to the issues in the case, especially given that GMS hired Esther M in spite of the "demands." Smith appeared to be biased against Esther M and attempted to portray her in a negative light, rather than responding in a straightforward fashion. Smith also minimized concerns raised by Esther M and did not believe the mention of "mold" in Esther M's email of August 11, 2017, to be a safety concern because it was not "black mold." Additionally, Smith made at least two inaccurate statements. For example, she testified that on August 17, 2017, she canceled Servpro's services because Unit B1 was "dry." However, when Joseph M and Jerry M visited Unit B1 on the evening of August 16, 2017, they observed that the floor was wet and relayed their observations to Smith. Second, Smith testified that Pearsall told her that she had not

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spoken to Esther M on the morning of August 17, 2017, but that contradicts Esther M's testimony, which was supported by the call records for Riverview Terrace. Accordingly, Smith was either dishonest in her testimony or could not accurately recall events. Therefore, the forum did not find her testimony to be credible, unless supported by other credible evidence. (Testimony of Smith, Esther M, Joseph M, Jerry M; Exs. A50, A58)

68) Peak also attempted to portray Esther M as having performance problems prior to her termination and described instances when Esther M exceeded the \$100 spending limit without approval. However, those issues did not result in discipline against Esther M and were not identified as a reason for the termination by Nored. Additionally, similar to Smith, Peak did not take Esther M's concerns about mold seriously, and testified that she did not think the mention of mold was a safety concern because "people see mildew and think it is mold." Peak appeared to be motivated by an agenda to depict Esther M in a negative light, rather than directly answering questions.

69) The forum found Joseph M and Jerry M to be generally credible witnesses, except with respect to their knowledge of the asbestos removal process. The forum credited their testimony in its entirety, except to the extent it conflicted with the credible testimony of Messina from DEQ.

70) Jesse Wolf had an inherit bias in favor of GMS because GMS regularly used his business to repair water leaks. However, the forum found that he testified credibly, without exaggeration or embellishment. He also admitted when he could not recall information. Accordingly, except for instances in which he had no personal knowledge or could not recall details, the forum credited his testimony in its entirety. (Testimony of Wolf)

71) Witnesses Perez, Lowe, and Mesford were credible, but not all of their testimony was relevant to the matters at issue in this case. The forum credited their testimony on all relevant facts.

72) The forum notes that both Esther M and Smith described interactions and conversations with Pearsall on August 17, 2017, but neither the Agency nor GMS called Pearsall to testify as a witness. Esther M testified that she communicated with Pearsall on the morning of August 17, 2017, and expressed concerns that Jerry M and Joseph M performed work that they were not certified to do. Esther M's testimony is supported by call records for the Riverview Terrace telephone (Exs. A50 and A58) showing that a 16-minute outgoing call was made from Riverview Terrace at 8:21 a.m. to "Wendy GMgmt."

In contrast, witnesses for GMS testified that Pearsall was present at meetings on August 17, 2017, in which people discussed not being able to locate Esther M. During those meetings, Pearsall never mentioned speaking to Esther M that morning. Neither the Agency nor GMS called Pearsall to testify to contradict the testimony of Esther M or Smith as to their interactions with Pearsall that morning, or to explain why Pearsall did not inform anyone that she had spoken to Esther M. Accordingly, the forum credits the

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testimony of both Esther M and Smith on that issue, and concludes that Esther M spoke to Pearsall by telephone on the morning of August 17 for 16 minutes, but Nored was not aware of that telephone call when he made the decision to terminate Esther M and Moses M.

73) The forum found Nored's testimony to be generally credible, but notes that he did not have firsthand knowledge of the actions of Esther M and Moses M on August 16 and 17, 2017. Additionally, to the extent Nored testified or inferred that he did not terminate Esther M or Moses M because they raised safety concerns, that was contradicted by his other testimony, including his statement that he believed they followed "much greater procedures" than necessary.

CONCLUSIONS OF LAW

1) At all times material herein, GMS was a corporation subject to the provisions of ORS 654.062 and was an employer as defined in ORS 659A.001(4). Esther M and Moses M were employees as defined in ORS 654.005(4).

2) GMS violated ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e) when it terminated Esther M because she opposed and made complaints related to the OSEA, and exercised her right to a safe workplace.

3) GMS violated ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e) when it terminated Moses M because he opposed and made complaints related to the OSEA, and exercised his right to a safe workplace.

4) Esther M, acting in good faith and while employed by GMS, reported information that she believed was a violation of OSEA and was evidence of a violation of a statute or rule to Pearsall.

5) GMS terminated Esther M in violation of ORS 659A.199 and OAR 839-010-0100(1).

6) Moses M, acting in good faith and while employed by GMS, reported information that he believed was a violation of OSEA and evidence of a violation of a statute or rule to the Oregon DEQ.

7) GMS terminated Moses M in violation of ORS 659A.199 and OAR 839-010-0100(1).

8) The Agency established that GMS violated ORS 659A.030(1)(f) when it terminated Esther M and Moses M.

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.

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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 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 GMS in the Order below are an appropriate exercise of that authority.

OPINION

The Second Amended Formal Charges in each case alleged the following:

- GMS terminated⁹ Esther M and Moses M because they reasonably believed they opposed a practice that was prohibited by the Oregon Safe Employment Act (“OSEA”), made a complaint under or related to the OSEA and/or exercised a right afforded by the OSEA on behalf of themselves or others in violation of ORS 654.062(a), (b), (c) and OAR 839-004-0016(1)(e), (a), (c).
- GMS unlawfully discharged or otherwise discriminated against Esther M and Moses M because they opposed an unlawful practice that they reasonably believed to be an unlawful practice, in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A), (B), (C).
- GMS unlawfully discharged Esther M and Moses M because they, in good faith, reported information that they believed was evidence of a violation of state or a federal law, rule, or regulation in violation of ORS 659A.199(1) and OAR 839-010-0100(1).

RETALIATION FOR ENGAGING IN A PRACTICE PROVIDED FOR BY OSEA

The Agency asserts that GMS terminated Esther M and Moses M because they complained about or opposed unsafe practices involving asbestos which are prohibited by the Oregon Safe Employment Act (“OSEA”). The OSEA provides:

“Every employer shall furnish employment and a place of employment which are safe and healthful for employees therein, and shall furnish and use such devices and safeguards, and shall adopt and use such practices, means, methods, operations and processes as are reasonably necessary to render such employment and place of employment safe and healthful, and shall do every other thing reasonably necessary to protect the life, safety and health of such employees.”

ORS 654.010. The OSEA requires that employers comply with all applicable rules “in any way relating to or affecting safety and health in employments or places of

⁹ Each of the three types of alleged violations also included assertions that there were other acts of discrimination or retaliation. However, the terminations of Esther M and Moses M were the only adverse employment actions in evidence. Accordingly, the forum will only examine whether GMS acted unlawfully in terminating their employment and not whether it engaged in some other type of adverse employment action against them.

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employment.” ORS 654.022. Oregon’s Occupational Safety and Health Division (“OSHA”) has adopted the federal workplace safety regulations pertaining to asbestos. See OAR 437-002-0360(2) (adopting by reference 29 CFR 1910.1001).

Under the OSEA, it is an unlawful employment practice for any person to bar or discharge from employment or otherwise discriminate against any employee or prospective employee because the employee or prospective employee has:

- (a) Opposed any practice forbidden by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780;
- (b) Made any complaint or instituted or caused to be instituted any proceeding under or related to ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780; or
- (c) Exercised on behalf of the employee, prospective employee or others any right afforded by ORS 654.001 to 654.295, 654.412 to 654.423 and 654.750 to 654.780.

ORS 654.062(5).

OAR 839-004-0016 states, in pertinent part:

“(1) ORS 654.062(5) prohibits discrimination against an employee or prospective employee (‘individual’) because the individual:

- (a) Made any complaint or instituted or caused to be instituted any proceeding under or related to the Oregon Safe Employment Act (OSEA); [or]

* * *

- (c) Exercised on behalf of the individual or others any right afforded by OSEA; [or]

- (e) Opposed any practice prohibited by OSEA or which the individual in good faith believed was prohibited by OSEA[.]”

To prevail in a claim under ORS 654.062, the Agency must prove by a preponderance of credible evidence that: (1) Esther M and Moses M were employees of GMS who opposed,¹⁰ complained about or caused a complaint to be instituted about conduct

¹⁰ Any references to “opposed” or “opposition” in this Final Order apply only to the analysis of alleged violations of ORS 654.062(5)(a). Alleged violations of ORS 654.062(5)(b) and OAR 839-004-0016(1)(a) involve “complaints,” “to complain about” and “to cause a complaint,” rather than “opposition” or “to oppose.”

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forbidden under or related to¹¹ the OSEA; (2) GMS subjected Esther M and Moses M to an adverse employment action; and (3) there is a causal connection between GMS's adverse employment action and Esther M's and Moses M's opposition to practices forbidden under or related to OSEA. *In the Matter of Oregon Truck Painting, LLC*, 37 BOLI 87, 109-10 (2018).

Element 1: Opposed, Complained About or Caused a Complaint Related to OSEA

To establish Element 1, the Agency must establish that Esther M and Moses M were employees who opposed, complained about or caused a complaint to be instituted about conduct forbidden under or related to the OSEA. It is undisputed that Esther M and Moses M were employees of GMS. To prove a violation, the Agency need not establish that Esther M or Moses M opposed conditions that actually violated a statute or rule; rather, the Agency need only prove that they were discriminated against for expressing safety concerns "under or related to" the OSEA. *In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI 57, 75 (2018), quoting ORS 654.062(5)(a). The purposes of the OSEA "could too easily be frustrated and chilled if employees reported unsafe conditions or avoided life and limb threatening hazards in the workplace only at risk of being right, of being procedurally correct and of 'deserving' recognition of their concerns." *In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI at 84 (quoting *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 82 (1992)).

The forum finds that Esther M opposed and/or complained about conduct under or related to the OSEA as follows:¹²

- Esther M emailed Smith with an update on August 15, 2017, after the asbestos testing results were received by GMS. The email mentioned "awaiting on the abatement side" and that Units B1 and B2 were "not an environment that anyone should be dealing with." (Finding of Fact - The Merits, #29)
- In an email to Smith on August 16, 2017, Esther M stated that fans could not be in place because of the need "to have the harmful contaminants contained by the abatement company." (Finding of Fact - The Merits, #29)
- In a telephone call with Smith and Peak on August 16, 2017, Esther M told them that Moses M could not perform asbestos abatement work because he was not certified to do so. (Finding of Fact - The Merits, #30)
- Esther M spoke to Joseph M by telephone on August 16, 2017, and told him that Joseph M and Jerry M should not be performing any work in Unit B1 because they did not have an asbestos abatement certification. (Finding of

¹¹ The references to "under or related to" apply to alleged violations of ORS 654.062(5)(b) rather than ORS 654.062(5)(a).

¹² Esther M also raised concerns about the possibility of mold in the units. However, she neglected to follow up with Servpro when they did not conduct a test for mold, suggesting that it was not a serious concern for her. Additionally, Smith and others at GMS also expressed concerns about mold and agreed that the units should be tested for mold. There is also no evidence that Nored considered the issue of mold when terminating Esther M and Moses M.

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Fact - The Merits, #35)

- On the morning of August 17, 2017, Esther M told Pearsall that Joseph M and Jerry M were “doing work [in Unit B1] that they should not be doing.” (Finding of Fact - The Merits, #44)¹³

The forum concludes that these actions were complaints under ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e).

As well, Moses M opposed or complained about conduct under or related to the OSEA as follows:

- In a telephone call with Joseph M on August 16, 2017, Moses M told Joseph M not to come to Riverview Terrace, and that Moses M would not let anyone into Unit B2 who was not certified to remove asbestos. (Finding of Fact - The Merits, #35)
- On the evening of August 16, 2017, Moses M spoke to Joseph M in the Riverview Terrace parking lot and told him that he was changing the locks to Unit B2, and that they would not allow Joseph M and Jerry M to enter the unit because they were not certified to perform asbestos abatement. He also told Joseph M that he would sue his brothers and GMS if they entered Unit B2. (Finding of Fact - The Merits, ##35, 45)
- Moses M called an OSHA hotline on the evening of August 16, 2017, and was connected to the DEQ. He reported that his landlord “attempted to remove mold and asbestos from his apartment” and that he refused access to his apartment due to his concern that a licensed contractor was not proposed for removal.” (Finding of Fact - The Merits, #41)

The forum concludes that these actions were complaints under ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e).

Element 2: Adverse Employment Action

Because Esther M and Moses M were terminated, the Agency established that GMS subjected them to an adverse employment action.

Element 3: Causation

To show causation, the Agency must prove that a respondent's unlawful motive was a “substantial factor” in the termination decision, or, in other words, that the complainants “would have been treated differently in the absence of the unlawful motive.” *In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, 217 (2020) (citing

¹³ Esther M also mentioned the potential need for abatement in an email sent at 4:31 p.m. on August 17, 2017, but there is no dispute that the email was sent after Nored terminated her employment. Accordingly, the decision to discharge her employment could not have been based on anything stated in that email.

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Harper v. Mt. Hood Cmty. Coll., 283 Or App 207, 214, 388 P3d 1170 (2016)). “When an employer has some good cause to discharge an employee, the discrimination or discharge may still be retaliatory if the employer’s knowledge of the employee’s opposition to safety hazards played a key role in the employer’s decision.” *In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI at 78. “ORS 654.062(5) requires both knowledge and action upon that knowledge to constitute retaliation; oftentimes the analysis involved requires reasonable inferences from the specific facts of a case.” *Id.* “[T]here is a rebuttable presumption that a violation of ORS [654.062(5)] has occurred if a person bars or discharges an employee * * * or otherwise discriminates against an employee * * * within 60 days after the employee” has engaged in any activities protected by ORS 654.062(5)(a)-(d). ORS 654.062(7)(a). Given that the terminations in this case followed the protected activity by only a few days, there is a rebuttable presumption that GMS violated ORS 654.062(5)(a), (b) and (c). Accordingly, the forum will examine whether GMS rebutted that presumption by a “preponderance of the evidence.” ORS 654.062(7)(a).

Nored testified that he terminated Moses M due to “insubordination” for refusing to obey instructions when he changed the locks to Unit B2, and that he terminated Esther M when she failed to report to work the day after Moses M’s confrontation with Joseph M in the Riverview Terrace parking lot.

However, the evidence also established that Nored found that Esther M and Moses M were not moving forward with repairs quickly enough due to their insistence that a certified abatement team remove the asbestos. Nored believed that Esther M and Moses M exaggerated the damage to Units B1 and B2 and that they wanted GMS to follow “much greater procedures” than were necessary. He also felt the repairs to the units were taking too long and thought it was wrong for Moses M to change the locks to Unit B2 and prevent Joseph M and Jerry M from entering.

Nored’s decision was also based on information he received from others who disagreed with the complaints and opposition made by Esther M and Moses M. Before Nored made the decision to terminate, Joseph M told Nored about his confrontation with Moses M in the parking lot and recommended that Nored terminate Moses M. Additionally, Smith reported to Nored that Esther M was not at work on August 1, 2017. However, Esther M’s testimony and the Riverview Terrace telephone logs established that she did work that day. It is clear that Smith was attempting to speak to Esther M about Moses M’s actions in the parking lot the previous day, in which he opposed what he believed to be unlawful activities by Joseph M and Jerry M. Smith found Esther M to be “litigious” and Joseph M reported that Moses M threatened to sue GMS and his brothers, if they entered Unit B2.

Taking all of this information together, the forum concludes that Smith, Joseph M, Jerry M and Nored were dismissive when Esther M and Moses M said that they did not want repairs to be done by people who were not certified to do so. Because the asbestos safety concerns raised by Esther M and Moses M played a part in Nored’s decision to terminate them, the forum concludes that Nored’s “knowledge of” Esther M’s

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and Moses M's complaints, opposition to safety hazards and exercise of the right to a safe workplace "played a key role in [Nored's] decision" to terminate their employment. Therefore, GMS did not rebut the presumption that a violation occurred, and the forum concludes that GMS unlawfully terminated Esther M and Moses M due to their complaints, opposition to unsafe practices and exercise of the right to a safe workplace, in violation of ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e).

DISCHARGE BECAUSE OF WHISTLEBLOWING

The Agency alleges that GMS violated ORS 659A.199(1) & OAR 839-010-0100(1) by terminating Esther M and Moses M because they made good faith reports of information they believed to be evidence of violations of the OSEA. In support of its allegation regarding violations of state or federal law, the Agency cites to the same asbestos safety regulations that were referenced in relation to its OSEA claim above.

"It is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation." ORS 659A.199(1). OAR 839-010-0100(1) interprets ORS 659A.199 as:

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

The Agency's prima facie case consists of the following elements: (1) GMS was an employer as defined by statute; (2) GMS employed Esther M and Moses M; (3) Esther M and Moses M, in good faith, reported information to someone that they believed was evidence of a violation of a state rule; (4) GMS discharged Esther M and Moses M; and (5) GMS discharged Esther M and Moses M because of their reports. *In the Matter of Oregon Truck Painting, LLC*, 37 BOLI 87, 113 (2018).

There is no dispute as to Elements 1, 2 and 4 of the prima facie case.

With respect to Element 3, the "good faith" requirement of ORS 659A.199 is met when the whistleblower has a reasonable belief that the information reported has occurred and that the information, if proven, constitutes evidence of a violation of a state or federal law, rule or regulation. *In the Matter of Vision International Petroleum LLC.*, 37 BOLI 187, 199 (2019). Under ORS 659A.199, an employee "report[s]" information when the employee communicates information to "anyone" that the employee believes is evidence of a violation of state law. *In the Matter of Vision International Petroleum LLC.*, 37 BOLI at 199.

As described in detail above in the section analyzing the alleged violations of ORS 654.062, Esther M and Moses M raised several concerns that asbestos abatement should be done only by people who were certified to do so. Those concerns were

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raised *before* any work was done in Units B1 or B2. Additionally, the forum concludes that *after* Joseph M and Jerry M entered Unit B1 and removed tiles with asbestos containing material, Esther M and Moses M reasonably believed there was a violation of state asbestos rules.¹⁴ Moses M made a report to DEQ on the evening of August 16, 2017, that unlicensed GMS workers were removing material that contained mold and asbestos. (Finding of Fact – The Merits # 41) Esther M reported to Pearsall on the morning of August 17, 2017, that Joseph M and Jerry M were “doing work they should not be doing” without a certification. (Finding of Fact – The Merits # 44) Accordingly, the Agency established Element 4.

In regard to Element 5 (causation), there is no evidence that Nored was aware that Moses M contacted DEQ on August 16, 2017, or that Esther M raised concerns with Pearsall on August 17, 2017, and thus, he could not have terminated them due to those complaints. However, as stated earlier, he was aware of their complaints about the removal of asbestos by people not certified to do so, and he and others were annoyed and dismissive of those complaints. Accordingly, the Agency established that Nored terminated Esther M and Moses M because of their complaints of a violation of state law.

DISCHARGE BECAUSE OF OPPOSITION TO UNLAWFUL EMPLOYMENT PRACTICE

The Agency also alleges that GMS violated ORS 659A.030(1)(f) when it terminated Esther M and Moses M because they opposed what they reasonably believed to be an unlawful practice. The analysis used in determining that GMS violated ORS 659A.199 applies equally to the Agency’s ORS 659A.030(1)(f) claim. See *In the Matter of Vision International Petroleum LLC.*, 37 BOLI at 199.¹⁵ Accordingly, the forum’s conclusion that GMS violated ORS 659A.199 necessarily leads to the conclusion that GMS also violated ORS 659A.030(1)(f). *Id.*

DAMAGES

Lost Wages

Esther M and Moses M are eligible for a back pay award because they were discharged in violation of ORS 654.062(5). *In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI at 79. The purpose of a back pay award is to compensate a complainant for the lost wages she or he would have received but for the unlawful employment practice. *Id.* Back pay awards are calculated to make a complainant

¹⁴ DEQ later concluded that the removal of the tiles from Unit B1 complied with asbestos regulations because the asbestos containing material was not friable and due to the small size of the affected area. See Finding of Fact – The Merits # 58. However, at the time Esther M and Moses M complained, they had a reasonable belief that the removal of the tiles was in violation of state law.

¹⁵ In addition, as described in detail above in the section analyzing the alleged violations of ORS 654.062, the forum concludes that Esther M and Moses M opposes practices that they reasonably believed to be unlawful.

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whole for injuries suffered as a result of the unlawful termination. *Id.*

Esther M

During her employment, GMS paid Esther M a gross monthly salary of \$975 per month and provided Esther M on site residency in Unit B2 (valued at \$893 per month). (Finding of Fact - The Merits # 3) Accordingly, her total monthly compensation was \$1,868 per month.

GMS argued that Esther M should not receive back pay because she did not make a sufficient effort to locate alternative employment. A complainant who seeks back pay is required to mitigate damages by using reasonable diligence to find other suitable employment. *In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI at 79. Esther M did not immediately attempt to find work after her termination and began a job search in May of 2018, approximately nine months after her termination. She asserted that the moving process and her car breaking down caused her to delay looking for employment. Esther M did not have any documentation of her job search, except for a computer screenshot dated January 19, 2019, showing an application for a position with Amazon. (See Finding of Fact – The Merits, #60) Additionally, although she testified that she wanted to find a job with the same situation as that offered to her at Riverview Terrace, Esther M could not name any rental properties where she attempted to seek work. Moreover, Esther M did not attempt to seek work for nine months after her termination and, prior to working at Riverview Terrace, she had not worked since 2009. (See Finding of Fact – The Merits, #60) Accordingly, the forum finds that the Agency did not sustain its burden to establish that Esther M mitigated her damages by looking for alternative employment, and is unable to award lost wages to her. See, e.g., *In the Matter of Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 98-99 (2015).

Moses M

Moses M testified that he did not take the on-call maintenance position with GMS to earn supplemental income, but rather to “help out.” Following his termination, Moses M continued to remain employed in his full-time position for Guardian Management. He did not seek another supplemental part-time maintenance position to replace the hours he worked for GMS. (See Finding of Fact – The Merits, #63) Accordingly, the forum also concludes that Moses M is not entitled to lost wages as a result of his termination.

Out-of-Pocket Expenses

This forum has consistently held that out-of-pocket expenses that are directly attributable to an unlawful practice are recoverable from a respondent as a means to eliminate the effects of any unlawful practice found. *In the Matter of Oregon Truck Painting, LLC*, 37 BOLI at 114. On behalf of Esther M and Moses M, the Agency seeks housing and moving expenses of at least \$13,320. Because Esther M received the use of Unit B2 as part of her employment and had to move after her termination, the forum finds that expenses attributable to moving out of Unit B2 and into a new apartment are

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recoverable as out-of-pocket expenses for Esther M. Those expenses totaled \$699.93. (See Finding of Fact – The Merits, #61) However, Moses M did not receive housing as compensation for his services. Accordingly, moving expenses are not directly attributable to the loss of his work for GMS, and he is not awarded out-of-pocket expenses.

Emotional Distress Damages

The Agency seeks damages on behalf of both Esther M and Moses M in the amount of “at least” \$75,000 for emotional, mental and physical 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 Oregon Truck Painting, LLC*, 37 BOLI at 114-15. 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.* The record included evidence that the discriminatory conduct of GMS negatively impacted Esther M and Moses M.

Esther M

Esther M was shocked and distraught after her termination. She felt that she handled everything properly, and that she was terminated and lost her family’s home because she “had an opposition or a concern.” Her family’s living situation felt unstable. For six weeks, Esther M’s family of four stayed together in one bedroom in an 1100-square-foot apartment with another family. Eleven total people lived in the apartment during that time. After Esther M and Moses M found a new apartment for their family, the new apartment had fleas and a water intrusion. (See Finding of Fact – The Merits, #59) Based on the record in this case, the forum concludes that \$60,000 is an appropriate award of emotional distress damages for Esther M. *See, e.g. In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI at 80 (awarding \$60,000 in emotional distress damages to a complainant who was terminated after voicing safety concerns and, among other things, worried about his ability to provide housing for his family).

Moses M

Moses M was depressed, scared and afraid following his termination. (Finding of Fact – The Merits, #62) He also testified about his apprehension due to the uncertainty of the family’s living situation. However, that apprehension was caused by Esther M’s termination and the loss of the use of Unit B2 as part of her compensation, not by the loss of Moses M’s on-call maintenance position. Accordingly, the forum finds

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that an award of \$15,000 in emotional distress damages is more appropriate for Moses M. See, e.g., *Insight Global, Inc.* 37 BOLI 229, 242 (2020) (awarding \$15,000 to a complainant who felt stressed, horrible and dejected after an employer unlawfully discriminated against him).

OTHER REQUESTED RELIEF

In the Second Amended Formal Charges for each case, the Agency asked that GMS and its managers, supervisors and human resources professionals be trained, at the expense of GMS, “on the OSEA and whistleblower protections under Oregon law” by “the Bureau of Labor and Industries Technical Assistance Unit, or another 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 also gives the Commissioner the authority to require GMS to undergo training on the Oregon laws pertaining to the OSEA, either by the Bureau of Labor and Industries Technical Assistance for Employers Unit or another trainer agreeable to the Agency. The forum finds that this requirement is appropriate in this case.

Exceptions to the Proposed Order

The Agency and GMS filed exceptions to the Proposed Order on January 29, 2021.

Agency Exceptions

The Agency filed 32 Exceptions, which are discussed below.

Exceptions 1, 3-4, 6-7, 10, 12, 29, 31, 32

With these exceptions, the Agency requests that the forum make corrections to scrivener’s errors and add citations. These exceptions are well taken, and the Exceptions are GRANTED as reflected above.

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Exception 2

Exception 2 requests that the forum change a reference from Ex. 62A to Ex. 62. However, Ex. 62A (a replacement for Ex. 62) was admitted into evidence, not Ex. 62. Accordingly, this Exception is OVERRULED.

Exception 5

In Exception 5 the Agency asks the forum to add a finding that DEQ Investigator Messina did not go on to the property and examine the site. Exception 5 is GRANTED as reflected in additions to Finding of Fact 58.

Exceptions 8-9 and 11

In Exceptions 8-9 and 11, the Agency asks that the Conclusions of Law specify that Esther M and Moses M “in good faith believed” that they reported practices prohibited by OSEA. This request is GRANTED and Conclusions of Law 4 and 6 are modified to include that specification.

Exceptions 13, 14

Agency Exceptions 13 and 14 take exception with the ALJ’s conclusions in the Proposed Order that GMS did not terminate Esther M and Moses M because of their good faith reports “and did not violate ORS 659A.199 and OAR 839-010-0100(1).” The Agency argued that the forum should also consider reports that occurred prior to an actual violation of the law, instead of only considering reports after a violation occurred. After reviewing the authorities cited by the Agency, the forum agrees with the Agency and Exceptions 13 and 14 are GRANTED as reflected in the Conclusions of Law, Opinion and Order.

More specifically, the statutes in ORS chapter 659A were enacted for a “remedial purpose.” See *Portland State Univ. Chapter of Am. Ass’n of Univ. Professors v. Portland State Univ.*, 352 Or 697, 713, 291 P3d 658 (2012). “[R]emedial statutes are to be construed liberally to effectuate the purposes for which they were enacted.” *Halperin v. Pitts*, 352 Or 482, 495, 287 P3d 1069 (2012). ORS 659A.199 “turns on whether the employee has reported in good faith based on what the employee believes is evidence of unlawful activity.” *Hall v. State*, 274 Or App 445, 451, 366 P3d 345 (2015). ORS 659A.199, ORS 659A.230 and ORS 659A.233 are all construed using a “subjective, good faith” standard. *Id.* at 452-54. ORS 659A.233 has been interpreted to protect an employee who “has in good faith reported possible violations.” *Id.* at 452 (quoting *McQuary v. Bel Air Convalescent Home, Inc.*, 69 Or App 107, 684 P2d 21, rev. den., 298 Or 37, 688 P.2d 845 (1984)). Additionally, the Ninth Circuit Court of Appeals noted that the legislative history of ORS 659A.199 reflects an intention that the statute protect employees who would like to do the right thing, and bring a bad practice to the attention

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of those who can rectify a situation. *Brunozzi v. Cable Commc'ns, Inc.*, 851 F3d 990, 1000 (9th Cir 2017)¹⁶ (discussing the legislative history of ORS 659A.199). Accordingly, the forum concludes that ORS 659A.199 also protects employees who report potential violations of the law and this Exception is GRANTED.

Exceptions 15-18

These Exceptions request reversal of the decision regarding alleged violations of ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A). These Exceptions are GRANTED, and the forum's conclusion on that issue is reversed as reflected in the Conclusions of Law, Opinion and Order.

Exceptions 19 and 20

Exceptions 19 and 20 concern clarifying the differences between ORS 654.062(5)(a) and (b). These Exceptions are GRANTED as reflected in the Opinion section.

Exception 21

In this Exception, the Agency requests clarification as to whether ORS 654.062(5)(c) and OAR 839-004-0016(1)(c) were also violated. This Exception is GRANTED as indicated in the Conclusions of Law, Opinion and Order.

Exception 22

With Exception 22, the Agency seeks clarification as to whether Esther M's actions also constituted "opposition" under ORS 654.062(5)(b) and OAR 839-004-0016(1)(a). The Exception is GRANTED as reflected in the Opinion section above.

Exceptions 23-27

In these Exceptions, the Agency requests that the forum specify that actions listed as opposition or complaints in the section regarding ORS 654.062 also apply to the analysis of alleged violations of ORS 659A.199 and ORS 659A.030(1)(f) and their associated administrative rules. The Exceptions are GRANTED as reflected in the Opinion section above.

Exception 28

In this Exception, the Agency seeks to change the spelling of a word. Because the word is taken from a direct quote from a past BOLI Final Order, the Exception is OVERRULED.

¹⁶ Although federal decisions are not binding on the forum, they can be instructive in construing state law. See *Bravo Event Services, Inc. and Dan Kor*, 36 BOLI 250, 265 (2018).

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Exception 30

This Exception requests that the forum include language stating that there is an inference of causation when a protected activity was close in time to a retaliatory action. Due to a recent amendment to ORS 654.062, the Opinion has been revised to reflect that there is a rebuttable presumption, and this Exception is GRANTED.

GMS Exceptions

GMS filed three Exceptions to the Proposed Order.

Exceptions 1 and 2

These Exceptions disagree with the forum's conclusions regarding the violations of ORS 654.062(5)(b). These Exceptions are OVERRULED for the reasons stated in the Opinion section above, which addresses the violations and the facts supporting them in detail.

Exception 3

This Exception objects to the damages and relief set forth in the Proposed Order. The facts supporting the awards are discussed extensively and the awards are based on statutes, regulations and longstanding BOLI precedent and appellate case law. Accordingly, this Exception is also OVERRULED.

ORDER

Case No. 46-18 (Esther M)

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 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e), ORS 659A.199 and ORS 659A.030(1)(f) by Respondent **Grand Management Services, Inc.**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Grand Management Services, Inc.** 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 **Esther Mascolo** in the amount of:

1) SIXTY THOUSAND DOLLARS (\$60,000), representing compensatory damages for emotional and physical suffering experienced by Esther Mascolo as a result of Respondent's unlawful employment practices found herein; plus,

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2) SIX HUNDRED DOLLARS NINETY-NINE DOLLARS AND NINETY-THREE CENTS (\$699.93), representing out-of-pocket expenses incurred as a result of Respondent's unlawful employment practices; plus

3) Interest at the legal rate on the sum of SIXTY THOUSAND SIX HUNDRED DOLLARS NINETY-NINE DOLLARS AND NINETY-THREE CENTS (\$60,699.93), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of Respondent's unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Grand Management Services, Inc.** to train its managers, supervisors, and human resources personnel on the correct interpretation and application of the Oregon laws pertaining to the OSEA, specifically ORS 654.062, either through a training offered by the Bureau of Labor and Industries Technical Assistance for Employers Unit or another trainer agreeable to the Agency.

Case No. 47-18 (Moses M)

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 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e), ORS 659A.199 and ORS 659A.030(1)(f)) by Respondent **Grand Management Services, Inc.**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Grand Management Services, Inc.** 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 **Moses Mascolo** in the amount of:

1) FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for emotional and physical suffering experienced by Moses Mascolo as a result of Respondent's unlawful employment practices found herein; plus,

2) Interest at the legal rate on FIFTEEN THOUSAND DOLLARS (\$15,000), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of Respondent's unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Grand Management Services, Inc.** to train its managers, supervisors, and human resources personnel on the correct interpretation and application of the Oregon laws pertaining to the OSEA, specifically ORS 654.062, either through a training offered by the Bureau of Labor and Industries Technical Assistance for Employers Unit or another trainer agreeable to the Agency.

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**In the Matter of
4R's Associates LLC dba
Arsenault Structural Moving Systems
and Christopher D. Arsenault aka Chris Arsenault,
Respondents, Case No. 75-19**

**Final Order of Commissioner Val Hoyle
Issued March 24, 2022**

SYNOPSIS

The Agency established that 4R's Associates LLC dba Arsenault Structural Moving Systems ("4R's") acting through Christopher Arsenault aka Chris Arsenault, its President and Registered Agent, engaged in unlawful employment actions by discriminating against and/or discharging Matthew Long after he requested payment of wages owed to him and advised that he believed the failure to pay him was a violation of state law. The forum awarded Long \$34,920 in lost wages and \$10,000 in emotional, mental, and physical suffering damages. The forum also required Arsenault and 4R's managers and supervisors to undergo approved training on unlawful harassment and discrimination in the workplace.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 6, 2020, via video conference.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adam Jeffries, an employee of the Agency.

The Agency called Matthew Long, Senior Investigator Omar Gandarilla, Civil Rights Division, and Richard Ray Kilbury, as witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X8 and (b) Agency exhibits A1 through A16.

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

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FINDINGS OF FACT – PROCEDURAL

1) On July 9, 2018, Long filed a complaint with the Agency's Civil Rights Division alleging unlawful employment practices in that Respondent retaliated against and discharged his employment after Long inquired about Respondent's failure to timely pay him wages earned. (Ex. X1)

2) On November 15, 2018, Long filed an Amended Complaint naming Christopher Arsenault as an aider and abettor pursuant to ORS 659A.030(1)(g). (Ex. A9)

3) On April 1, 2019, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence of the following unlawful employment actions:

- Termination of Long's employment because he made a wage claim inquiry in violation of ORS 652.355
- Termination of Long's employment in retaliation for making a wage inquiry in violation of ORS 653.060
- Discrimination against Long for applying for workers' compensation benefits in violation of ORS 659A.040.

(Ex. A14)

4) On April 16, 2020, the forum issued a Notice of Hearing to Respondent, the Agency, and Long stating the time and place of the hearing as October 6, 2020, beginning at 9:30 a.m., at the Workers Compensation Board, 20310 Empire Avenue A101, Bend, OR 97703. 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. X2a – X2i)

5) The Formal Charges alleged that Respondent 4R's engaged in an unlawful employment practice under ORS 652.355(1)(a), (2) and OAR 839-010-0100(4)(a) pertaining to discrimination because of wage claim; ORS 659A.199(1) and OAR 839-010-0100(1) pertaining to discrimination or retaliation for employee whistleblowing; ORS 659A.030(1)(f) and OAR 839-005-0125(1)-(3) pertaining to discrimination based on opposition to an unlawful practice; and ORS 659A.030(1)(g) pertaining to aiders and abettors. The Formal Charges sought damages for physical, mental, and emotional distress in the amount of "at least \$10,000.00" and "[l]ost wages in an amount estimated to be at least \$3,328.00." The Formal Charges also asked that Respondent be trained, at their expense, "on workplace retaliation and whistleblowing". 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 Long and others similarly situated. (Ex. X2b)

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6) On September 10, 2020, the Agency moved for an Order of Default against Respondent 4R's, based on the failure of Respondent to file an answer to the Formal Charges. In its motion, the Agency represented that Arsenault, as 4R's representative under OAR 839-050-0030(1)(a), was personally served with the Notice of Hearing and Formal Charges on August 19, 2020. No response was filed to the Agency's motion. (Ex. X6)

7) On September 16, 2020, the forum issued an Interim Order Requiring Case Summaries to be Filed no later than September 22, 2020. (Ex. X7)

8) On September 21, 2020, the forum issued an interim order, which stated, in pertinent part:

"Ruling on the Agency's Motion

"On September 10, 2020, the Agency filed a Motion for Default. The motion requests that the forum find that Respondents 4R's Associates LLC dba Arsenault Structural Moving Systems ('4R') and Christopher D. Arsenault aka Chris Arsenault ('Arsenault') were served and are in default. No responses to the motion were filed.

"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 20

"(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].'

"RESPONDENT ARSENAULT

"The Agency argues that Arsenault is in default because he was personally served with the Notice of Hearing and Formal Charges on August 19, 2020, and has failed to file an answer. In support of its motion, the Agency submitted the Deschutes County Sheriff's Office return of service showing that the Notice of Hearing and Formal Charges were personally served on Arsenault.

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(Agency Ex. 1) Accordingly, the forum finds Arsenault to be in default for not filing an answer within 20 days of service and the Agency's motion is GRANTED.

“RESPONDENT 4R's

“The Agency asserts that 4R's is in default because Arsenault was identified as the registered agent of 4R's on the website of Oregon's Secretary of State and the Agency personally served Arsenault. The registered agent of a limited liability company such as 4R's 'shall be an agent of the limited liability company upon whom any process, notice or demand required or permitted by law to be served upon the limited liability company may be served.' ORS 63.121(1). Accordingly, personal service upon Arsenault on August 19, 2020, constituted service upon 4R's 'representative' under OAR 839-050-0030(1)(a). (Agency Exs. 1, 2) Because 4R's has not yet filed an answer, it is in default and the Agency's motion as to 4R's is GRANTED.

“Notice of Default

“Relief from default may be granted if 4R's and Arsenault show good cause, within ten days after the date of this order, for failing to timely file an answer. A request for relief must be in writing and accompanied by a written statement, together with appropriate documentation, setting forth the facts supporting the claim of good cause. OAR 839-050-0340. Any document filed by 4R's should be submitted by an attorney or should be filed together with a statement indicating that the person filing the document is an authorized representative of the party. See OAR 839-050-0110(1), (2).”

(Ex. X8)

9) On September 22, 2020, the Agency filed its case summary. (Ex. X8)

10) At the start of hearing, pursuant to ORS 183.417(5), 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)

11) On December 14, 2021, the forum issued an interim order transferring the case to ALJ Caroline Holien.

12) On February 10, 2022, 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 its exceptions on February 22, 2022.

FINDINGS OF FACT – THE MERITS

1) Respondent 4R's is an inactive Oregon limited liability company. Its business is primarily focused on moving residential structures. Christopher Arsenault,

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aka Chris Arsenault, is 4R's registered agent. (Ex. X6, Testimony of Long)¹

2) On or about June 1, 2013, Long began working as a laborer for 4R's, with an hourly wage of \$16.00. Long's hourly wage during the summer of 2017 was \$20.00. (Testimony of Long)

3) Long reported directly to Arsenault. Long often had issues receiving his wages in a timely fashion during the final several months of his employment. Long frequently reminded Arsenault that he owed him wages and that failing to pay him the wages owed to him violated state laws. Arsenault typically responded angrily when Long inquired about the wages owed to him, which intimidated Long and caused him to be reticent to inquire any further. (Testimony of Long)

4) 4R's did not pay wages owed to Long beginning on about April 14, 2017, and continuing through Long's last day of work on September 20, 2017, despite Long having worked approximately 2,966 hours during that period. (Testimony of Long, Exs. A15, A16)

5) Long noted the total hours he worked each day on a personal calendar. Long's hours fluctuated depending on the job, but he generally worked an average of 12 hours each day, five or six days per week. (Testimony of Long; Exs. A15; A16)

6) On September 19, 2017, a 4R's customer gave Long a check for \$50,000 for work performed by 4R's, which he turned over to Arsenault. (Testimony of Long)

7) On September 20, 2017, Long spoke with Arsenault by telephone. Richard Ray Kilbury was present for Long's portion of the telephone conversation. Long told Arsenault that it was embarrassing that he was required to borrow money when Arsenault owed him so much money in wages that had not been paid. Arsenault then discharged Long. (Testimony of Long)

8) Long reported to Kilbury that Arsenault had discharged him at the conclusion of the telephone conversation. (Testimony of Long, Kilbury)

9) Long liked working for 4R's and was not intending to leave the employment at the time he was discharged. Long had no reason to suspect his employment with 4R's was in jeopardy at the time of his discharge. (Testimony of Long)

10) On January 20, 2018, Long began working as a laborer for Jeld Wen Windows and Doors ("Jeld Wen") on a full-time basis after having looked for work during the four months following his termination from 4R's. Long's hourly wage at Jeld Wen was approximately \$12.75. Long's hourly wage increased to approximately \$16.00 after

¹ 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).

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he completed his 90-day probationary period. Long worked for Jeld Wen for approximately two years, with an ending hourly wage of approximately \$16.00. (Testimony of Long)

11) Long began working in construction in July 2020. Long is currently earning approximately \$20.00 per hour. (Testimony of Long)

12) Long suffered lost wages in the amount of \$34,920 as a result of the termination of his employment at 4R's, which was calculated as follows:

- 2,966 actual hours worked from January 1, through September 20, 2017
- Average hours worked per week from January 1 to September 23, 2017² = 78.05 (2,966 hours ÷ 38 weeks = 78.05 hours)
- 18 weeks from September 20, 2017, through January 20, 2018
- 40 hours x \$20 x 18 weeks = \$14,400
- 38 overtime hours x \$30 x 18 weeks = \$20,520
- \$14,400 in regular wages + \$20,520 in overtime wages = \$34,920

13) Respondent's failure to timely pay Long the wages he had earned caused him distress and frustration that was still apparent at the time of hearing. Long continued working without pay with the expectation that Respondent would pay him when it received its next big payment. Long frequently had to contend with Arsenault's angry response when he inquired about the wages owed.

14) Long was devastated and depressed after being discharged for requesting payment of the wages owed to him by 4R's. Long continued to be disturbed and depressed during the four months he was unemployed because of Arsenault's decision to discharge him. (Testimony of Long).

CONCLUSIONS OF LAW

1) At all times material herein, 4R's was an employer as defined in ORS 659A.001(4) and employed Long as a laborer.

2) The actions, statements, and motivations of Arsenault (Long's supervisor and the Registered Agent of 4R's) are properly imputed to Respondent. *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 73 (2015).

3) 4R's retaliated against Long after he, in good faith, reported information he believed was evidence of a violation of a state or federal law in violation of ORS 659A.199(1) and OAR 839-010-0100(1).

² Long was discharged on Wednesday, September 20, 2017.

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4) 4R's discharged and/or discriminated against Long because of his inquiry regarding about a wage claim in violation of ORS 652.355(1)(a), (2) and OAR 839-010-0100(4)(a).

5) At all times herein, Arsenault was an individual and a "person" under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

6) Arsenault aided and abetted 4R's in these unlawful employment practices in violation of ORS 659A.030(1)(g).

7) 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.

8) 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 award Long back pay resulting from Respondents' unlawful employment actions and Arsenault's aiding and abetting of those practices, as well as to award damages for emotional suffering sustained and to issue a cease-and-desist order. 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 4R's discriminated against Long because he opposed 4R's unlawful employment practice of failing to timely pay him the wages he had earned. The Agency further alleges that Arsenault, as 4R's Registered Agent, aided and abetted the unlawful employment practice and ultimately discharged Long for his demand for wages owed to him. The Agency did not seek wages that 4R's owed to Arsenault for work performed from January 1, through September 20, 2017.

The Agency has the burden of proof to establish the causal link in a civil rights case and the standard of proof is a preponderance of the evidence. *In the Matter of Kenneth Wallstrom*, 32 BOLI 63, 82-83 (2012). "Preponderance of evidence means 'more probably true than false.'" *In the matter of Horizontal Motorsports, Inc., and Robert S. Duggar, Jr.*, 37 BOLI 205, 215 (2020) (internal citations omitted).

LIABILITY OF 4R'S FOR VIOLATION OF ORS 659A.199

The Agency alleges that 4R's violated ORS 659A.199 & OAR 839-010-0100(1) by terminating Long because he made a good faith report of information that he believed to be evidence of a violation of state or federal law.

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

"It is an unlawful employment practice for an employer to discharge * * * an employee * * * for the reason that the employee has in good faith

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reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.”

OAR 839-010-0100(1) interprets ORS 659A.199 as:

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

The “good faith” requirement in ORS 659A.199 is met when the whistleblower has a reasonable belief that the information reported has occurred and that the information, if proven, constitutes evidence of a violation of a state or federal law, rule or regulation. *Vision International Petroleum LLC & Hai Chheng Gov*, 37 BOLI 187, 199 (2019).

The Agency's prima facie case consists of the following elements: (1) 4R's was an employer as defined by statute; (2) 4R's employed Long; (3) Long, in good faith, reported information to someone that he believed was evidence of a violation of a state rule; (4) 4R's discharged Long; (5) 4R's discharged Long because of his report(s). *Oregon Truck Painting, LLC, On Time Painting, Inc., Richard Bowman, and Amanda M. Marin*, 37 BOLI 87, 113 (2018).

It is undisputed that Long repeatedly advised Arsenault, as his supervisor and as the Registered Agent for 4R's, that he believed the withholding of his wages was in violation of Oregon law. Long asked for payment of his wages several times from April 14, 2017, and continuing to September 20, 2017, when he was discharged after making a final inquiry about his unpaid wages.

The forum concludes 4R's violated ORS 659A.199(1) and OAR 839-010-0100(1) by terminating Long after he requested payment of his wages and advised Arsenault that failure to pay his wages violated state law.

LIABILITY OF 4R'S FOR VIOLATION ORS 652.355

It is an unlawful employment action for an employer to “discharge or in any other manner discriminate against an employee because [t]he employee has made a wage claim or discussed, inquired about or consulted an attorney or agency about a wage claim.” ORS 652.355(1)(a), (2) and OAR 839-010-0100(4)(a).

It is undisputed that Long made a final demand for wages owed to him on September 20, 2017, before being discharged by Arsenault. There is no evidence showing Long's employment was in jeopardy prior to his final conversation with Arsenault or that he otherwise intended to leave the employment. Therefore, the forum concludes that 4R's violated ORS 652.355(1)(a)(2) and OAR 839-010-0100(4)(a) when it discharged Long after he made a demand for payment of wages owed to him for work

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performed between April 14, 2017, and September 20, 2017.

LIABILITY OF 4R'S FOR VIOLATION OF ORS 659A.030

It is an unlawful employment practice “[f]or any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.” ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A). See also OAR 839-005-0010(1). The analysis used in determining that GMS violated ORS 659A.199 applies equally to the Agency’s ORS 659A.030(1)(f) claim. See *In the Matter of Vision International Petroleum LLC*, 37 BOLI 187, 199 (2020).

Long offered uncontroverted testimony that he explicitly told Arsenault that he believed he was owed unpaid wages and that 4R’s failure to pay those wages violated state law. Therefore, the forum concludes that 4R’s violated ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A) by discharging Long after he opposed 4R’s unlawful employment practice of failing to timely pay him the wages he earned for work performed from April 14, 2017, through September 20, 2017.

LIABILITY OF ARSENAULT 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 Oregon Truck Painting, LLC*, 37 BOLI 87, 113 (2020). 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 Vision International*, 37 BOLI at 218. See also *In the Matter of Hey Beautiful Enterprises, Ltd.*, and *Kimberly Schoene*, 34 BOLI 80, 97 (2015); *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, Arsenault, as Long’s direct supervisor and the Registered Agent of 4R’s, engaged in an unlawful employment practice by failing to timely pay Long wages earned, as well as ultimately discharging Long when he made a final demand for those wages on September 20, 2017. Accordingly, Arsenault aided and abetted the unlawful employment practices identified above and is in violation of ORS 659A.030(1)(g). As an aider and abettor, Arsenault is jointly and severally liable with 4R’s for all unlawful employment practices at issue in this case.

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DAMAGES

The Agency seeks damages on behalf of Long in the amount of “at least \$10,000” for physical, mental, and emotional suffering and “[l]ost wages in an amount estimated to be at least \$3,328.00 to be proven at hearing.” (Ex. X2) 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 Atlas Bolt & Screw Co., LLC*, 37 BOLI 57, 80 (2018).

The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *Id.* 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 Long and complying with injunctive or other equitable relief; and

“(C) Protect the rights of the Long and other persons similarly situated[.]”

ORS 659A.850(a)(A)(B)(C).

Emotional Distress Damages

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).

Long credibly testified that he experienced distress and frustration as he continued to work without pay during the period of April 14, 2017, to September 20, 2017. Long was often met with an angry response when he questioned Arsenault about being paid and when he advised him that he believed 4R’s failure to pay him violated state law. Long felt devastated after being fired and depressed that he was fired because his employer owed him wages for work he had performed. Those feelings persisted as he looked for work and after he obtained employment paying significantly less than what he had been paid while working for 4R’s.

The discriminatory conduct of 4R’s and Arsenault negatively impacted Long during the final months of his employment and was still ongoing on the date of the hearing. The Formal Charges seek “at least \$10,000” in damages for emotional, mental, and physical suffering. Based on the record, the forum concludes that \$10,000 is an

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appropriate award. See *In the Matter of Insight Global, LLC*, 37 BOLI 229, 242 (2020) (awarding complainant \$15,000 in emotional distress damages); *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 239 (2015) (awarding \$20,000 for mental and emotional suffering); *In the Matter of Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 101 (2015) (awarding complainant \$10,000 in emotional distress damages).

Lost Wages

Long is eligible for an award for lost wages because he was discharged in violation of ORS 652.355(1)(a), (2); ORS 659A.199(1); ORS 659A.030(1)(f), (g); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-010-0100(1), (4)(a). The purpose of a back pay award in an employment discrimination case is to compensate a complainant for the lost wages he would have received but for the unlawful employment practices. *In the Matter of Insight Global, LLC*, 37 BOLI 229, 240 (2020). Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *Id.* A complainant who seeks back pay is required to mitigate damages by using reasonable diligence to find other suitable employment. *Id.*

Long enjoyed his job at 4R's and would have continued in the employment but for 4R's discriminatory conduct. Long used reasonable diligence looking for work following his termination and has been consistently employed since he obtained employment approximately 18 weeks after he was discharged by 4R's. Therefore, Long is entitled to the wages he lost as a result of 4R's discriminatory conduct. ORS 659A.850.

Long worked a total of 2,966 hours for 4R's from January 1 to September 20, 2017. (Exs. A15, A16). Long worked an average of 78.05 hours each week. Long was unemployed for a total of 18 weeks after 4R's discharged him in violation of ORS 652.355(1)(a), (2); ORS 659A.199(1); ORS 659A.030(1)(f), (g); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-010-0100(1), (4)(a). As such, Long is entitled to lost wages in the amount of \$34,920, which accounts for his regular hourly wage of \$20.00 and his overtime wage of \$30.00. See ORS 635.261(1)(a) (overtime may be paid after 40 hours of work in one work week at a rate of one and one-half times the regular rate); see also *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 38 (2012) (Complainant's average weekly wage used to calculate back pay award).

OTHER REQUESTED RELIEF

The Agency asked in its Formal Charges 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). This statute gives the Commissioner the authority to require Respondents and Respondents' managers and supervisors to undergo training of the

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type sought in the Formal Charges. The forum finds that this requirement is appropriate in this case.

EXCEPTIONS TO THE PROPOSED ORDER

On February 22, 2022, the Agency filed eight exceptions to the Proposed Order. With these exceptions, the Agency requested that the forum make corrections to scrivener's errors and add citations. These exceptions are well taken, and the Exceptions are GRANTED as reflected above.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and (4), and to eliminate the effects of the violations of ORS 652.355(1)(a), (2); ORS 659A.199(1); ORS 659A.030(1)(f), (g); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-010-0100(1), (4)(a) by Respondents **4R's Associates LLC, d/b/a Arsenault Structural Moving Systems and Christopher D. Arsenault, a/k/a Chris Arsenault**, 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 **Matthew Long** in the amount of:

- 1) TEN THOUSAND DOLLARS (\$10,000), representing compensatory damages for emotional and physical suffering experienced by Long because of Respondents' unlawful employment practices found herein; plus,
- 2) THIRTY-FOUR THOUSAND NINE HUNDRED TWENTY DOLLARS (\$34,920), wages lost by Matthew Long between September 21, 2017, and January 23, 2018, as a result of Respondents' unlawful employment practices found herein; plus,
- 3) Interest at the legal rate on the sum of FORTY-FOUR THOUSAND NINE HUNDRED TWENTY DOLLARS (\$44,920), 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 **4R's Associates LLC, d/b/a Arsenault Structural Moving Systems and Christopher D. Arsenault, a/k/a Chris Arsenault** to participate in training, at Respondents' expense, on workplace retaliation and whistleblowing to be conducted by the Bureau of Labor and Industries' Technical Assistance Unit, or another trainer agreeable to and approved by the Agency.

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In the Matter of

**Next Step Carpet, LLC, Respondent,
Case No. 115-20**

**Final Order of Commissioner Val Hoyle
Issued June 21, 2022**

SYNOPSIS

The Agency established that Next Step Carpet, LLC (“Next Step”), engaged in unlawful employment practices in that it discriminated against and discharged Complainant Natasha Burgess (“Burgess”) because of her sex (pregnancy) in violation of ORS 659A.030(1)(a), (b). The forum awarded Burgess \$3,780 in lost wages and \$120,000 in emotional, mental, and physical suffering damages. The forum also required Next Step managers and supervisors to undergo approved training on unlawful discrimination in the workplace.

The above-entitled case was assigned to Cynthia L. Domas, designated as Administrative Law Judge (“ALJ”) by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The hearing was held on January 12, 2021, via the GoToMeeting application. The Notice of Hearing set the hearing to begin at 9:30 a.m., but as set forth below, the proceedings did not commence until 10:00 a.m.

The Bureau of Labor and Industries (“BOLI”) was represented by Administrative Prosecutor Rachel Diamond-Cuneo (“Diamond-Cuneo”), an employee of the Agency. Neither Brent (“B. Moulton”) nor Greg Moulton (“G. Moulton”) appeared at hearing.

No appearance was made by Next Step or any other person on its behalf at hearing, nor was any notice given to the forum explaining its failure to appear. Nonetheless, the Agency presented its prima facie case, as required by OAR 839-050-0330(3).

The Agency called Zachary Zerzan (“Zerzan”), Senior Civil Rights Investigator, and Complainant Natasha Burgess (“Burgess”) as witnesses. No other witnesses were called or testified. The forum received into evidence: (a) Administrative exhibits X1 through X14 and (b) Agency exhibits A1 through A5.

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

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

FINDINGS OF FACT – PROCEDURAL

1) On April 29, 2019, Burgess filed a complaint alleging Next Step terminated her employment after she notified Owner G. Moulton that she was pregnant. (Ex. A1).

2) On October 4, 2019, Zerzan sent Next Step a request for information seeking information regarding Burgess' employment with Next Step. Next Step did not respond to the request for information. (Ex. A4)

3) The Agency subsequently issued a Notice of Substantial Evidence Determination in which it was determined that there was substantial evidence of an unlawful employment practice (termination on the basis of sex/pregnancy) in violation of ORS 659A.030(1)(a-b). (Ex. A5)

4) On July 23, 2020, the forum issued a Notice of Hearing to Respondent, the Agency, and Burgess stating the time and place of the hearing as January 12, 2021, beginning at 9:30 a.m., at Worksource Oregon Employment Department, 1901 Adams Ave., La Grande, Oregon, 97850. 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)

5) The Formal Charges alleged that Next Step engaged in an unlawful employment practice under ORS 659A.030(1)(a) and (b), OAR 839-005-0021(2), OAR 839-005-0026(1) and (2) and OAR 839-005-0030(4)(a) and (d) in that Next Step discriminated against and discharged Burgess on the basis of sex(pregnancy). The Formal Charges sought damages for physical, mental, and emotional distress in the amount of "at least \$120,000.00" and "[l]ost wages in an amount estimated to be at least \$3,700.00." The Formal Charges also sought a cease and desist order and requested that Next Step be trained, at its expense, "on preventing discrimination based on sex in the workplace." The Agency did not seek out-of-pocket expenses. (Ex. X2)

6) On August 17, 2020, Next Step filed an Answer to Formal Charges in which it denied the allegation that it discriminated against and/or discharged Burgess on the basis of sex. (Ex. X3)

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

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7) On August 19, 2020, the forum issued an Interim Order Re Requiring Case Summaries to be Filed and Setting Contested Case Deadlines, in which it was ordered that Case Summaries be filed no later than December 29, 2020. (Ex. X4)

8) On August 19, 2020, the forum issued an Interim Order Re Temporary Procedures as a result of the impact of the COVID-19 outbreak. The Agency and Respondent both indicated that they consented to accept filings by email. (Ex. X5)

9) On November 17, 2020, the forum issued an Interim Order Re Virtual Hearing and Updated Document Filing Procedures. (Ex. X6)

10) On December 1, 2020, Next Step's attorney of record filed a Motion to Withdraw as Attorney of Record for Respondent. (Ex. X7)

11) On December 2, 2020, the forum sent an email to Next Step's attorney of record requesting confirmation that Next Step had been provided with all filings and orders in the matter, which was received that same day. (Exs. X8, X9)

12) On December 2, 2020, the forum issued an Interim Order Re Attorney Withdrawal granting the motion of Respondent's attorney to withdraw as attorney of record:

"On December 1, 2020, Respondent's attorney, Wyatt Baum, filed a Motion to Withdraw as Attorney for Respondent. The motion was accompanied by Mr. Baum's Declaration that good cause existed to grant his withdrawal. In the Declaration, Mr. Baum provided the last known mailing and email address for Respondent.

"On December 2, 2020, the forum requested assurance from Mr. Baum that copies of all filings and interim orders had been provided to Respondent. Mr. Baum promptly provided assurance that he had provided the documentation to Respondent.

"Therefore, Mr. Baum's motion to withdraw as attorney of record for Respondent is GRANTED."

(Ex. X10)

13) On December 10, 2020, the forum issued an Interim Order Re Virtual Hearing that included information regarding the GoToMeeting application. (Ex. X11)

14) On December 10, 2020, the forum issued an Interim Order Requiring Respondent to be Represented by Authorized Representative or Counsel. The order included:

"On December 2, 2020, the forum issued an interim order allowing attorney Wyatt Baum to withdraw as attorney of record for Respondent. The

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hearing in this matter is set for January 12, 2021. To date, the forum has not been informed that Respondent has retained new counsel or that that Respondent has an Authorized Representative appointed as required.

“Next Step Carpet, LLC is a limited liability company and limited liability companies are unincorporated associations. ORS 63.001(17). OAR 839-050-0110(1) requires that unincorporated associations must be represented at all stages of the proceeding either by counsel or by an authorized representative. An authorized representative includes an authorized officer or regular employee of the limited liability company. OAR 8390-050-0110(2). **Before a person may appear as an authorized representative, the corporation that is a party to the contested case proceeding must file a letter specifically authorizing the person to appear on behalf of the party.** OAR 839-050-0110(3).

“Respondent Next Step Carpet, LLC is hereby notified that it **MUST** be represented either by an attorney or by an ‘authorized representative’ at all stages of this proceeding. From now on, except for a letter authorizing a person to appear on behalf of Respondent Next Step Carpet, LLC as an authorized representative, the forum will disregard any motions, filings, or other communications from Respondent Next Step Carpet, LLC unless they are through an attorney or authorized representative. If Respondent Next Step Carpet, LLC is not represented at the hearing by an attorney or authorized representative, Respondent Next Step Carpet, LLC will be found in default and will not be allowed to participate in the hearing. OAR 839-050-0330 (1)(d).

“An authorized form is attached for Respondent’s convenience.”

(Ex. X12)(emphasis in original)

15) On December 29, 2020, the Agency timely filed its Case Summary. No Case Summary was filed on behalf of Next Step. (Ex. X13)

16) On December 30, 2020, the forum issued an Interim Protective Order noting that Ex. A3, page 4, was a medical record that required protection under the Oregon Public Records law pursuant to ORS 192.355(2)(a). The order noted that Ex. A3, page 4, would be placed in an envelope marked “Confidential – Subject to Protective Order.” (Ex. X14)

17) Respondent did not appear at the hearing; nor did Respondent notify the Agency or the ALJ that it would not appear at the time and place set for hearing. Diamond-Cuneo informed the ALJ that she had responded to an email sent to her by someone on behalf of Next Step the morning of hearing by listing the date and time for hearing and including the log-in information for the GoToMeeting application. Diamond-Cuneo indicated she heard nothing more from Next Step prior to hearing. (Hearing Record)

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18) The ALJ waited until after 10:00 a.m., and commenced the hearing. At the start of hearing, the ALJ orally informed the participants who were present of the issues to be addressed, the matters to be proved and the procedures governing the conduct of the hearing. (Hearing Record)

19) On August 31, 2021, the forum issued an Interim Order Re Reassignment of ALJ.

20) On February 18, 2022, the forum issued an Interim Order Re Reassignment of ALJ assigning the matter to the undersigned.

21) On March 8, 2022, 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 on March 18, 2022. The exceptions are addressed in the Opinion section of this Final Order.

22) On March 18, 2022, Next Step filed Respondent's Request for 90-day Extension to File Exceptions to Proposed Order. On March 29, 2022, the forum issued an Interim Order Re Respondent's Request for 90-day Extension to File Exceptions to Proposed Order denying the motion.

FINDINGS OF FACT – THE MERITS

1) At all times material, Next Step was a Domestic Limited Liability Company with its principal place of business located in La Grande, Oregon. (Ex. A2)

2) B. Moulton is an owner of Next Step. G. Moulton is B. Moulton's son, and he is listed as Next Step's Registered Agent, Member and Manager. (Ex. A2)

3) Burgess began working as a sales associate for Next Step in April 2018. Burgess was a salaried employee who worked between 40 and 45 hours per week. Burgess's average hourly rate was \$15. (Testimony of Burgess)

4) In September 2018, Burgess agreed to become a gestational surrogate, which required her to undergo extensive medical screenings. Burgess was also required to notify her family and her employer of her intent to become a gestational surrogate as part of the process of becoming a gestational surrogate. (Testimony of Burgess)

5) Burgess notified both B. Moulton and G. Moulton of her intention to become a gestational surrogate at the beginning of the process. (Testimony of Burgess)

6) On February 13, 2019, an embryo was transferred to Burgess, which required her to take time off from work. Burgess returned to work on February 18, 2019, and spoke with B. Moulton about the procedure and how she was feeling. (Testimony of Burgess)

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7) On February 19, 2019, G. Moulton was waiting for Burgess at her desk when she reported for work. G. Moulton had been out of the office the previous day. G. Moulton asked Burgess if she was pregnant. Burgess, who had recently learned she had received a positive pregnancy test result, confirmed that she was pregnant. G. Moulton informed Burgess that Next Step was letting her go, because “it was best for her to focus on her pregnancy.” (Testimony of Burgess)

8) Burgess sent a text message to B. Moulton after she left the business asking why he did not tell her the previous day that she was being discharged. B. Moulton responded, “I am truly sorry I hoped it wouldn’t come to this and didn’t know myself it needed to happen so soon.” (Ex. A3; Testimony of Burgess)

9) On March 3, 2019, B. Moulton sent a second text message to Burgess:

“Tasha have waited to reach out to you purposely. I wanted to give you time to use your faith to help you. I want you to know what we had to do. We prayed and thought hard on where we needed to go with the company. It was totally a business decision. Had nothing to do with you as a person you are * * * * *.”

(Ex. A3)²

10) Both G. Moulton and B. Moulton had previously made comments in Burgess’ presence suggesting women should stay home once they become pregnant. Burgess was aware that G. Moulton did not allow his wife to work. Burgess did not think anything of the comments at the time, because she assumed she was protected as an employee. (Testimony of Burgess)

11) Burgess was upset and embarrassed at being discharged. Burgess was particularly upset given the stated reason for her discharge and that she was then required to explain the complex circumstances of her surrogacy efforts. Burgess continues to experience embarrassment and distress whenever she sees G. Moulton or B. Moulton or one of her former co-workers. (Testimony of Burgess)

12) Burgess learned shortly after her discharge that she had received a negative test result on her second pregnancy test. Burgess believes it was the stress caused by her discharge that caused her to lose the pregnancy. (Testimony of Burgess)

13) On February 28, 2019, Next Step posted the following on Facebook:

“Next Step Carpet just had its biggest month in company history!! We would like to personally thank all of our loyal customers and supporters. We couldn’t have done this without you. Especially in the middle of a crazy snowstorm and a short month! Stay tuned for what we have in store next month!”

² The text message included in Ex. A3 appears to have been cut off and is quoted as it appears in Ex. A3.

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(Ex. A3)

14) Burgess was unemployed for approximately six weeks before she began working for another carpet store located in La Grande on April 3, 2019. (Testimony of Burgess)

15) Burgess' current position is commission based, but she is guaranteed an hourly wage of approximately \$15.00. Burgess currently works approximately 40 hours per week and is earning more than she did when working for Next Step. (Testimony of Burgess)

16) On or about April 11, 2019, Burgess observed Next Step had posted a job opening for her former position on a recruitment website. (Ex. A3)

CONCLUSIONS OF LAW

1) At all times material herein, Next Step was an employer as defined in ORS 659A.001(4) and OAR 839-005-0003(5) that employed Burgess.

2) Next Step engaged in an unlawful employment practice in that it discriminated against Burgess in the terms, conditions or privileges of employment because of her sex (pregnancy) in violation of ORS 659A.030(1)(b), OAR 839-005-0030(4)(d), OAR 839-005-0021(2) and OAR 839-005-0026(1) and (2).

3) Next Step engaged in an unlawful employment practice in that it discharged, expelled or otherwise discriminated against Burgess because of her sex (pregnancy) in violation of ORS 659A.030(1)(a), OAR 839-005-0030(4)(a), OAR 839-005-0021(2) and OAR 839-005-0026(1) and (2).

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. The sums of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority. ORS 659A.800 - ORS 659A.865.

5) 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

It is an unlawful employment practice for "[a]n employer, because of an individual's * * * sex * * * to * * * discharge the individual from employment." ORS

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659A.030(1)(a). ORS 659A.030(1)(b) prohibits an employer from discriminating against an individual “in compensation or in terms, conditions or privileges of employment” because of that individual's sex. In pertinent part, ORS 659A.029 provides that “[f]or purposes of ORS 659A.030, the phrase 'because of sex' includes, but is not limited to, because of pregnancy, childbirth and related medical conditions or occurrences.” OAR 839-005-0021(1) & (2) and OAR 839-005-0026(1) & (2) echo those provisions.³

To prove that Next Step violated ORS 659A.030(1)(a) and (b) by discriminating against and terminating Burgess’ employment because of her sex (pregnancy), the Agency must establish a prima facie case consisting of the following five elements: (1) Next Step was an employer; (2) Next Step employed Burgess; (3) Burgess was in a protected class (sex); (4) Next Step discharged Burgess and (5) Next Step terminated Burgess because of her sex (pregnancy). *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 32 (2012).

The Agency has successfully established each element of its prima facie case based upon the uncontroverted evidence of record. OAR 839-050-0330(2). Next Step was an employer that employed Burgess as a sales associate who was discharged after confirming to G. Moulton that she was pregnant.

“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.

In this case, G. Moulton’s statement to Burgess at the time of her discharge constitutes direct evidence of a discriminatory motive with regard to the reasons for Burgess’ discharge. Further, circumstantial evidence in the form of text messages from B. Moulton to Burgess following her discharge is further evidence of a causal connection between Burgess’ discharge and her sex (pregnancy). (Finding of Fact #9.) The forum therefore determines that Next Step engaged in an unlawful employment practice in that it discriminated against and discharged Burgess on the basis of sex (pregnancy) in violation of ORS 659A.030(1)(a) and (b).

³ OAR 839-005-0021(1) & (2) provide:

“(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.”

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DAMAGES

Back Pay

Burgess is eligible for a back pay award because she was discharged in violation of ORS 659A.030(1)(a). The purpose of a 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 Edgewood Construction, LLC*, 37 BOLI 2, 14-15 (2018)(internal citation omitted). Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *Id.* 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 216, 238 (2015).

Burgess was unemployed from February 19, 2019, to April 3, 2019, a period of approximately six weeks. (Finding of Fact #14). Burgess credibly testified she worked between 40 and 45 hours per week for Next Step and was guaranteed an hourly wage of \$15. There is no credible evidence of record showing Burgess failed to mitigate her damages in that she was unemployed for only six weeks following her unlawful discharge from Next Step.

The forum finds the Agency's use of 42 hours per week in the calculation of its damages request to be reasonable and adopts that approach. Therefore, Burgess is entitled to a back pay award of \$3,780 (42 hours per week x \$15 x 6 weeks).

Emotional Distress Damages

The Agency seeks damages on behalf of Complainant in the amount of at least \$120,000 for emotional, mental and physical 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 Vision International*, 37 BOLI 187, 200-01 (2019). 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. *Edgewood Construction*, 37 BOLI at 15.

Burgess credibly testified she experienced mental and emotional suffering as a result of her termination. Burgess was visibly upset and emotional while testifying regarding the circumstances surrounding her discharge and the events that followed. Burgess described the embarrassment and hurt she felt every time she ran into either G. Moulton or B. Moulton or any of her former co-workers. She also described the

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feelings she felt as a result of having to explain the complex nature of the circumstances surrounding the reason given for her discharge. Further, Burgess attributes the loss of her pregnancy a short time after the discharge to the stress she felt as a result of the unlawful employment practice.

Based on the above and the amount of damages awarded in comparable BOLI Final Orders, the forum finds that \$120,000 is an appropriate sum. *In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 76-77 (2015) (\$120,000 awarded for emotional and mental suffering following a termination); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 40-41 (2012) (also awarded \$120,000 for emotional and mental suffering comparable to that experienced by Complainant in this case).

ADDITIONAL RELIEF REQUESTED BY THE AGENCY

The Agency asks that the forum issue a cease and desist order against Respondent requiring it 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. The forum further finds the Agency's request that Next Step's managers, supervisors, and human resources personnel complete training, at the expense of Next Step, on preventing discrimination based on sex in the workplace appropriate relief. The training must be completed by the Bureau of Labor and Industries' Technical Assistance Unit, or another trainer agreeable to and approved by the Agency.

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EXCEPTIONS TO THE PROPOSED ORDER

On March 18, 2022, the Agency filed eight exceptions requesting that the forum make corrections to scrivener's errors. The Agency's exceptions are well taken and are GRANTED as reflected above.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondent Next Step Carpet, LLC's violations of ORS 659A.030(1)(a) and (b), and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Next Step Carpet, 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, a certified check payable to the **Bureau of Labor and Industries in Trust for Complainant Natasha Burgess** in the amount of:

1) THREE THOUSAND SEVEN HUNDRED EIGHTY DOLLARS(\$3,780), less lawful deductions, representing wages lost by Natasha Burgess between February 19, and April 3, 2019, as a result of Next Step Carpet, LLC's unlawful employment practice found herein; plus,

2) ONE HUNDRED TWENTY THOUSAND DOLLARS (\$120,000), representing compensatory damages for emotional and mental suffering Natasha Burgess experienced as a result of **Respondent Next Step Carpet, LLC** unlawful employment practice of discriminating against and terminating her employment; plus,

3) Interest at the legal rate on the sum of ONE HUNDRED TWENTY THREE THOUSAND EIGHTY DOLLARS (\$123,780) until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of **Respondent Next Step Carpet, LLC** violations of ORS 659A.030(1)(a) & (b), the Commissioner of the Bureau of Labor and Industries hereby orders and Next Step, LLC to require its current employees, if any, to attend training on recognizing and preventing discrimination in the workplace based on sex/pregnancy. Such training may be provided by the Bureau of Labor and Industries Technical Assistance for Employees unit or another trainer agreeable to the Agency.

C. Cease and desist from discriminating against any employee based upon the employee's gender.

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**In the Matter of
University of Oregon, Case Nos. 84-20,
01-21 (Consolidated)**

**Final Order of Commissioner Val Hoyle
Issued June 21, 2022**

SYNOPSIS

Wage Claimants attended mandatory training at the Department of Public Safety Standards and Training police academy from October 13, 2013, through February 21, 2014. Claimants were engaged in law enforcement activities during this training, as defined under OAR 839-020-0220 (3), (4), and are therefore exempted from overtime payment rates pursuant to ORS 653.269(3). Time spent at the police academy is compensable under OAR 839-020-0044. Claimants are entitled to wages for time not reported in the amount of 63.25 hours, at a regular hourly rate of \$22.60, for a total of \$1,429.45 in unpaid wages for each Claimant.

The above-entitled case was assigned to Cynthia L. Domas designated as Administrative Law Judge (“ALJ”) by Val Hoyle, 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 Rachel Diamond-Cuneo, an employee of the Agency. Respondent was represented by Assistant General Counsel Jeslyn A. Everitt and Attorney Liani Reeves.

This matter was scheduled for hearing on June 22, 2021. On June 8, 2021, Respondent sent an email to the forum stating the parties had agreed to a set of stipulated facts and that they would be open to the forum taking the matter under submission. Respondent indicated that the parties were open to an administrative conference to discuss any remaining factual issues.

On June 9, 2021, the parties filed a document titled, “Stipulated Facts,” with supporting Exhibits 1 through 17.¹ The document was signed by both Respondent and the Agency.

On June 10, 2021, the forum issued an Interim Order Re Stipulated Facts Hearing that included notice to that parties that the June 8, 2021, email was being treated as a

¹ Exhibits to Stipulated Facts are referred to as “Ex. SF.”

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motion for a hearing on stipulated facts and that the parties were waiving the need for an in-person video hearing. The interim order also clarified that the parties were not requesting to submit briefs and that the Commissioner, not the ALJ, would issue a final order in this matter. The order also canceled the hearing scheduled for June 22, 2021.

On August 13, 2021, the forum issued an Interim Order Re Administrative Exhibits, which included a list of the Administrative Exhibits (Exs. X1-X37). On August 23, 2021, Respondent's attorney, Jeslyn Everitt, indicated that the Respondent had no objection to the admission of the X1 through X37 so long as the documents were part of the procedural history or for jurisdictional purposes. The forum received Administrative Exhibits X1 through X37 and Exhibits SF1 through SF17 into evidence.

Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Proposed Findings of Fact (Procedural, On the Merits, and Ultimate²), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On November 26, 2019, the Wage and Hour Division ("WHD") issued an Order of Determination ("OOD") #19-3032, Case No. 84-20, that alleged that during the time period of October 13, 2013, through February 21, 2014, wage claimant Steven W. Barrett (Barrett) had worked 181.75 hours at \$22.60 per hour for which he had not been compensated and was due \$4,107.55 in unpaid wages. (Ex. X2b)

2) On December 23, 2019, Respondent filed a Request for Contested Case Hearing and Answer to OOD #19-3032. (Ex. X1a)

3) On September 8, 2020, the forum issued a Notice of Hearing to the Respondent and to the Agency in Case No. 84-20. The Notice set the hearing for February 2, 2021. Along with the Notice of Hearing, the forum sent a copy of the OOD, a multi-language warning notice, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required for ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," and a copy of the forum's contested case hearing rules, OAR 839-050-0000 to 839-050-0445. (Exs. X2, X2a-X2f)

4) On April 1, 2020, the WHD issued OOD #19-2874, Case No. 01-21, that alleged that during the time period of October 13, 2013, through February 21, 2014, wage claimant John C Loos (Loos) had worked 181.75 hours at \$22.60 per hour for which he had not been compensated and was due \$4,107.55 in unpaid wages. (Ex. X7, X7a-X7f)

5) On April 17, 2020, Respondent filed a Request for Contested Case Hearing and Answer to OOD # 19-2874. (Ex. X6a)

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

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6) On September 8, 2020, the forum issued a Notice of Hearing to the Respondent and to the Agency in Case No. 01-21. (Ex. X7) The Notice set the hearing for February 2, 2021. Along with the Notice of Hearing, the forum sent a copy of the OOD, a multi-language warning notice, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required for ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," and a copy of the forum's contested case hearing rules, OAR 839-050-0000 to 839-050-0445. (Exs. X7a-X7f)

7) On September 10, 2020, the Agency filed a motion to consolidate the two cases. (Exs. X3, X8)

8) On September 23, 2020, the forum issued an Interim Order Consolidating Cases in which it was determined that Case Nos. 84-20 and 01-21 involved common questions of law and fact and consolidated the two cases for hearing. (Ex. X12)

9) On September 29, 2020, the forum issued an Interim Order Requiring Case Summaries to be Filed and Setting Case Filing Deadlines. An Amended Interim Order Re Temporary Procedures was issued on September 29, 2020, setting forth the temporary procedures put in place due to COVID-19. (Exs. X13, X14)

10) On September 29, 2020, the forum issued an Interim Order Requiring Case Summaries to be Filed and Setting Case Filing Deadlines that corrected the case number. (Ex. X15)

11) On December 4, 2020, the forum issued an Interim Order Re Hearing Status Update and New Procedures. (Ex. X16)

12) On December 22, 2021, a notice of appearance by attorney Liani Reeves was filed. On the same date, Ms. Reeves filed Respondent's Motion for Summary Judgment. (Exs. X17-X18)

13) On December 23, 2020, the forum issued an Interim Order Re Agency's Motion for an Extension of Time to File Response after receiving the Agency's unopposed motion that same day. (Exs. X19-X22)

14) On December 29, 2020, the Agency filed a second unopposed motion for an extension of time to file a response to the summary judgment motion. On the same date, the forum issued an Interim Order Re Agency's Motion for an Extension of Time to File Response granting the motion. (Exs. X21-X22)

15) On January 8, 2021, the parties filed a Joint Motion for Postponement of Hearing and Case Deadlines. On the same date the forum issued an Interim Order Re Joint Motion for Postponement of Hearing and Case Filing Deadlines granting the motion. (Exs. X23-X24)

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16) On January 14, 2021, the forum issued an Interim Order Setting new Hearing Date and Setting Case Summary and Filing Deadlines. (Ex. X25)

17) On February 2, 2021, the forum received the Agency's response to the motion for summary judgment. (Ex. X26)

18) On February 16, 2021, Respondent filed an unopposed motion to submit a reply to the Agency's response to the summary judgment motion. On the same date the forum issued an interim order granting Respondent's motion. (Exs. X27-X28)

19) On February 26, 2021, Respondent filed its' reply to the Agency's response to the motion for summary judgment. (Ex. X29)

20) On March 26, 2021, the forum issued an Interim Order Rescheduling Hearing and Case Summary Dates. (Ex. X30)

21) On April 27, 2021, the forum issued an Interim Order Re New Hearing and Case Summary Dates. (Ex. X31)

22) On May 17, 2021, the forum issued an interim order denying Respondent's summary judgment motion. Pursuant to OAR 839-050-150(4)(b), the interim order denying Respondent's motion for summary judgment is set out below:

"INTRODUCTION

"This matter involves two wage claims more specifically set out below. The two cases were consolidated by Interim Order dated September 23, 2020. (9-23-20 interim order)

"Wage Claimant Steven R. Barrett

"The University of Oregon ('Respondent') hired Steven R. Barrett ('Barrett') as a Police Officer 1 on or about October 7, 2013. On October 13, 2013, Respondent sent Barrett to the Department of Public Safety Standards and Training ('DPSST') in Salem, Oregon for training. The training was completed on February 21, 2014. (Respondent's motion page 3, declaration of Barrett) Training provided by DPSST, or a similar out-of-state training, is required of all police officers or public safety officers. (Respondent's motion, page 3)

"On November 26, 2019, the Wage and Hour Division ('WHD') issued Order of Determination ('OOD'), #19-3032, regarding Barrett. (OOD, Ex. R11) The OOD alleged that Respondent employed Barrett from October 13, 2013, through February 21, 2014, but failed to compensate him for all of the work, labor and services he performed during that time period. The alleged amount of unpaid wages was \$4,107.55 for 181.75 hours at an hourly rate of \$22.60. The OOD further alleged that in addition to the \$4,107.55 in unpaid wages, Respondent owed Barrett interest thereon at the legal rate of interest from March 1, 2014, until paid. (OOD)

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"Barrett was still employed by Respondent as of February 11, 2021. (Declaration of Barrett).

"The Agency issued a Notice of Tort Claim to the University of Portland Police Department at the University of Oregon's Eugene, Oregon address on October 30, 2019. (Ex. R8) On November 29, 2019, the Agency issued a Revised Notice of Tort Claim, correcting the name of Respondent and sending the Notice to a different Eugene, Oregon address. (Ex. R10)

'Wage Claimant John C. Loos

"The Respondent hired John C. Loos ('Loos') as a Public Safety Officer in September of 2010. Loos became a Police Officer 1 on October 7, 2013. (Respondent's motion page 5) On October 13, 2013, Respondent sent Loos to the DPSST in Salem, Oregon for training. The training was completed on February 21, 2014. Loos was last employed by Respondent on April 12, 2019. (Respondent's motion pages 3-4, Declaration of Loos)

"On April 1, 2020, WHD issued OOD, #19-2874, regarding Loos. (OOD, Ex. R18) The OOD alleged that Respondent employed Loos from October 13, 2013, through February 21, 2014, but failed to compensate him for all of the work, labor and services he performed during that time period. The alleged amount of unpaid wages was \$4,107.55 for 181.75 hours at an hourly rate of \$22.60. The OOD further alleged that in addition to the \$4,107.55 in unpaid wages, Respondent owed Loos interest thereon at the legal rate of interest from March 1, 2014, until paid. (OOD) The Agency issued a Notice of Tort Claim regarding Loos to Respondent on February 19, 2020. (Ex. R16)

"Both claimants allege that that they were not paid for all the services they performed while at DPSST including cleaning of the dormitory and bathrooms, lining up for formation, marching between classes, attending flag-raising ceremonies, and doing homework. (Agency response page 3)

"The Agency alleges that Barrett was instructed by his supervisors at Respondent to fill out his timesheet to indicate a 40-hour workweek unless overtime was shown on DPSST's schedule. (Agency's response pages 3-4, Declaration of Barrett) The duties described above were not reflected on DPSST's schedule. The Agency alleges that Barrett was subject to discipline if he did not perform the above duties. The Agency further alleges that Barrett did not include the time spent on the above tasks on his timesheet because of Respondent's directive. (Agency's response at 3, Declaration of Barrett)

"The Agency alleges that Loos was also instructed by his supervisors at Respondent as well as DPSST staff to fill out his timesheet to indicate a 40-hour workweek unless overtime was shown on DPSST's schedule. (Agency's response page 3, Declaration of Loos) The duties described above were not reflected on DPSST's schedule. The Agency alleges that Loos was subject to discipline if he did not perform the above duties. The Agency further alleges that Loos did not include

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the time spent on the above tasks on his timesheet because of DPSST's and Respondent's directive. (Agency's response at 3, Declaration of Loos)

"The elements of a wage claim are (1) respondent employed the claimant; (2) the agreed upon wage if other than minimum wage; (3) the amount and extent of the work performed by the claimant for the respondent; and (4) claimant performed work for which the claimant was not compensated. *In the Matter of Oregon Fir Millworks, Inc.*, 37 BOLI 2, 5 (2017). The parties are in agreement as to the first two elements.

"In the OODs, the Agency does not seek payment of overtime wages, civil penalties or penalty wages. (OODs, Agency response, page 7)

"SUMMARY JUDGMENT STANDARD

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

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

ORCP 47C.

"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 Derrick's Custom Painting, Inc.*, 37 BOLI 271, 275 (2020).

"The record considered by the forum in deciding this motion consists of: (1) the two OODs; (2) Respondent's answers to the OODs; (3) Respondent's motion for summary judgment, its argument made in support of the motion and the exhibits submitted with the motion; (4) the Agency's response to Respondent's motion with attachments; and (5) Respondent's reply to the Agency's response to the motion.

"ANALYSIS

"Respondent set out four bases for its motion. They are:

- a. The wage claims against Respondent, a public body, are barred by the Oregon Tort Claims Act (OTCA).
- b. The wage claims are untimely and are barred by the Statute of Limitations.

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- c. The wage claims are barred by the Collective Bargaining Agreement (CBA).
- d. The lack of timeliness in asserting the wage claims makes dismissing them just.

“Oregon Tort Claims Act

“The OTCA is codified from ORS 30.260 through ORS 30.300. Respondent’s position is that a wage claim is a tort within the meaning of the OTCA, and, therefore, the OTCA applies. Respondent further maintains that it did not receive timely notice of the wage claims as required by the act. (Respondent’s motion pages 9-13)

“The Agency takes the opposite position and states that wage claims are not torts, and, therefore, the OTCA does not apply. The Agency maintains that notice is not required before filing an Order of Determinations that initiates an administrative proceeding. (Agency’s response at 5)

“For purposes of the OTCA, ORS 30.260(8) provides:

“Tort’ means the breach of a legal duty that is imposed by law, other than a duty arising from contract or quasi-contract, the breach of which results in injury to a specific person or persons for which the law provides a civil right of action for damages or for a protective remedy.’

“This matter is before the forum as the result of a failure to pay all wages due under an employment contract. (Agency’s Response page 7) As the duty to pay the claimants is based upon a contract, the OTCA does not apply. Further, the Agency contends that an administrative proceeding is not an action in the legal sense. (Agency’s Response page 5).

“When interpreting statutes, the forum uses the methodology set out in *In the Matter of the City of The Dalles, Columbia Gateway Urban Renewal Agency and Tokola Properties, Inc., Requesters*, 37 BOLI 141, (2019) The case provides at 163-164:

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

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“The Agency points to the legal definition set forth in Black’s Law Dictionary (11th Ed 2019) for the definition of ‘action’ and states that the term refers to a civil or criminal proceeding in a court of law. The Agency further bolsters its position by referring to *Abbott v Baldwin*, 178 Or App 289, 298, 36 P.3d 516 (2001) which held that the term ‘action’ has a discrete judicial meaning. (Agency’s response page 5)

“In addition, the Agency maintains that an administrative proceeding is not an action as there is no plaintiff involved. The term plaintiff has a well-recognized legal meaning, again referring to Black’s Law Dictionary (11th Ed 2019). Black’s states that a plaintiff is, ‘a party who brings a suit in a court of law.’ (Agency’s Response page 5) There are no plaintiffs, as defined, in this proceeding.

“ORS 652.330 sets forth the duty and powers granted to the Commissioner by the Legislature regarding wage claims. ORS 652.330(2) specifically exempts a wage claimant who has assigned his or her wage claim to the Commissioner from being a party in any court action under the section. As set out is ORS 652.330(1)(d), the legislature made a distinction between a civil action and an administrative proceeding.

‘In any case where a civil action may be brought under this chapter for the collection of a wage claim, provide for an administrative proceeding to determine the validity and enforce collection of the claim. The administrative proceeding shall be conducted as provided in this chapter, and is subject to the employer’s right to elect a trial in a court of law.’

“The statutes pertaining to the Agency, distinguished between an employee filing a complaint with the Agency and bringing a civil action. See ORS 652.035(1), ORS 652.230(1)(2), ORS 652.235, ORS 279C.855(5). In doing so, the legislature made a distinction between an administrative proceeding and a civil action. If the legislature had intended that there be no distinction between an administrative proceeding and a civil action, it could easily have done so. The legislature specifically made provisions for two processes, one administrative, and one civil, for enforcing wage claims.

“In regard to the OTCA, the legislature set specific time limitations on filing for overtime but did not do so for pursuing an assigned wage claim under ORS 652.310 to 652.414. The legislature also distinguished between wage claims, claims for overtime wages, and penalty wages. Allowing Respondent the option of requesting a contested case hearing or requesting a trial in court does not violate due process or produce an absurd result as alleged by Respondent. Respondent gets the process due under the type of proceeding they choose.

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"In summation, the OTCA does not apply to wage claims brought by the Agency pursuant to ORS 652.310 to 652.414. Respondent's motion as to the OTCA is denied.

"Statute of Limitations

"Respondent alleges that the wage claims are further barred by the statute of limitations. The cases cited by Respondent concern the payment of overtime wages. Most involve overtime wages under the FLSA, a federal statute. See *Butterfield v. Oregon*, 163 Or App. 277, 987 P2d 569 (1999). There is no time limitation on when the Commissioner may pursue an assigned wage claim.

"ORS 12.250 provides:

'Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit.'

"The OOD, an administrative notice in this matter, was issued by the Commissioner of the Bureau of Labor and Industries, a state agency. Both the Commissioner and the Agency are part of state government. See ORS 174.111, 174.112. The matter has been brought in the name of the Agency which is part of the state. Therefore, the time limitations in ORS Chapter 12 do not apply. See *Shasta View Irr. Dist. v. Amoco Chemicals Corp.*, 329 Or 151, 158, 986 P2d 536 (1999).

"The Agency seems to cite to *State ex rel Dept. of Human Services v Broyles*, 228 Or App 264, 208 P3d 519 (2009) for the proposition that if the statute does not expressly provide that time limitations apply to the state, the statute does not apply. *Broyles* held that the time limitation in ORS 115.408 expressly applied to an action brought by the state. However, a negative inference from *Broyles* cannot be drawn that if the statute does not expressly say that a time limitation applies to the state, then the limitation does not apply to an action brought by the state.

"ORS 12.250 makes most Chapter 12 statutes of limitation inapplicable to actions by the state. Actions brought by the state can be subject to applicable statutes of limitation that are outside of Chapter 12. However, Respondent has not pointed to an applicable statute of limitation for wage claims under ORS 652.310 to ORS 652.414.

"Respondent received actual notice of the tort claim for Barrett on or about November 14, 2019, although the notice was dated October 30, 2019, and incorrectly stated that the respondent was the University of Portland. (Ex. R9 page 5) A corrected notice was sent naming the correct Respondent on November 25, 2019. (Ex. R10) Barrett filed his wage claim with the Agency on either October 15 or October 28 of 2019. There are two date stamps on

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his wage claim form. (Agency Ex. 1 page 1; Ex. R6 page 1). The OOD regarding Bennett was issued on November 26, 2019, and the OOD for Loos was issued on April 1, 2020.

“A Notice of Tort Claim dated February 19, 2020, was sent to Respondent regarding Loos. Loos filed his wage claim with the Agency on either October 7, 2019, or February 12, 2020. There are two date stamps on Loos’s wage claim. (Agency Ex. 1 page 1, Ex. R14, page 1)

“Respondent cites to *In the Matter of Brown Architectural Sheetmetal, Inc. and Braun Metals Company, LLC*, and *Marc Brown*, 35 BOLI 68, 103 (2016) for the holding that the statute of limitations in ORS 12.080(1) applies to a wage claim for regular wages. However, there was no discussion of how that determination was reached. As stated above, per ORS 12.250 and the holding in *Shasta View Irr.*, the time limitations in Chapter 12 do not apply in this matter. Therefore, Respondent’s motion regarding the statute of limitation is denied.

“Collective Bargaining Agreement

“Respondent argues that the Agency is precluded from seeking unpaid overtime wages because the wage claimants were under a collective bargaining agreement (CBA) and Article 25 of the CBA prohibits overtime without prior management approval. (R20 page 48) The OODs do not seek overtime payment. (OODs) They seek wages at the claimants’ regular hourly rate. Therefore, Section 25 of the CBA is not applicable.

“Respondent argues that the claimants were required to adhere to the CBA’s grievance process contained in Article 18. (R20 pages 25-26, Respondent’s motion page 7) In addressing this argument in a light most favorable to the Agency, the argument fails. Respondent exerted control over the claimants when the claimants’ supervisor and personnel from DPSST told the claimants not to include any hours over 40 per week on their timecards unless the hours were reflected on the schedule controlled by DPSST. The claimants were subject to discipline if they refused to perform tasks required by DPSST in addition to the 40-hour workweek. Under these circumstances, the grievance procedure is pointless. Respondent’s reliance on the CBA regarding claimants requesting overtime pay and failing to go through the grievance procedure under the CBA is misplaced. Respondent’s motion as it pertains to the CBA is denied.

“Respondent’s Fairness Argument

“Respondent maintains that its motion for summary judgment should be granted because fairness requires it. Respondent cites to OAR 839-050-0150(4)(a)(C) which provides for a motion for summary judgment for just reasons. Respondent states that it would be unjust to allow the wage claimants to pursue this matter without complying with the elements

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Respondent feels are necessary for the claimants to pursue their claims. Respondent further argues that allowing these claims to go forward would create an undue hardship on Respondent.

“However, in viewing the evidence in the light most favorable to the Agency as the non-moving party, there is evidence that Respondent orchestrated this scenario. The Agency alleges that the wage claimants were required to perform duties in addition to the hours they were allowed to show on their timecards. These duties included, among other things, cleaning dorm rooms and restrooms. If they did not perform the additional duties, the wages claimants were subject to discipline. (Agency’s Response pages 2-3, Declarations of Barrett and Loos) Respondent placed the claimants in this untenable position and cannot now benefit from doing so. Accordingly, this portion of the motion is also denied.

“Sovereign Immunity

“Respondent filed a Reply to the Agency’s Response and stated that either the OTCA or sovereign immunity applied to this matter. The applicability of the OTCA was previously discussed.

“The Oregon Constitution provides that sovereign immunity may be waived by the legislature. Art. IV, Sec. 24; see *MacPherson v. DAS*, 340 Or 117, 136-138, 130 P3d 308, (2006) (Art. IV Sec. 24 allocates power to wave sovereign immunity to the legislature). The waiver of sovereign immunity must be clearly indicated by the legislature, i.e., the statute must contain wording expressing that the provisions apply to public bodies such as BOLI. See, e.g., *Newport Church of the Nazarene v. Hensely*, 335 Or 1, 17 P3d 386 (2002) (general statute not applicable to the state because there was no express wording in the statutory provision that applied to public bodies for a waiver to sovereign immunity).

“There are other statutory provisions besides the OTCA provision in which the legislature has expressed a clear intent to waive sovereign immunity. See *Preble v. Centennial School District No. 287*, 298 Or App 357, 366-367, 447 P3d 42 (2019) (ORS Chapter 656, worker’s compensation statutes applied to public bodies because the legislature defined “employer” to explicitly include public employers in ORS 656.005(13(a))).

“Sovereign immunity does not apply regarding wage claim cases because the legislature expressly waived sovereign immunity when it defined ‘employer’ for wage claim purposes in ORS 652.310(1) to include state agencies. The statute states:

“(1) ‘Employer’ means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes any successor to the business of any employer, or any lessee or purchaser of any employer’s business property for the continuance of the same

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business, so far as such employer has not paid employees in full. 'Employer' includes the State of Oregon or any 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 but does not include:

(a) The United States.

(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof."

"(Emphasis added).

"Therefore, sovereign immunity does not apply when BOLI enforces wage claims against other state agencies pursuant to ORS 652.310 through 652.414.

"For the above reasons, Respondent's Motion for Summary Judgment is **DENIED**.

"IT IS SO ORDERED." (Ex. X32)

23) On May 27, 2021, the forum issued an Interim Order Video Information. The forum subsequent issued an Amended Interim Order Video Hearing Information (Case No. Correction). (Exs. X33-X34)

24) On June 9, 2021, the parties jointly filed Stipulated Facts setting forth the facts that the parties requested the forum to consider in issuing a proposed order. (Ex. X35)

25) On June 10, 2021, the forum issued an Interim Order Re Stipulated Facts informing the parties that the forum would be treating the filing of the Stipulated Facts as a motion for a hearing on those facts. (Ex. X36)

26) On August 13, 2021, the forum issued an Interim Order Re Administrative Exhibits informing the parties that the Administrative Exhibits (X1-X37) would be admitted if the parties had no objection. (Ex. X37)

27) On December 6, 2021, the forum issued an Interim Order Re ALJ Change assigning the matter to the undersigned.

28) On February 10, 2022, the ALJ issued a Proposed Order that notified the participants they were entitled to file exceptions to the Proposed Order within ten days

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of its issuance. The parties timely filed their exceptions on February 22, 2022. The exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) The University of Oregon is a state governmental entity under ORS 352.002 and 352.033. See Respondent's Exception 1.

2) On June 9, 2021, the parties filed the following Stipulated Facts:³

"Claimant Steven Barrett (Case No. 84-20)

- "1) Claimant Officer Steven Barrett ("Barrett") was hired by the University as a Police Officer 1 on October 7, 2013.
- "2) Barrett attended the Department of Public Safety Standards and Training ("DPSST") police academy in Salem, Oregon from October 13, 2013, to February 21, 2014.
- "3) The DPSST police academy, or comparable out-of-state training, is required training for all officers in the state of Oregon. See ORS181A.410; OAR 259-008-0025.
- "4) Barrett's time records submitted to the University during his time at the DPSST academy show that he worked 40-hour weeks and had a total of 46.5 hours of overtime while at the academy. See Ex. SF1.
- "5) Barrett was compensated for the time reported on his time sheets, as reflected in the University's payroll files. Exs. SF2-SF3.
- "6) For the purposes of avoiding costs associated with a contested case hearing and resolving factual disputes in this proceeding only, the Parties agree that Barrett worked an additional 63.25 hours of uncompensated time, subject to a \$22.60/hour rate of compensation while at DPSST academy. Barrett alleges that this time was spent participating in formations, marching and colors, and homework outside of class time, and that he did not report the time because these activities were not reflected on the DPSST schedule.
- "7) With respect to the uncompensated hours in paragraph 6, the Parties agree that Barrett did not record the hours on his time sheets, did not request approval for the additional work under the

³ Exhibits to Stipulated Facts are referred to as "Ex. SF" for clarity.

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collective bargaining agreement, and did not file a grievance related to his compensation through the University's official channels.

- "8) On September 30, 2019, Barrett signed an Assignment of Wages form to "hereby assign in trust to the Labor Commissioner of the State of Oregon all wages, whether penalty or otherwise, due me from my previous employer, or any other persons legally responsible for the payment of my wages." Ex. SF4.
- "9) On or about October 11, 2019, Barrett filed a wage claim with the Agency. Ex. SF5.
- "10) The Agency issued a Notice of Tort Claim to the University on October 30, 2019. Ex. SF6.
- "11) On November 19, 2019, the University provided a Wage Claim Investigation/ Employer Response denying that any wages were due. Ex. SF7.
- "12) On or about November 25, 2019, the Agency sent a revised Notice of Tort Claim on behalf of Barrett correcting the proper employer. Ex. SF8.
- "13) On November 26, 2019, the Agency issued an Order of Determination. Ex. SF9.
- "14) On December 23, 2019, the University timely filed its answer denying that any wages were due, asserted affirmative defenses, and requested a contested case hearing. Ex. SF10.
- "15) On September 23, 2020, the ALJ consolidated Barrett's case (Case No. 84-20) with that of John Loos (Case No. 01-21).

"Claimant John Loos (Case No. 01-21)

- "16) Claimant Officer John Loos ("Loos") was hired by the University as a public safety officer in September 2010, and became a Police Officer 1 on October 7, 2013.
- "17) Loos attended the DPSST police academy in Salem, Oregon, at the same time as Barrett, from October 13, 2013, to February 21, 2014.
- "18) According to University pay records, during the time he was at DPSST, Loos worked 40 hour work weeks and was compensated for 54 hours of overtime. See Ex. SF3.

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- “19) For the purposes of avoiding costs associated with a contested case hearing and resolving factual disputes in this proceeding only, the Parties agree that Loos worked an additional 63.25 hours of uncompensated time, subject to a \$22.60/hour rate of compensation, while at DPSST academy. Loos alleges that this time was spent participating in formations, marching and colors, and homework outside of class time, and that he did not report the time because these activities were not reflected on the DPSST schedule.
- “20) With respect to the uncompensated hours in paragraph 19, the Parties agree that Loos did not record the hours on his time sheets, did not request approval for the additional work under the collective bargaining agreement, and did not file a grievance related to his compensation through the University's official channels.
- “21) Loos' last day of employment with the University was April 12, 2019.
- “22) n October 3, 2019, Loos signed an Assignment of Wages form to "hereby assign in trust to the Labor Commissioner of the State of Oregon all wages, whether penalty or otherwise, due me from my previous employer, or any other persons legally responsible for the payment of my wages." Ex. SF11.
- “23) On or about October 4, 2019, Loos filed a wage claim with the Agency. Ex. SF12.
- “24) On February 19, 2020, the Agency sent the University a Notice of Tort Claim alleging that Loos was not fully compensated for work performed from October 13, 2013, through February 21, 2014. Ex. SF13.
- “25) On March 11, 2020, the University provided a Response to Loos's claim. Ex. 14. 26. On April 1, 2020, the Agency issued an Order of Determination. Ex. SF15.
- “26) On April 17, 2020, the University timely filed its answer, asserted affirmative defenses, and request for contested case hearing. Ex. SF16.
- “27) On September 23, 2020, the ALJ consolidated Loos' case (Case No. 01-21) with that of Steven Barrett (Case No. 79-20). Collective Bargaining Agreements

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- “28) At the time Claimants attended police academy, UOPD officers were represented by the Service Employees International Union (SEIU).
- “29) Claimants' employment during their time at police academy was governed by the SEIU collective bargaining agreement (CBA) dated 2013-2015 and attached at Exhibit 17. The relevant provisions of the CBA are as follows:

“ARTICLE 25: OVERTIME

“**Section 2.** Overtime Work Definition. Overtime for employees working a regular work schedule, as defined in Article 55, Section 1— Work Schedules, is time worked in excess of either (a) eight (8) hours per day; (b) ten hours per day for employees working a 4-10 schedule; (c) the agreed-upon hours each day for employees working other repeating work schedules; or (d) forty (40) hours per work week. Overtime for employees working a flexible work schedule, as defined in Article 55, Section 1, is time in excess of the agreed upon hours each day or time in excess of forty (40) hours per work week.....

“**Section 4(C).** No overtime is to be worked without the prior authorization of management.

“Ex. SF17 at p. 47-48.

“ARTICLE 18: GRIEVANCE AND ARBITRATION PROCEDURE

“**Section 1.** Grievances are defined as acts, omissions, applications or interpretations alleged to be violations of the terms or conditions of this Agreement. Grievances shall be filed within thirty (30) calendar days of the date the grievant or the Union knows or by reasonable diligence should have known of the alleged grievance, or in the case of discipline, within thirty (30) calendar days of the effective date of the action. In the event that a deadline for filing a grievance, submitting a grievance response, or appealing a grievance response falls on a Saturday, Sunday or university holiday, such action will be considered timely if it is taken by 5:00 p.m. on the following business day (Monday —Friday).

“Grievances shall be reduced to writing, and shall be signed by the grievant(s), stating the specific Article(s) alleged to have been violated and clear explanation of the alleged violation, sufficient to allow processing of the grievance. In the case of group grievances, the grievance shall specifically enumerate, by name, the affected employees, when known. Otherwise, the affected employees will be generically described (i.e., work location, classification, approximate number of employees) in the

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grievance. Grievances shall be filed at all steps of this procedure on the form identified as the Official Statement of Grievance Form. Once filed, the Union shall not expand upon the original elements and substance of the written grievance.

“All grievances shall be processed in accordance with this Article and it shall be the sole and exclusive method of resolving grievances....

“Section 2. Time limits specified in this and the above-referenced Articles shall be strictly observed, unless either party requests a specific extension of time, which if agreed to, must be stipulated in writing and shall become part of the grievance record. "Filed" for purposes of all grievances shall mean postmarked (dated by meter or U.S. Post Office), or faxed, emailed or hand-delivered by the close of the business day (5:00 p.m.) to the appropriate office identified in Appendix I of this Agreement.

“Ex. SF17 at p. 25-26.

“Jurisdiction

“31) The Parties agree that the Bureau of Labor and Industries has jurisdiction over this matter pursuant to ORS 652.330(1)(d).”

(Ex. X35)

CONCLUSIONS OF LAW

1) Respondent is a state governmental entity under ORS 352.002 and 352.033.

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

3) BOLI's Commissioner has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405

4) Barrett performed 63.25 of work time while attending the DPSST police academy from October 13, 2013, to February 21, 2014, for which Respondent owes him \$1,429.45 in unpaid wages. ORS 653.010(11) and OAR 839-020-0004(19)

5) Loos performed 63.25 hours of work time while attending the DPSST police academy from October 13, 2013, to February 21, 2014, for which Respondent owes him \$1,429.45 in unpaid wages. ORS 652.332(1) and OAR 839-020-0004(19)

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6) Interest on the wages due to both Barrett and Loos runs from the date the evidence shows the wages to be due, which was the first pay day after the wages were earned. ORS 82.010(1)(a).

7) 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 both Barrett and Loos their earned, unpaid, due and payable wages. ORS 652.332(1) and OAR 839-020-0004(19)

OPINION

The Agency is not seeking unpaid overtime wages or civil penalties in this matter.⁴ Ex. R9. Therefore, the issue that remains is whether Respondent owes unpaid regular wages for time spent by Barrett and Loos participating in formations, marching and colors, and homework outside of class time, and that he did not report the time because these activities were not reflected on the DPSST schedule while attending the police academy in Salem, Oregon from October 13, 2013, to February 21, 2014.

"The elements of a wage claim are (1) respondent employed the claimant; (2) the agreed upon wage if other than minimum wage; (3) the amount and extent of the work performed by the claimant for the respondent; and (4) claimant performed work for which the claimant was not compensated." *In the Matter of Oregon Fir Millwork, Inc.*, 37 BOLI 2, 5 (2017).

ORS 653.010(2) defines "employ" to include "suffer or permit to work...". OAR 839-020-0004(19) provides:

"'Hours worked' means all hours for which an employee is employed by and required to give to the employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed workplace and all time the employee is suffered or permitted to work. 'Hours worked' includes 'work time' as defined in ORS 653.010."

ORS 653.010(11) defines "work time" as including "* * * both time worked and time of authorized attendance."

OAR 839-020-0040(2),(3),(4) further clarifies:

* * * * *

"(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.

⁴ ORS 653.269 exempts employees engaged in law enforcement activities, as defined under OAR 839-020-0220 (3), (4), from overtime payment rates.

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- “(3) Work performed for the employer but away from the employer’s premises or job site is considered work time. If the employer knows or has reason to believe that work is being performed, the time spent must be counted as hours worked.
- “(4) It is the duty of the employer to exercise control and see that the work is not performed if it does not want the work to be performed. The mere promulgation of a policy against such work is not enough.”

However, attendance at training programs need not be counted as work time under OAR 839-020-0044(1) if the following four criteria are met:

- (a) Attendance is outside of the employee’s regular working hours;
- (b) Attendance is voluntary;
- (c) The course, lecture, or meeting is not directly related to the employee’s job; and
- (d) The employee does not perform any productive work during such attendance.

The evidence shows that neither Barrett nor Loos met any of the four criteria set forth under OAR 839-020-0044. Barrett and Loos attended the police academy during regular working hours. Neither Barrett’s nor Loos’ attendance was voluntary. Further, the training was directly related to and required for them to continue their work as police officers for Respondent. Further, there has been no showing that neither Barrett nor Loos performed any productive work during their attendance at the police academy. Therefore, the time Barrett and Loos spent at the DPSST police academy from October 13, 2013, to February 21, 2014, is compensable at their regular hourly rate of \$22.60. Accordingly, the forum concludes that Barrett and Loos are each owed \$1,429.45 in unpaid wages (63.25 hours x. \$22.60) for time spent at the police academy from October 13, 2013, to February 21, 2014.

Exceptions to the Proposed Order

Agency’s Exceptions

On February 22, 2022, the parties timely filed exceptions to the Proposed Order. The Agency filed ten exceptions requesting the forum make corrections to scrivener’s errors and legal citations. The Agency’s exceptions are well taken and **GRANTED** as reflected above.

Respondent’s Exceptions

Exception 1

Respondent’s Exception 1 seeks to include a finding that the Respondent is a state governmental entity under ORS 352.002 and 352.033. Respondent’s Exception 1

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is well taken and **GRANTED** as reflected in Findings of Fact – the Merits.

Exception 2

Respondent's Exception 2 seeks to include a finding that it is entitled to sovereign immunity that can only be waived by the legislature. Respondent's Exception 2 mirrors its argument in its motion for summary judgment. Respondent argues that the state entity's sovereign immunity can be waived only by legislative action. See e.g., *MacPherson v. Dep't of Admin. Servs.*, 340 Or 117, 137, 130 P3d 308, 320 (2006); *Schrader v. Veatch*, 216 Or 105, 107–09, 337 P2d 814 (1959). Respondent argues the forums reliance on *Preble v. Centennial Sch. Dist. No. 287*, 298 Or App 357, 447 P3d 42 (2019) is incorrect in that the *Preble* court "faced two statutes with conflicting rights of action and limitations periods, both of which applied to state employers * * * as opposed to here where the only right of action is the employee's underlying wage claim, which can be brought against the University of Oregon only if there is a waiver of sovereign immunity." (Respondent's Exceptions, p. 3-4)

Respondent's argument does not address the language of ORS 652.310(1) which includes the State of Oregon in the definition of "employer." The State of Oregon is not included in those entities excluded from the definition of "employer." See ORS 652.310(1)(a),(b). If the legislature had intended to exclude state entities such as Respondent, it presumably would have done so. Rather, the legislature specifically included state entities in the definition of employers subject to Oregon's wage laws. Given the legislature's grant of authority in ORS 652.330(1) to the Commissioner to "[i]nvestigate and attempt equitably to adjust controversies between employers and employees in respect of wage claims or alleged wage claims," the forum is not persuaded that Respondent, as a state entity, is entitled to sovereign immunity. Therefore, Respondent's Exception 2 is **OVERRULED**.

Exception 3

Respondent's Exception 3 argues that, if the wage claims at issue in this case arise from statute, notice within 180 days of the loss or injury, ORS 30.275(2), and the two-year statute of limitations, ORS 30.275(9), required under the Oregon Tort Claims Act ("OTCA") apply. Respondent contends that neither were met in this case and, therefore, the claims are untimely. Respondent concedes an exception exists for private entities against which wage claims are filed. See ORS 12.250. However, Respondent argues that claims against a state entity are subject to the OTCA limitations periods and not those arising under Chapter 12.

As noted in the Interim Order Re Respondent's Motion for Summary Judgment, "[t]his matter is before the forum as the result of a failure to pay all wages due under an employment contract. (Agency's Response page 7) As the duty to pay the claimants is based upon a contract, the OTCA does not apply." *Id.*, p. 7. Further, as the Agency argued in its response to the motion for summary judgment, this is an administrative proceeding as there is no plaintiff involved. The legislature made a clear distinction between an administrative proceeding and a civil action. See ORS 652.035(1), ORS

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652.230(1)(2), ORS 652.235, ORS 279C.855(5). Therefore, the forum is not persuaded that the OTCA applies to wage claims brought by the Agency pursuant to ORS 652.310 to 652.414.

Statute of Limitations

Respondent further argues that the wage claims are barred by the statute of limitations. Respondent relies upon cases involving claims for unpaid overtime wages under the FLSA. Unlike those cases, this case involves only an assigned wage claim.

The Commissioner of the Bureau of Labor and Industries, a state agency, issued an administrative notice in this matter that it was seeking unpaid wages owed to the claimants in this matter. ORS 12.250 provides:

“Unless otherwise made applicable thereto, the limitations prescribed in this chapter shall not apply to actions brought in the name of the state, or any county, or other public corporation therein, or for its benefit.”

Both the Commissioner and the Agency are part of state government. See ORS 174.111, 174.112. If the legislature had intended to include a statute of limitations on wage claims brought in the name of the state it could have done so. *State Land Board v. Lee*, 84 Or. 431, 434 165 P 372, 373 (1917)(“Stated in broad terms, it is a rule of universal recognition that the government is not included in a general statute of limitation, unless it is expressly or by necessary implication included.”). This matter has been brought in the name of the Agency. Therefore, the time limitations in ORS Chapter 12 do not apply. See *Shasta View Irr. Dist.*, 329 Or 151, 158, 986 P2d 536 (1999).

Collective Bargaining Agreement

Respondent also raises the argument that the wage claims, if considered contract claims, are precluded by the terms of the parties’ contract that requires a 30-day notice period and limits the venue for addressing such claims to a grievance process culminating in arbitration. Respondent argues that the only contractual provisions addressing wages are set forth in the parties CBA, which provides that the exclusive remedy for violations of the terms and conditions of the CBA is a grievance under Article 18, which must be filed within 30 days of the violation and appealable only to arbitration.

The claims at issue in this matter arise from Oregon’s wage statutes. While the CBA clearly addresses the terms and conditions of employment, the existence of the CBA does not necessarily preclude the recovery of unpaid wages under state law. See *Hawaiian Airlines, Inc. v. Norris*, 512 US 246, 262–63, 114 SCt 2239, 129 LEd2d 203 (1994)(“Setting minimum wages, regulating work hours and pay periods, requiring paid and unpaid leave, protecting worker safety, prohibiting discrimination in employment, and establishing other worker rights remains well within the traditional police power of the states * * *”). Therefore, the forum is not persuaded that the CBA precludes the wage claims involved in this matter. For the reasons noted above, as well as the analysis set forth in the

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Interim Order Re Respondent's Motion for Summary Judgment , Respondent's Exception 3 is **OVERRULED**.

Exception 4

All defenses and jurisdictional arguments from Respondent's Request for Contested Case Hearing and Answer to Order of Determination; Motion for Summary Judgment; and Reply in Response to Summary Judgment are hereby preserved as requested in Respondent's Exception 4.

Exception 5

Respondent's Exception 5 seeks to limit any interest payments to the date of the notice, i.e., October 30, 2019, for Claimant Barrett and February 19, 2020, for Claimant Loos, rather than March 1, 2014, which would have been the first day after the end of the February 2014 pay period in which the wages were found to have been earned by both Claimants. See Stipulated Facts (Exs. SF2-SF3)

Respondent argues that ORS 82.010, as interpreted by Oregon courts, provides that interest accrues only that the time the money becomes "due." Respondent does not address the application of ORS 652.120, which addresses when wages due and owing to employees are to be paid. This is an action to collect wages owed to the Claimants for work performed during the period of October 13, 2013, to February 21, 2014. Those wages would have been due and owing to both Barrett and Loos at the next payday, which would have been no later than March 1, 2014. Therefore, the forum is not persuaded that it would be appropriate to limit any interest payments to the date of Notice of Tort Action. Therefore, Respondent's Exception 5 is **OVERRULED**.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent University of Oregon** 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, two certified checks payable to the Bureau of Labor and Industries in trust for Claimant Steven Barrett and Claimant John Loos each in the amount of **ONE THOUSAND FOUR HUNDRED TWENTY-NINE AND FORTY-FIVE CENTS** (\$1,429.45), less appropriate lawful deductions, representing \$1,429.45 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on the sum of \$1,429.45 from March 1, 2014, until paid.

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**In the Matter of
SIS-Q Cellular, LLC, Respondent,
Case No. 35-20**

**Final Order of Commissioner Val Hoyle
Issued July 5, 2022**

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant had been discriminated against and terminated on the basis of opposition to an unlawful employment practice in violation of ORS 659A.030(1)(f), the Commissioner dismissed the complaint and Formal Charges. OAR 839-005-0125(1)-(3) and OAR 839-005-0010(1)(d)(A) and (B).

The above-entitled case came on regularly for hearing before Cynthia L. Domas designated as Administrative Law Judge (“ALJ”) by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 25, 2021, via the GoTo Meeting application. The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by administrative prosecutor Rachel Diamond-Cuneo (“Diamond-Cuneo”), an employee of the Agency. Respondent Sis-Q Cellular, LLC (“Sis-Q”) was represented Dominic M. Campanella (“Campanella”), attorney at law. Sis-Q owner Barbara Porter (“Porter”) was present throughout the hearing.

The Agency called Leila Wall (“Wall”), Operations Manager-Portland, Civil Rights Division (“CRD”); Complainant Jennifer Joyce (“Joyce”); Cezanne Jensen (“Jensen”), Joyce’s daughter and former Sis-Q sales associate; Sarah Chavez (“Chavez”), former Sis-Q administrative assistant; and Chris Ball, former Allen Creek Sis-Q Store Manager, as witnesses. Sis-Q called Michael Campbell (“Campbell”), Sis-Q owner, and Laura Weigand (“Weigand”), Sis-Q’s Director of Operations, as witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X24; (b) Agency exhibits A1 through A13; and (c) Sis-Q exhibits R1 through R25.¹

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

¹ The second page of R1 was excluded as it contained personal information of individuals who are not parties to this matter.

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

FINDINGS OF FACT – PROCEDURAL

1) On September 27, 2018, Joyce filed a complaint with the Agency's Civil Rights Division alleging Sis-Q engaged in "unlawful employment practices in that [Sis-Q] subject[ed] her to different terms and conditions of employment because of her opposition to unlawful employment practices, sex, age, and use of the Oregon Sick Time Leave (OSTL)." (Ex. A1, Testimony of Wall)

2) On September 27, 2019, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence that Sis-Q subjected Joyce to different terms and conditions of employment on the basis of opposition to an unlawful employment practice in violation of ORS 659A.030(1)(f). The SED also found that Campbell was an aider and abettor in the unlawful employment practice pursuant to ORS 659A.030(1)(g). (Ex. A12; Testimony of Wall)

3) The SED also included the Agency's Civil Rights Division's findings that there was no substantial evidence showing that Joyce was subject to different terms and conditions of employment on the basis of sex and/or age. Further, the SED included a finding that there was no substantial evidence showing Joyce was subject to different terms and conditions of employment due to her use of OSTL. (Ex. A12; Testimony of Wall)

4) On April 9, 2020, the forum issued a Notice of Hearing to Respondent, the Agency and the Complainant stating the time and place for hearing as October 6, 2020, beginning at 9:30 a.m., at the Oregon Employment Department, 119 N. Oakdale Ave., Medford, Oregon, 97501. 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)

5) The Formal Charges alleged that Respondent Sis-Q engaged in an unlawful employment practice under ORS 659A.030(1)(f), OAR 839-005-0125(1)-(3), and OAR 839-005-0010(1)(d)(A) and (B). The Formal Charges did not allege that Campbell was an aider and abettor of the unlawful employment practice. The Formal Charges sought "out of pocket expenses in the amount of \$4,000.00; lost wages in the amount of \$7,292.00; and damages for emotional, mental, and physical suffering in the amount of at least \$40,000.00." (Ex. X2b)

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

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6) On April 10, 2021, the forum sent an email to the parties setting forth the procedures implemented due to the impact of the COVID-19 outbreak. The forum subsequently issued an Interim Order Re Temporary Procedures on April 13, 2020, noting that counsel had consented to receive filings via email. (Exs. X3, X5)

7) On April 27, 2020, Sis-Q filed Respondent's Answer in which it denied the allegations set forth in the Formal Charges. (Ex. X6)

8) On April 29, 2020, the Agency filed its Notice of Reassignment indicating that Chief Prosecutor Cristin Casey would be representing the Agency. The Agency subsequently filed a Notice of Change in Assigned Prosecutor indicating that Diamond-Cuneo would be representing the Agency. (Exs. X7, X8)

9) On June 11, 2020, the forum issued an Interim Order Requiring Case Summaries to be Filed and Setting Case Deadlines. (Ex. X9)

10) The forum issued an Interim Order Amending Case Deadline Dates on June 29, 2020. The forum subsequently issued an Interim Order Rescheduling Hearing Date and Setting New Case Summary Deadline on August 24, 2020. (Exs. X10, X11)

11) On December 4, 2020, the forum issued an Interim Order Re Change of ALJ. (Ex. X12)

12) On February 10, 2021, the forum issued an Interim Order Setting Video Hearing. (Ex. X13)

13) On February 22, 2021, Sis-Q filed Respondent's Motion for Summary Determination arguing there was no genuine dispute as to any material fact and the Respondent was entitled to judgment as a matter of law. The Agency timely filed its response to the motion on March 3, 2021. (Exs. X14 – X 18)

14) On April 6, 2021, the parties timely filed their respective Case Summaries. (Exs. X19, X20)

15) On May 3, 2021, the forum issued an Interim Order Re Respondent's Motion for Summary Judgment which stated:

"On February 22, 2021, Respondent Sis-Q-Cellular, LLC ("Sis-Q") filed a motion for a summary 'determination' seeking a dismissal of the Formal Charges, arguing that the Agency 'has failed to allege facts sufficient to constitute grounds that Sis-Q engaged in or committed any unlawful employment practice.' Because BOLI's contested case rules do not provide for motions for summary determinations, this motion will be treated as a motion for summary judgment under OAR 839-050-0150(4). After obtaining an extension of time to respond, the Agency submitted a timely response to Sis-Q's motion on March 3, 2021.

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

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

ORCP 47C. In reviewing a motion for summary judgment, this forum draws 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 Derrick’s Custom Painting, Inc.*, 37 BOLI 271, 275 (2020). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants’ pleadings and other filings. *In the Matter of F.R. Custom Builders, Inc.*, 20 BOLI 102, 104 (2000).

“The record considered by the forum in deciding this motion consists of the Agency’s Formal Charges, Sis-Q’s Answer to the Formal Charges, Sis-Q’s motion and the Agency’s response to the motion.

“The Formal Charges allege that Sis-Q discriminated against and terminated Complainant because she opposed an unlawful practice, in violation of ORS 659A.030(1)(f). That statute provides that it is an unlawful employment practice:

‘For any person to discharge, expel, or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.’

ORS 659A.030(1)(f). To establish an ORS 659A.030(1)(f) claim, the Agency must show that (1) Complainant ‘engaged in the protected activity of complaining of discrimination,’ (2) Complainant was subject to discriminatory action, and (3) the discriminatory action was taken against her because of her protected complaint. *Meyer v. State by & through Oregon Lottery*, 292 Or App 647, 678, 426 P3d 89 (2018), *citing Medina v. State of Oregon*, 278 Or. App. 579, 588, 377 P.3d 626 (2016). See also *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166 (2012). (‘The Agency’s prima facie case in an ORS 659A.030(1)(f) retaliatory discharge case consists of the following elements: (1) Complainant opposed an unlawful employment practice; (2) [the respondent] discharged

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Complainant; and (3) there is a causal connection between Complainant's opposition and her discharge.')

"In its motion, Sis-Q argues that the Formal Charges do not allege ultimate facts sufficient to constitute grounds that Sis-Q engaged in sexual harassment, unlawful harassment or any other unlawful employment practice as to Complainant, Cezanne Jensen. Sis-Q asserts that the Formal Charges fail for two reasons. First, Sis-Q argues that the Agency did not allege 'that any Sis-Q employee actually sexually harassed' Complainant. Second, Sis-Q contends that the Formal Charges 'are completely devoid of any allegation that [C]omplainant somehow 'opposed' any unlawful practice by Sis-Q.' In essence, Sis-Q argues that the Agency did not allege sufficient facts to support Element 1 of the prima facie case.

"With respect to Sis-Q's first argument, it is not necessary for the Agency to show that Complainant was the person who was sexually harassed. Rather, as described above, the Agency need only show that Complainant engaged in a protected activity by opposing an unlawful practice. As well, the Agency need not prove that an unlawful practice actually occurred, but can also prove that Complainant opposed what she "reasonably believed to be an unlawful practice." OAR 839-005-0125.

"Second, Sis-Q argues that there are no allegations to show that Complainant actually opposed an unlawful practice. Sis-Q argues that 'the most [the Agency] has alleged is that [C]omplainant participated in a management meeting to discuss' another employee's allegations of sexual harassment. The pertinent portion of the Formal Charges state that another employee (Complainant's daughter) reported sexual harassment. After that report, Complainant met with Campbell and Schmidtke 'to discuss' her daughter's complaint. After Campbell and Schmidtke told Complainant that her daughter 'was being overdramatic[,] Complainant said that could be decided by looking at the camera recording for the incident.' Drawing all inferences against the participant filing the motion (Sis-Q) and in favor of the Agency, the forum finds that Sis-Q's motion did not demonstrate that there was no issue of material fact. Accordingly, Sis-Q's motion is DENIED.

"IT IS SO ORDERED."

(Ex. X21)

16) On May 14, 2021, the forum issued an Interim Order – ALJ Change. (Ex. X22)

17) On May 17, 2021, the Agency filed an Addendum to Agency Case Summary. (Ex. X23)

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18) On May 17, 2021, the forum issued an Interim Order Re New Dial-In Hearing Information. (Ex. X24)

19) On February 15, 2022, the forum issued an Interim Order – ALJ Change assigning the matter to the undersigned.

20) On March 24, 2022, 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.

FINDINGS OF FACTS – THE MERITS

1) At all times material herein, Respondent Sis-Q was an Oregon domestic limited company. Sis-Q is an authorized agent of US Cellular that owns and operates seven retail stores located in Josephine and Jackson Counties. (Ex. A2; Testimony of Campbell)

2) On October 13, 2017, Sis-Q hired Joyce as an Area Sales Manager. Joyce's annual salary was approximately \$50,000 at the time of her hire. Joyce was eligible for performance-based pay (e.g., commissions), which was paid on a monthly basis. Joyce was also eligible for health and vision coverage, matching IRA and other insurance benefits. Joyce was also eligible for bonuses that were paid on a quarterly basis. Joyce was also allowed to use a company owned vehicle as part of her employment. (Exs. R3, R4; Testimony of Joyce, Campbell)

3) Joyce's salary was paid on a twice monthly basis. Joyce averaged \$1,100 in monthly performance-based pay. (Ex. R4; Testimony of Joyce)

4) Joyce was hired to fill an already established position. Campbell advised Joyce during her interview that he was intending to create a second Area Sales Manager position and split supervision of the seven stores between the two positions. (Testimony of Campbell)

5) Joyce's duties as the Area Sales Manager initially included overseeing the daily operations of the seven retail stores and conducting the Monday morning leadership meetings with Campbell and the store managers. Joyce also assisted Campbell and store managers in interviewing and hiring new employees. (Testimony of Joyce and Campbell; Ex. R2)

6) Joyce's work schedule was generally 8:00 a.m. to 7:30 p.m., Monday through Friday, which were the hours Sis-Q retail stores were open to the public. Joyce also worked or was on call on Saturday and Sunday. Joyce frequently worked approximately 70 to 80 hours per week. (Testimony of Joyce)

7) Joyce was free to set her work schedule based upon business needs. Campbell did not set Joyce's work schedule or otherwise dictate the number of hours

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she worked each week. Joyce was responsive to Campbell's phone calls and text messages, many of which were sent outside of normal store hours. (Testimony of Joyce and Campbell)

Campbell Hires Schmidtke as the Second Area Sales Manager

8) Campbell had intended to hire Evan Schmidtke ("Schmidtke") as the second Area Sales Manager when he hired Joyce. Schmidtke had previously worked for US Cellular corporate and had extensive knowledge and experience in wireless sales. Schmidtke was not available to begin work at Sis-Q until April 2018. (Testimony of Campbell)

9) On or about April 30, 2018, Schmidtke began working as Sis-Q's second Area Sales Manager. (Testimony of Campbell)

10) Campbell increased Joyce's annual salary to \$56,000 to match Schmidtke's annual salary once Schmidtke was hired. In all respects, Joyce's compensation was the same or similar to that received by Schmidtke. (Testimony of Campbell)

11) Both Joyce and Schmidtke reported directly to Campbell. Campbell considered the Area Sales Managers to be the "eyes and ears" in the field interacting with employees and customers and responsible for ensuring continued profitability, customer satisfaction, and employee performance. The store managers and frontline associates reported to the Area Sales Manager assigned to their store. (Testimony of Campbell)

12) Campbell split the oversight of the stores between Schmidtke and Joyce. Campbell's assignment of stores was based on geographical considerations, as well as consideration of the number of employees at each store and each store's sales volume. Campbell wanted to ensure the assignment of stores was fair. (Testimony of Campbell)

13) Campbell initially assigned the South Medford, White City, and Ashland stores to Schmidtke. Campbell assigned the Central Point, West Medford and both stores in Grants Pass to Joyce. Campbell later assigned the Central Point store to Schmidtke. (Testimony of Campbell)

14) Both Campbell and Schmidtke were expected to be available by telephone or instant message when the stores were open for business or if issues arose after store hours. Campbell and Schmidtke's job duties were the same or similar with no significant difference between what was expected of them in terms of performance of those duties as Area Sales Managers. (Testimony of Joyce and Campbell)

15) Both Campbell and Schmidtke were required to wear clothing with Sis-Q's logo visible when they intended to spend a considerable time in a retail store or interact with customers. Retail store employees were always required to wear this "logo wear"

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when working at a store. (Testimony of Campbell; Exs. R5, R6)

16) Both Schmidtke and Joyce were required to participate in weekly leadership meetings with Campbell and the store managers. Schmidtke quickly emerged as the leader of the meetings and “organically” took over running the meetings. Campbell did not formally assign the responsibility of running the meetings to Schmidtke. (Testimony of Campbell)

17) Joyce grew concerned that Schmidtke was taking over running the leadership meetings. When Joyce shared those concerns with Campbell, he directed her to talk with Schmidtke and to find more ways to work together when she shared concerns about not being as involved as Schmidtke in the leadership meetings. Campbell also encouraged Schmidtke to “extend an olive branch” to Joyce in an effort to resolve the issue. (Testimony of Campbell)

18) Joyce and Campbell engaged in the following text message exchange after Joyce informed Campbell that she had contacted Schmidtke about meeting:

“Campbell: Hey have you reached back out to Evan to discuss calls, etc.? I really would like you to bring some ideas to the table of how you’d like to contribute and be a more vocal presence in front of the leaders, but the ideas have to come from you.

“Joyce: I have a couple of times.

***³

“Campbell: Well, follow up! This is up to you.

“Joyce: How can I make him respond or schedule something. I used to do these calls now if I offer anything up I am humiliated in front of the group. Or told we are doing those things anymore. I absolutely want to contribute! I love this team. They are an awesome group.

“Campbell: What happened to the strong independent person I hired. You are so caught up in this victim mentality it’s paralyzing you. Only you can change your mindset.

“Campbell: Thank you. Keep bringing stuff to the table. Maybe your ideas won’t always manifest themselves in the way you expect but the conversation and dialogue is critical and can’t happen if you don’t speak up.”

(Ex. A7, pp. 42, 44)

³ It appears a portion of the exchange is missing from the Exhibit A7.

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19) Joyce and Schmidtke's exchange regarding meeting included:

"Schmidtke: Let's find some time early next week, maybe Monday afternoon or Tuesday?"

"Joyce: Monday is better for me.

"Joyce: Hey Evan do you want to schedule a time to meet?"

"Schmidtke: We can find some time to meet. What did you want to discuss?"

"Joyce: The Monday calls.

"Schmidtke: Is there something specific about the Monday calls or feedback you've received? Just trying to get a better idea of what to bring.

"Joyce: How I can please have a part of them again."

(Ex. A7, p. 43)

Issues at the South Medford Store

20) Joyce's daughter, Cezanne ("CeeCee") Jensen, worked at the South Medford store and reported to Store Manager Jonny Mancilla, who reported to Schmidtke. (Testimony of Joyce, Jensen, and Campbell)

21) On May 5, 2018, Jensen sent an email to Campbell and Porter following an incident in which Mancilla, her supervisor, "pulled her shirt back...to see [her] tattoo." Jensen testified she intended to communicate to Campbell that Mancilla had pulled her shirt back to look inside her shirt. (Testimony of Jensen; Exs. A8; R8)

22) Jensen's email had the subject line: "Transfer Request" and included:

"I would like to put in a formal complaint on Jonny and transfer to either GP [Grants Pass] or White City due to a hostile work environment as soon as possible.

"Here is a list of examples as to why I feel like SM and Jonny are a hostile work environment.

- "Constant use of degrading nicknames, he never uses my actual name, even to customers
- "There was a picture on slack of Hailey outside on the corner with a US Cellular sign and he kept talking about her looking like she was a hooker and how she has gained a lot of weight and has gotten fat.

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- "He is constantly complaining about Jen [Joyce] and things she has him do.
- "Always undermines Jen and says she has no idea what she is talking about.
- "Pulled my shirt back on the back of my collar to see my tattoo to make it visible and complained about tattoo then made me wear my sweater zipped all the way up to my chin.
- "Constantly hits my arms and even when is asked to stop and I tell him that it hurts he says I barely touched you.
- "Jonny knows I don't like the noise of balloons popping, it makes me very anxious. He constantly pops the things from packages behind me and in my ear.
- "He is constantly negative.
- "Belittles me for the need to wear tennis shoes due to my foot being wrapped.
- "We feel like we are in trouble if we have to ask about scheduling or time off.
- "Makes remarks of having to clean the bathroom/back counters because they will get in trouble if anything is there by Jen.
- "Not allowed to do events anymore. He said they are stupid and a waste of time.
- "Lied and said he wasn't told about the gold hill event but he was in the emails and was asked by Stefanie if it was on beforehand.
- "When I asked for my vacation he said I better not hurt or break my other foot or get sick otherwise he would not allow me to go.

"He has made it very clear that he dislikes Jen. He has been taking it out on me personally and makes my work atmosphere feel hostile.

"Please consider this move as soon as possible, as I can no longer work in these conditions."

(Testimony of Jensen; Exs. A8, R8)

23) Campbell responded to Jensen approximately 13 minutes after receiving her email:

"I am very concerned to hear this. Thank you for letting me know. We take these things very seriously and will investigate immediately. What was the most recent thing you experienced that caused you to make this request?

"Did you happen to document any specific dates and times when any of this occurred? Don't stress if not, I know that could be a tall order, but worth asking anyway. At the very least what would be most helpful is if you can remember if anyone else has witnessed this behavior or was in the store when these things happened. I would be very interested to talk to those people too.

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"Hang in there. As I said we will investigate immediately."

(Exs. A8, pp. 3-4)

24) Jensen responded:

"The most recent thing was the increase on the crap talking about Jen in front of me as well as him continuing to call me by every other name and also telling customers to call me whatever he is calling. I feel it is completely disrespectful. I don't have a list of dates or times but for the most part anyone who has worked in my store with the both of us has been there when some of those things have occurred. Chris, Shawn, and Luke have been there to witness most of it...seeing how Luke hasn't been in our store for quite sometime that kind of shows how long this has been going on. The people who have trained in our store have witnessed some of it as well. I know Desirae knows about the balloons thing [because] he kept doing it while she was in our store. As far as the name thing goes everyone who has been in our store has witnessed that. Kaleigh, Avram, Stefanie and Brian have probably witnessed a thing or two as well. The hitting me in the arm I can't even think of who has been there when he's done it but 9 times out of 10 there has been someone there when he has. I don't mean to cause any problems, I just have been having a hard time letting it continue to pile up after so long. I love this company and working for it."

(Exs. A8, pp. 2-3; R8)

25) Campbell considered Jensen's complaint to be one of harassment. Campbell did not interpret her complaint to be alleging sexual harassment. (Testimony of Campbell)

26) Campbell forwarded Jensen's first email to Schmidtke so he could investigate the allegations. Schmidtke had only been an Area Sales Manager a few days when he received Jensen's complaint. (Ex. R8)

27) Campbell approved Jensen's request to transfer to a different store. Jensen was assigned to the Ashland store because it was the only store that had an opening. Jensen had requested a transfer to a different store that had a sales volume similar to that of the South Medford so she did not suffer a loss of income. Jensen was subsequently offered Sunday shifts at the South Medford store so she could earn additional income. Jensen accepted the offer to work at the South Medford store on Sundays, because Mancilla did not work that day. (Testimony of Campbell)

28) In addition to the store having an opening, Campbell assigned Jensen to work at the Ashland store because he thought she would be able to build the store's business. Campbell had assumed Jensen would one day become a Sis-Q store manager and thought working in the Ashland store would help her gain experience that

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would benefit her as a manager. (Testimony of Campbell)

29) On May 6, 2018, Schmidtke sent a Key Leader Meeting invite to Joyce and Campbell for the next day. The meeting was intended to be a planning meeting unrelated to Jensen's complaint. Jensen's complaint was raised during the course of the meeting, and Joyce indicated she wanted to stay out of it because Jensen was her daughter. (Testimony of Campbell; Ex. R9)

30) On May 8, 2018, Schmidtke emailed Campbell his documentation regarding his interviews with Jensen and Mancilla. (Exs. R11, R13)

31) On May 8, 2018, Jensen sent an email to Campbell in which she acknowledged speaking to Schmidtke about transferring from the South Medford store. Jensen wrote:

"I reached out to Evan this morning just a little bit ago. As I let Evan know today Jonny hit me on camera at 11:13 am yesterday, I thought maybe that would be the last time since Evan came and talked to him after speaking to me yesterday. I was scheduled to work at 10:30 am today and at 10:53 am Jonny hit me in each of my shoulders and said that is his only way of 'cheering me up' was to push or hit me. I told Evan I have decided to go through with the transfer as it is not ok for Jonny to touch, push, or hit me. I honestly wanted to walk out and leave today because of this but as I previously mentioned I love this company and working for it."

(Ex. A8, p. 2)

32) Schmidtke ultimately decided to coach and counsel Mancilla regarding professional behavior at work and require him to review the policy guide, with particular attention paid to the sections pertaining harassment. Schmidtke also required Mancilla to take online training offered by US Cellular regarding harassment and professionalism. Schmidtke did not recommend termination. (Testimony of Campbell)

33) On May 10, 2018, Jensen sent an email to Campbell requesting "a copy of the video at the times on the dates specified of the incidents from this week please. I feel like I can explain the incidents through the video you can see the seriousness of the situation." (Ex. A8, p. 2).

34) Campbell did not want to release the video to Jensen because he did not want to set such a precedent. Campbell also knew that the security video at the South Medford store regularly reset and listed a "random" date and time making it nearly impossible to find the portions of the tape coordinating with the dates and times Jensen had requested. (Testimony of Campbell)

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35) Campbell responded to Jensen's email:

"I certainly do understand the seriousness of the situation, which is why we have already quickly and decisively addressed the issues you brought to our attention.

"We've also granted your request to transfer, which I understand you confirmed with Evan today.

"What am I missing about your desired outcome here?"

(Ex. A8, p. 1)

36) Jensen did not respond to Campbell's email. (Ex. A8)

37) On May 10, 2018, Joyce sent a meeting invite to Schmidtke and Campbell entitled, "Call to discuss the Weekly Leader Discussion." (Ex. R10)

38) On May 11, 2018, Joyce, Campbell and Schmidtke met to discuss staffing issues related to Jensen's transfer from the South Medford store. The calendar invitation described the meeting as, "Call to discuss recent staffing incidents in South Medford, collect information for timeline documentation, outline next steps." The intent of the meeting was to set the agenda for the upcoming leadership meeting and staffing issues related to Jensen's transfer. (Testimony of Joyce and Campbell; Ex. A7, p. 4)

39) Joyce later learned that Schmidtke had investigated the complaint and that corrective action had been taken against Mancilla. Joyce also learned that Jensen's transfer request had been approved. (Testimony of Joyce and Campbell).

40) Joyce asked Campbell if the store video could be reviewed so they could resolve the issue. Joyce expressed concern that Jensen's complaint was not being handled appropriately. (Testimony of Joyce)

41) Campbell told Jensen that they "were not going to live by watching cameras." Campbell also informed Joyce that the video had been erased. (Testimony of Joyce and Campbell)

42) On May 19, 2018, Jensen submitted notice of her resignation citing her loss of income as a result of the transfer to the Ashland store. Schmidtke forwarded Jensen's email to Campbell with the following:

"As we proceed with CeeCee's resignation, I want to clarify that she was not moved to Ashland. She requested to transfer stores and Ashland was the only store with open headcount. She was given the option to stay at South Medford and she declined. It's also important to mention that we offered her Sunday shifts in South Medford twice a week which she accepted.

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"I have documented the entire situation along with her resignation letter."

(Ex. R12)

43) Campbell was surprised at Jensen's resignation. Campbell believed the matter had been resolved once Schmidtke had completed his investigation and Jensen transferred to the Ashland store. (Testimony of Campbell)

Joyce's Working Conditions Following Jensen's Complaint

44) Joyce testified that she was "not doing sales calls anymore;" Campbell took away different stores and responsibilities from her; and she was "treated completely differently" after she expressed concern regarding the handling of Jensen's harassment complaint. (Testimony of Joyce)

45) Chavez observed that Campbell was cold and short with Joyce after Schmidtke's hire. Ball observed that Joyce had very little input in the Monday meetings after Schmidtke's hire. Neither Chavez nor Ball offered any other specific examples of Campbell treating Joyce differently than Schmidtke. (Testimony of Chavez and Ball)

46) Joyce's pay was not decreased but, rather, was increased at or near the time of Jensen's complaint and Schmidtke's hire. Joyce continued using the company car after Jensen's complaint and after Schmidtke's hire. Joyce received no formal discipline following Jensen's complaint. (Testimony of Joyce, Campbell)

47) Joyce participated in the interviews of approximately eight applicants on June 6, 2018, and June 12, 2018. Interviews were typically conducted with the Area Sales Manager, store manager and Campbell. Campbell never vetoed a vote by Joyce and accepted her recommendations. Schmidtke did not attend the interviews of the eight applicants. (Testimony of Joyce and Campbell; Exs. R14, R15)

48) Campbell observed that Joyce became increasingly defensive in her relationships with store managers and Schmidtke following Jensen's complaint. Campbell was frequently required to function as a mediator rather than Joyce addressing the matter herself. (Testimony of Campbell)

49) On July 6, 2018, Schmidtke sent an email to Joyce informing her of issues he had observed with a recently hired employee performing a tablet activation, which would have been beyond the stage of her training as a new employee. Schmidtke also commented on an issue regarding an employee at one of Joyce's stores not understanding a Sis-Q policy. (Ex. R16)

50) Campbell received a copy of the email and responded to Joyce:

"If you'll remember back to the conversation the three of us had a few weeks ago, one of the things I expect as we train new hires from her out is more active

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involvement from the store leader AND ASM. If you haven't already, please schedule at least weekly in person check ins with both the leader and trainee to inspect progress and address any questions/concerns. I would suggest looking at the training log and doing a quick assessment of what they have retained, as well as asking the new hire and leader directly what is going well and what isn't. Please capture this feedback in the notes section of the ASM Store visit log. I saw you captured some notes to this effect in the most recent log for Jackson Creek, which is great. I am looking for some more specifics though so we can continue improving the training process as we go."

(Ex. R16)

51) On July 6, 2018, the store manager involved in the training of the new employee referenced in Schmidtke's email to Joyce sent an email to Schmidtke that included:

"I wanted to let you know that Jen and I talked about Tygh's training and your observation yesterday. I have no problem with having Tygh observe rather than work through the process herself with my supervision. Please, feel free to communicate with me, especially for something of this magnitude. Thank you for your time."

(Ex. R17)

52) Schmidtke responded the same day with:

"No worries! This was no big deal, just wanted to make sure you felt supported in her training. The feedback was aimed more at the role leadership plays in the successful onboarding of new hires, not on specific things you were doing or not doing."

(Ex. R17)

53) Joyce responded to Schmidtke's email approximately five days later:

"I wanted to reach out to you about this email you sent to Luke. I am concerned that you would send an email to one of my managers stating they are not being supported. If you need to communicate with me about trainees or any other concerns I am available.

"I would appreciate communications at our level stay at our level or incorporate Michael. With clear communication Sis-Q-Cellular will become a great team!"

(Ex. R17)

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54) Campbell responded to Joyce's email to Schmidtke:

"While I appreciate that you reached out to Evan, I'm so disappointed that you decided to do it in this manner. Not to mention, it took me two minutes to read through this and interpret this situation way differently than you have.

"Here's what happened in my view:

- Evan shared some feedback, DIRECTLY with you, not a member of your team.
- You spoke to Luke, and for whatever reason, Luke felt the need to reach out to Evan directly afterwards.
- Because Luke **reached out to Evan first**, Evan replied. He made a comment about leadership, which you interpreted as a personal affront to you. Not how I interpreted it, but it's how you did, without asking him first for clarification.

"Am I missing something here?

"I'm really hoping you'll think about this further. It deserves some introspection from you.

"For example, you told Barb and I you 'own your messages 100%.' Why then did Luke feel the need to reach out to Evan? Is there a way the feedback could have been shared with Luke that didn't elicit that response?

"You mentioned 'clear communications' being important to our success. I agree. I also hope you'll ask yourself the right questions going forward."

(Ex. R17)(emphasis in original)

55) Campbell forwarded the exchange to Porter:

"Here's another example. She decided to email rather than call, made accusations before seeking first to understand, and fails to realize that perhaps had she communicated the feedback better from the outset this whole thing could have been avoided.

"She's so caught up in being the victim and telling herself stories, no wonder the business isn't doing well.

"FRUSTRATING!!!"

(Ex. R17)(capitalization in original)

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56) Porter responded:

"Sadly, she is looking for someone else to lay blame on. No, in fact she doesn't own her messages, and I agree, had she thought this out and communicated clearly, this back and forth may not have occurred.

"Had Evan's email been the first touch base, then yes, that would have been inappropriate, BUT as you point out, he was responding to Luke. I wish I had even a small clue how to help her jump this hurdle of self doubt which I believe is the biggest issue here. So many misinterpretations it's shocking.

"I don't know, I wonder if I sat down with her if that would help."

(Ex. R17)

57) On July 10, 2018, Joyce sent an email to Campbell that included:

"Just out of curiosity. Something I have been wondering about.

"When we spoke about Jonny's inventory last week after I dropped off the 3 iPhones, the first thing you asked me was why was I there?

"Evan sent an email to Luke that basically implied that he is not getting support from his leader. I can't figure out a situation where my peer sending that to one of my team members would be appropriate. How would he know that when he really has no conversation with me.

"I support my teams and my leaders. Call them at any time. It just is baffling that happened.

"Thanks for letting me ask."

(Ex. R18)

58) Campbell responded:

"I don't recall asking 'why you were there,' but I DO recall wanting to get a better understanding of the circumstances surrounding transfers we were making. Please don't misinterpret as anything but that.

"Have you spoken with Evan about your concerns before coming to me? I really think that would be the best first step, and I hope you will soon."

(Ex. R18)

59) In late July 2018, the Joyce's Central Point store began having issues with

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employee performance and attendance, including several employee resignations. There was also an increase in the number of customer complaints. Campbell coached Joyce several times via text and email about concerns he had with the performance of her stores. (Testimony of Campbell; Exs. R7, p. 18; R20; R21)

60) On August 6, 2018, Campbell sent Joyce an email that included:

"I'd like to set up a Monday Hangout call with you and Evan individually(1 on 1) to go over the previous weeks' store visits. This will allow us the time to talk through any trends, set up the week, and provide a consistent avenue for feedback and dialogue. Let me know if you prefer Mondays at 11am or 11:30.

"The store visit recaps will really help direct the discussion. On that note, I am still not consistently getting them from you. For example, last week I got:

"One for Jackson Creek on Monday 7/30

"One for Allen Creek on Tuesday 7/31

"One for Jackson Creek on Thursday 8/2

"Aside from me following you on every visit, this is the best way I can think for you to document what you're seeing in stores so that I can support you. It's especially concerning not to have any for stores that are struggling. I know you're spending time in stores, so what's getting in the way of getting these done?"

(Ex. R21)

61) Joyce responded: "Monday at 11 is great. I will do better to get all of my visit recaps complete." (Ex. R21)

US Cellular's Breach of Contract Notice

62) On August 23, 2018, US Cellular notified Sis-Q that its Central Point store had failed to meet the quarterly minimum performance standard during the second quarter 2018, and it was considered to be in breach of its contract with US Cellular. A breach of that contract could result in Sis-Q losing the ability to sell US Cellular products at that particular store or put the entire contract at risk of being cancelled. US Cellular advised Sis-Q that it would "[withdraw] its approval for the sales location for which Sis-Q failed to cure the breach" no later than September 30, 2018. (Exs. R22, R23)

63) Campbell was surprised at the breach of contract notice because the Central Point store rarely had trouble meeting its sales goals in the past. This was the "final straw" for Campbell, and he decided to assign the Central Point store to Schmidtke. Sis-Q was able to cure the defect at the Central Point store under Schmidtke's leadership. (Testimony of Campbell)

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64) Campbell notified Joyce of his decision and sought her input on how to communicate his decision to her team. (Ex. R7, p. 22).

Campbell's Concerns Regarding Joyce's Performance

65) On September 5, 2018, Campbell met with Joyce to discuss ongoing concerns he had regarding her performance. Campbell sent an email to Joyce to recap the topics covered at the meeting.

"Thanks for stopping by to chat yesterday. I thought it would be helpful to send a recap to make sure my expectations are clear and give you the opportunity to ask any follow up questions. If you don't have any questions, please reply anyway to let me know you received this message.

"We talked about:

- "Expectations around store visits, specifically what I expect of you in engaging the team and documenting some of the key elements of each visit in the ASM Observation form.
 - "Last week, I received zero store visit recaps from you, to cap off an inconsistent month with several missing days. The ASM Observation Form is designed to provide you a resource to compile store results and match them with your observations, as well as keep track of and support your leaders in their key objectives. Documenting each visit allows us to debrief and helps me support you. I expect each visit to be documented using this form, and I expect the forms to be submitted at the end of each business day or by the following morning at the latest. Finally, as I've said before, the form is supposed to help you, and I will continue to be wide open to feedback if there's something that can be tweaked to make it better.
 - "In addition to the expectation of actually utilizing the form with each visit, we talked through and clarified some specific elements of the form, including the performance goals and trends sections, behavioral observations, focus/actions/commitments, and capturing notes regarding the performance culture and showroom appearance sections.
- "Cohesion as a key leadership team
 - "Though we have different styles, I expect us to be in sync when it comes to communicating and reinforcing key company objectives. In order to continue providing exceptional experiences to our customers and driving profitable growth, we have to be relentless in

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our focus of developing the skills of our staff through frequent and consistent feedback. I expect ASM's to be constantly observing and providing feedback to leaders and associates while in stores, both on their customer interactions and leaders' interactions with their teams. I expect store leaders to be held accountable for doing the same. On calls with the leadership team, I want to see more engagement from you in the form of asking questions that perpetuate critical thinking and meaningful dialogue. At the same time, I do not want us talking just to talk if it doesn't add to the conversation or align with our key focuses. If leaders are operating under the "deficiency lens," (focusing on factors outside their control, blaming others, not being solution focused) I expect you to be able to get them back to a productive place.

"As I said yesterday, right now I'm very concerned that the forces of pride, emotions, victim mentality, gossip, and an overall lack of cohesion are preventing us from being as effective as we can be. Our actions must be singularly focused on giving the world's best customer experience, providing support, guidance and development to our employees, and driving and maintaining profitable business results. If we're divided internally, will never be able to protect against the external challenges we face on a daily basis, ESPECIALLY if we're also not getting our essential job functions done at the same time.

"Jen, I care about you and I really want this relationship to work. I need to be very clear, also, that I will take swift and decisive in taking action to rectify the situation if things don't improve. Our 30 employees and 20,000 plus customers deserve nothing less than all of our collective best efforts to ensure Sis-Q prospers.

"As always, I'm here as a resource. Please keep the lines of communication free-flowing."

(Ex. R. 24)

66) Joyce responded:

"I received your recap email.

"I am glad you covered what you would like in your ASM observation form. This is the first time we have had for you to give me any detail of what you are looking for in these forms.

"As you mentioned yesterday, you did not receive my forms last week from my visits. I have all of my notes from those visits and I can type and email those to you if you would like, even today with the Thursday form Luke had to submit twice to get his to go through. I will keep a closer eye on the submission receipts for those.

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"I am sure you join in my pride and enthusiasm that all of my store exceeded goal this month! My team was a leading force of the total gross profit and accessory profit piece for the entire company, this shows that we are in sync with the key company objectives. We are excited to bring these numbers and performance. Me and my leaders agree with you that are customers deserve World class customer service and committed to providing it every day.

"My team exceeding goal and having high customer satisfaction rates show that we are dedicated to maintaining profitable business results."

(Ex. R24)

67) Campbell responded:

"Indeed I do share in the excitement of hitting goals last month. Everything I mentioned has to do with having a foundation in place that will allow us to not only sustain but grow upon that success. I don't want us living and dying by what happens in one month. If that were true, we would have set the goal at what we did last August: \$40k in gross profit higher.

"I'm frustrated that you continue to insinuate that you submitted the forms and somehow all three got lost in cyberspace. Perpetuating that narrative is insulting. If for some reason that does happen, then I would expect you to communicate with me. It was radio silence last week."

(Ex. R24)

68) On September 7, 2018, Joyce sent Campbell an email regarding a leave request she had submitted so she could attend a medical appointment with her husband: "In light of yesterday's email Jim and I have decided it is best that I go into the store instead of attending his appointment." (Ex. R25)

69) Campbell responded:

"Jim's appointment was something you told me about in advance and is a medical appointment for the care of a family member, completely separate from and unrelated to your job performance. At no point did I ask you not to go, nor would I expect that of you now."

(Ex. R25)

70) Campbell sent Joyce a text message a few minutes later that began the following exchange:

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“Campbell: Good morning. I refuse to accept that you are now going to try to paint this as us not allowing you to care for your family. That’s petty, and absolutely ridiculous. If you choose not to go, that’s completely on you. We’ve been nothing but supportive.

“Joyce: I am not painting you anyway. I have a dedication to making sure all the essential duties are taken care of.

“Campbell: Right but this was a pre-approved excuse absence. Just like last Monday and Tuesday. And is normally something you would just text me about but you instead decided to randomly email both Barb and I? Please, don’t play games.

“Joyce: I had told both of you I was going to it.”

(Ex. R7, p. 23)

Publication of Communications between Schmidtke and Campbell

71) On September 9, 2018, a series of screen shots or pictures of messages between Schmidtke and Campbell and other Sis-Q employees were sent in a group text of approximately 14 people. The shots were taken from Slack, which is an instant messaging platform used by Sis-Q management and staff. Campbell assumed there had been a data breach and shut down Slack and reset employee email passwords. (Testimony of Campbell)

72) Campbell later learned that it was Joyce’s son and White City store manager Brian Nelson, who took the screen shots. Campbell was unable to determine who actually sent them out to approximately 14 Sis-Q staff members. (Testimony of Campbell)

73) Sis-Q had recently changed its leave policy to allow for donation of paid-time-off by other employees. On or about July 24, 2018, Campbell informed Joyce that Nelson had received a total of 43 hours of donated parental leave that he was free to use after the birth of his child. (Testimony of Campbell; Ex. R7, p. 17-18)

74) On September 10, 2018, Nelson quit his employment with Sis-Q. (Testimony of Campbell)

75) Joyce and Campbell subsequently exchanged a series of text messages exchange in which she informed Campbell that another employee was reportedly in the hospital and another employee was going to be absent. Joyce also notified Campbell that she was going to be out the rest of the week.

Campbell: Have you left for Grants Pass?

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Joyce: Nope at the doctor.
Stefanie is out today.

Campbell: Was that planned?

Joyce: No she is stressed out.
I am going to be out today as well. I have a doctor's note through Friday.

Campbell: Yeah. Interesting. Those pictures get sent out. Brian quits. Chris is going to the hospital, and Stefanie is out too. Can you meet me today? I'd like to get the car back if you're gonna be out.

Campbell: Just following up. Exactly what are you asking for? You're asking to go on medical leave? I'd be happy to get you the necessary documentation. If you're going to be out for an extended time frame I would like to recover the company's property in the mean time.

(Ex. R7, pp. 24-25)

76) From September 12, 2018, to September 17, 2018, Campbell traveled to Los Angeles for a wireless conference. Campbell directed Joyce not to report for work during his absence due to his loss of trust in her after the events of September 9, 2018. (Testimony of Campbell)

77) After Campbell returned from the conference, he informed Joyce of his decision to terminate her employment. Campbell's decision was not based upon Jensen's complaint but, rather, Joyce's performance during the final months of her employment and the events of September 9, 2018. (Testimony of Campbell)

78) Sis-Q issued Joyce her final paycheck and her final commission check. Sis-Q withheld approximately \$4,000 from Joyce's final commission check after it was discovered that it had failed to withhold healthcare premiums from Joyce's pay during the preceding weeks. (Testimony of Joyce and Campbell)

Credibility of the Witnesses' Testimony

79) The testimony of Wall is deemed credible, and the forum has credited her testimony in its entirety. However, it should be noted that the investigation conducted by the investigator who did not appear was limited in scope and did not include interviews with key witnesses who testified at hearing. (Testimony of Wall; Exs. A4-A6, A9-A12)

80) Joyce's testimony was vague as to events central to her complaint that she was treated differently after opposing the handling of her daughter's discrimination

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complaint. For example, Joyce alleged Campbell was not required to wear logo wear but offered no specifics as to when she observed him working in a store without wearing a piece of clothing bearing Sis-Q's logo. Similarly, Joyce testified that Campbell took away responsibilities after Jensen's complaint, but identified only the leadership meetings, which, as noted above, were not "taken away" from her by any direct action of Campbell. The messages between Joyce and Campbell show that Campbell wanted Joyce to share in that responsibility with Schmidtke and did nothing to discourage or to prevent her from doing so. (Testimony of Joyce and Campbell; see also Findings of Fact – the Merits ## 16-18).

Perhaps weighing greatest against finding Joyce's testimony more credible than the evidence presented by Sis-Q was the fact that Joyce's stock response when pressed for specifics on cross examination was, "I don't know." For example, it is undisputed that Schmidtke took over management of the Central Point store after the breach of contract notice by US Cellular. When Sis-Q counsel questioned Joyce as to why she failed to mention the reassignment of the Central Point store was prompted by the breach of contract notice in her direct testimony, Joyce's responded, "I don't know." Similarly, when asked why she did not mention in her direct testimony that Campbell and/or Schmidtke referred to Jensen as being "over dramatic" when they met to discuss Schmidtke's handling of Jensen's complaint, Joyce again responded, "I don't know." (Testimony of Joyce)

Joyce's testimony was also disproved as to one element of her complaint. Joyce alleged she was no longer involved in the interview process for new employees. The evidence shows she either issued or accepted several interview requests during the period in question. No evidence was offered showing there were interviews held without Joyce's knowledge or participation or employees were hired without her input. (Testimony of Joyce and Campbell; Exs. R14, R15)

Joyce's testimony is deemed less credible than the evidence presented by Sis-Q for the reasons outlined above. Joyce's testimony is credited only when it is corroborated by substantial and credible evidence of record. Where Joyce's testimony differs from the credible evidence of record, the forum has relied on Campbell's version of events. (Observation of ALJ)

81) Jensen's testimony is deemed credible as to the events leading up to her filing her complaint regarding Mancilla as it was uncontroverted. (Testimony of Jensen)

82) Chavez's testimony was based almost entirely on her personal opinion as to the demeanor of Campbell and others in management in relation to Joyce. Chavez offered very little factual testimony. The testimony of Chavez was deemed credible to the extent it did not conflict with credible evidence of record. (Testimony of Chavez)

83) Ball's testimony was also based almost entirely on his personal opinion as to his observations of the leadership meetings. Ball's testimony was deemed credible to the extent it did not conflict with credible evidence of record. (Testimony of Ball)

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84) Campbell clearly has a financial interest in the outcome of this matter as an owner of Sis-Q. However, Campbell's testimony was clear, direct and detailed. Campbell testified in greater detail than Joyce as to the events central to her BOLI complaint. Further, Campbell's testimony was consistent with the text messages and other documentary evidence admitted. Campbell's testimony is credited in its entirety. (Testimony of Campbell)

85) Weigand clearly has a bias in that she is a long-term Sis-Q employee. However, Weigand's testimony was clear and direct, and she demonstrated no animus toward Joyce. Weigand's testimony is deemed credible to the extent it does not conflict with credible evidence of record.

CONCLUSIONS OF LAW

1) At all material times, Respondent Sis-Q Cellular, LLC, was an "employer" for purposes of ORS 659.030(1)(f); OAR 839-005-0125(1)-(3); and OAR 839-005-0010(1)(d)(A) and (B).

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.022; ORS 659.040 et seq.

3) Respondents did not terminate Complainant's employment because she had opposed unlawful sexual harassment, and did not violate ORS 659.030(1)(f).

4) Pursuant to ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The Agency alleges in its Formal Charges that Sis-Q violated ORS 659A.030(1)(f) when it discriminated against and/or terminated Joyce's employment, because she opposed what she reasonably believed to be an unlawful practice related to the handling of the hostile work environment claim of Joyce's daughter.

The Agency's prima facie case consists of the following elements: (1) Sis-Q was an employer as defined by statute; (2) Sis-Q employed Joyce; (3) Joyce explicitly or implicitly opposed an unlawful practice or what she reasonably believed to be an unlawful practice; (4) Sis-Q subjected Joyce to adverse treatment and (5) there is a causal connection between the protected activity and the adverse treatment. OAR 839-005-0125(2)(a),(b),(c). See also *In the Matter of Andrew W. Engel, DMD, PC*, 32 BOLI 94, 132 (2012); *In the Matter of From the Wilderness*, 30 BOLI 227, 288 (2009); *In the Matter of Trees, Inc.*, 28 BOLI 218, 247 (2007); *In the Matter of Robb Wochnick*, 25 BOLI 265, 287 (2004); *In the Matter of Barbara Bridges*, 25 BOLI 107, 123 (2003).

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There is no dispute as to elements (1), (2), and (4). What remains in contention are elements (3) and (5).

REPORT OF A VIOLATION OF A STATE RULE (ELEMENT 3)

The Agency argues that Joyce reported concerns she had regarding the handling of her daughter's complaint in early May 2018, which include the failure to properly investigate the complaint or to take proper corrective action against Mancilla based upon the harassment continuing.

Joyce testified she met with Campbell and Schmidtke a second time and requested to view the security video. Joyce testified Campbell refused to produce the video and became "shorter with her" and removed various responsibilities from her in the weeks following her request.

Joyce's testimony was in stark contrast with Campbell's testimony. Campbell testified that he, Schmidtke and Joyce had a planning meeting on May 7, 2018, during which Jensen's complaint was raised. Campbell testified Joyce's response was that she wanted to stay out of it. The three met again on May 11, 2018, after Joyce issued a meeting invite the day before to discuss staffing issues related to Jensen's transfer.

Joyce testified she expressed concerns during the May 11, 2018, meeting regarding the handling of Jensen's complaint and requested the store video be reviewed. Joyce testified Campbell told her that they were "not going to live by video" and denied her request. Joyce did not recall whether Campbell had explained to her that the video had been erased due to the limitations of the store security system. Campbell denied any substantive conversations occurred regarding the complaint.

As noted above, Joyce's testimony was generally vague and lacking in detail. Given the nature of Joyce's testimony at hearing, particularly her vagueness and obvious reticence to provide any greater detail when pressed, it seems unlikely that she opposed an unlawful employment practice as contemplated by ORS 659A.030(1)(f). It seems more likely that the meeting proceeded as described by Campbell.

Campbell produced evidence regarding the dates of the meetings, including the meeting invite issued by Joyce. Further, Campbell's testimony regarding the topics covered at the meetings was much more detailed than Joyce's testimony. Again, it makes little sense that if Joyce reported her concerns as alleged she had such a faulty memory as to the circumstances surrounding that report. Further, Joyce testified she had concerns but offered no specific testimony as to what those concerns were. There was no evidence showing she reviewed Schmidtke's investigative reports or that she was aware of what coaching or discipline Mancilla had received as a result of Jensen's complaint. It is therefore determined that the Agency has failed to produce sufficient evidence to support a finding that Joyce opposed an unlawful practice, Element 3 of its prima facie case has been satisfied.

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CAUSAL CONNECTION (ELEMENT 5)

Even if it was found that Joyce had opposed an unlawful practice by reporting her concerns regarding the handling of Jensen's complaint, the evidence does not support a finding that she was discharged because of her complaint. The Agency must prove a nexus between Complainant's whistleblower protected class status and the treatment she received from Campbell and ultimate discharge in order to establish Element 5 of its prima facie case. *In the Matter of Engel*, 32 BOLI at 132.

Notably absent from Joyce's testimony was any reference to the issues that led to her discharge, including staff turnover at her stores; issues raised by Campbell regarding documentation pertaining to her store visits; and, perhaps most significantly, the breach of contract notice issued by US Cellular after Joyce's store failed to meet its quarterly goals. Also missing from Joyce's testimony was any reference to the events of September 9, 2018, which included the publication of several screen shots of conversations between Campbell and Schmidtke taken by her son, who quit shortly thereafter. (Findings of Fact – the Merits ## 62, 66, 71, and 72)

Joyce's testimony suggested the difference in her and Schmidtke's duties were attributable to her having reported concerns regarding the handling of her daughter's complaint. However, there was no evidence offered showing Campbell or any other member of Sis-Q management directed Schmidtke to lead the weekly leadership meetings or that the initial removal of stores from her oversight was not an expected part of the hiring of a second Area Sales Manager, which she had been apprised of at the time of her interview. Further, the reassignment of the Central Point store to Schmidtke was directly as a result of the breach of contract notice from Sis-Q. Joyce's testimony failed to address lapses in her performance, which were documented in the various text messages and emails between her and Campbell. Similarly, Joyce's allegation she was removed from the hiring process was disproved by the meeting invites issued in June 2018. (Findings of Fact – the Merits # 4, 18, 62, and 37)

In short, there is no credible evidence of record showing the treatment of Joyce following Jensen's complaint or her termination was because she opposed an unlawful practice. Rather, the evidence shows there were significant issues regarding her performance that contributed to her strained relationship with Campbell during the final months of her employment and her subsequent termination. Therefore, the Agency has failed to show a causal nexus between Joyce's alleged opposition to an unlawful practice and her subsequent termination four months later. The Agency has failed to establish the fifth element of its prima facie case. As such, the Agency has failed to show that Sis-Q discriminated against and/or terminated Joyce's employment because of her opposition to an unlawful employment practice in violation of ORS 659A.030(1)(f).

EXCEPTIONS TO PROPOSED ORDER

The Agency filed 19 Exceptions to the Proposed Order. Respondent did not file any Exceptions to the Proposed Order.

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Agency Exceptions 1 -3

The Agency's Exceptions address the spelling of Sis-Q in the caption, as well as the order itself. The Agency's Exceptions 1-3 are GRANTED.

Agency Exceptions 4, 6, and 20

The Agency's Exceptions ## 4, 6, and 20 seek corrections to scrivener's errors, which are well taken. The Agency's Exceptions ## 4, 6, and 20 are GRANTED as reflected above. The Agency's remaining Exceptions are addressed below.

Agency Exception 5

The Agency requests that the forum change Proposed Finding of Fact – the Merits #16 from describing Joyce as “not being as involved as Schmidtke” to “no longer leading the calls.” There is no evidence showing that Schmidtke was expressly made the leader of the Monday calls or that Joyce was prevented from having a more active role in the weekly calls. Therefore, this portion of the Agency's Exception 5 is DENIED. However, the remaining exception is GRANTED as reflected above, with the inclusion of the entirety of the text message exchanges between Campbell and Joyce (Findings of Fact – the Merits #19) and Schmidtke and Joyce (Findings of Fact – the Merits #19).

Agency Exception 7

The Agency requests that Proposed Findings of Fact – the Merits #18 be modified for clarification as to Jensen's testimony regarding what she intended to communicate when she reported her concerns regarding Mancilla's behavior to Campbell. The Agency's exception is GRANTED as reflected above in Findings of Fact – the Merits # 21.

Agency Exception 8

The Agency takes exception with the forum's characterization of the May 11, 2018, meeting between Joyce, Campbell and Schmidtke. The Agency's Exception is GRANTED as reflected above in Findings of Fact – the Merits ## 39-41.

Agency Exception 9

The Agency requests that the forum include testimony from Chavez and Ball regarding Joyce's working conditions. The Agency's Exception #9 is GRANTED as reflected above in Findings of Fact – the Merits # 44.

Agency Exception 11

The Agency argues in its exception that Respondent did not prove that Joyce did not receive the calendar invitations for interviews scheduled for June 12, 2018. (Exs.

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R15, R7) The Agency points to a number of individuals resigning at Joyce's Central Point store but not a similar number of interviews being scheduled. Joyce did not testify as to what interviews occurred without her participation or which employees were hired for her stores without her input. Further, there was no suggestion in Joyce's testimony or evidence admitted that she experienced any difficulty receiving email or calendar invitations from either Schmidtke or Campbell. Presumably, Joyce would have been privy to who was newly hired at her stores and would have been able to identify which employees were hired without her input at hearing. Given the lack of specificity of Joyce's testimony, the forum is not prepared to give greater weight to Joyce's testimony than the more specific documentary evidence offered by Respondent regarding Joyce's allegation she was excluded from the interview process. Therefore, Agency's Exception # 11 is DENIED.

Agency Exception 12

The Agency argues in its Exception that, while the forum found that Campbell had produced documentary evidence regarding other factors contributing to Joyce's discharge, "none of that evidence shows that there is not a causal connection between Ms. Jensen's complaint and Ms. Joyce's discharge." As noted above, the forum found that the Agency failed to establish the necessary nexus between Jensen's complaint in May 2018 and Joyce's discharge on September 17, 2018, approximately four months later. It is not Respondent's burden to disprove an element of the Agency's prima facie case if the Agency has not produced sufficient evidence to satisfy its burden of showing a causal connection between Jensen's complaint and Joyce's discharge four months later. See *In the Matter of Leo Thomas Ryder dba Leo's BBQ & Grill*, 34 BOLI 67, 75 (2015). Therefore, the Agency's Exception # 12 is hereby DENIED.

Agency Exception 13

The Agency requests that the forum conclude that Sis-Q terminated Joyce's employment because she had opposed sexual harassment rather than its conclusion to the contrary as set forth in Conclusions of Law # 3.

"To prove causation under ORS 659A.030(1)(f)—that is, that the defendant discharged the plaintiff "because" of his protected activity—plaintiff must prove that defendant's unlawful motive was a substantial factor in his termination, or, in other words, that he would have been treated differently in the absence of the unlawful motive." *Lacasse v. Owen*, 278 Or App. 24, 33, 373 P3d 1178 (2016).

The forum is not convinced that comments made by Joyce during the May 11, 2018, regarding the manner in which Jensen's complaint was handled was a substantial factor in the decision to terminate her employment. Beyond the performance issues outlined during the September 5, 2018, meeting between Joyce and Campbell and the notice of breach of contract by Sis-Q, the staffing issues that arose soon after screenshots of conversations between Campbell and Schmidtke taken by Joyce's son, including her son's resignation were, in essence, the "final straw(s)" prior to Joyce's

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termination. (Findings of Fact – the Merits ## 4, 18, 62, 66) Further, the forum is somewhat perplexed that if Campbell was so angry about Joyce's comments regarding the handling of Jensen's complaint to subsequently unfairly scrutinize her performance and to ultimately terminate her employment, that Sis-Q's policies would be changed to allow Joyce's son to receive donated hours from his fellow Sis-Q employees to have approximately 43 hours of parental leave after the apparently difficult birth of his child. (Findings of Fact – the Merits ## 71-74) It is incongruous that, two months after the May 11, 2018, meeting, Campbell would change Sis-Q policies to benefit Joyce's son if he was operating with a retaliatory animus as alleged by the Agency. Therefore, Agency Exception # 13 is DENIED.

Agency Exception 14

The Agency takes Exception to the dismissal of the charge and the complaint against Sis-Q. For the reasons set forth above, the Agency's Exception # 14 is DENIED.

Agency Exception 15

The Agency takes exception to the forum's finding that the evidence presented by Sis-Q and the testimony of Campbell on behalf of Sis-Q was more credible than the testimony of Joyce. The forum is mindful that Campbell, an owner of Sis-Q has a financial interest in the outcome of this matter. See *In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, _ (2020). However, as compared to Joyce's more vague and less specific testimony, the forum finds that Campbell's testimony and Respondent's documentary evidence, which was frequently more detailed regarding events significant to Joyce's claim, more credible.

The Agency also requested a finding that Joyce explicitly or implicitly opposed an unlawful practice of what she reasonably believed to be an unlawful practice in the May 11, 2018, meeting. It is noted that fact was undisputed by Respondent.

The forum has modified Findings of Fact – the Merits # 80 to make clearer the reasons for its finding that Joyce's testimony less credible than the evidence presented by Sis-Q. Therefore, the Agency's Exception # 15 is DENIED.

Agency's Exception 16

The Agency takes exception to the forum's finding that Schmidtke took over leading the weekly meetings "organically" rather than due to any direction by Campbell. The Agency argues that Campbell did nothing to either return leadership of the meetings to Joyce or to even out the contributions of Joyce and Schmidtke. Given that Joyce and Schmidtke each held the same position with the same responsibilities, the forum is not prepared to find that Campbell was required to ensure that all things were equal in terms of the performance of Joyce and Schmidtke at the weekly meetings. There is no evidence showing that Campbell did anything to prevent Joyce from

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asserting herself at the meetings or otherwise encouraged Schmidtke to take over the leadership of the meetings. Without more evidence suggesting such things occurred, the forum does not find that Campbell's unwillingness to take a greater hand in determining who emerged as the leader of the weekly meetings evidence a retaliatory animus based upon the concerns Joyce voiced regarding the handling of her daughter's complaint during the May 11, 2018, meeting. Therefore, the Agency's Exception # 16 is DENIED.

Agency's Exception 17

The Agency takes exception to the forum's finding that Joyce's allegation that she was removed from the hiring process was disproved by the meeting invites issued in June 2018. The Agency argues that meeting invitations merely show that Joyce was invited to five in-person interviews on June 6, 2018, or listed as a possible attendee. The Agency points out that there is no evidence in the record showing Joyce was invited to or listed as a possible attendee for interviews held in July, August, or September 2018, despite turnover at those stores.

Neither Joyce in her testimony nor the Agency in its exception point to any employee who was hired during the period in question without Joyce's knowledge and input. The forum is not prepared to find that Joyce was foreclosed from the hiring process without some credible evidence showing interviews were held without Joyce's knowledge and participation. Given the lack of evidence showing that employees were interviewed and hired for Joyce's store without her input as the Area Sales Manager, the Agency's Exception is DENIED.

Agency's Exception 18-19

The Agency argues in its Exceptions that the forum's incorrectly concluded that it had failed to show that Sis-Q discriminated against and/or terminated Joyce's employment because of her opposition to an unlawful employment practice in violation of ORS 659A.030(1)(f). The Agency rightly notes that the forum has long held that evidence includes inferences. *In the Matter of Income Property Management*, 31 BOLI 18, 39 (2010). It is up to the forum to decide which inference to draw. *Id.* "[P]roof of a causal connection can be established [1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment...or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]." In *Id.*, citing *Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005).

Joyce testified that Campbell "treated her entirely differently" and was cold and short with her following the May 11, 2018, meeting. Chavez also testified she observed Campbell was cold and short with Joyce when she was in the office. The Supreme Court of Oregon addressed what constitutes a retaliatory action under ORS 659A.030(1) in *Summerfield v. Oregon Liquor Control Commission*, 366 Or 763, 780-781, 472 P3d 231, 240-241 (2020). In *Summerfield*, the court noted its adoption of the

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standard set forth in *Burlington N. and S.F.R Co. v. White*, 548 US 53 (2006) in a previous case and affirmed that the *Burlington* standard continued to be the standard in Oregon. *Id.* (discussing its reliance on the *Burlington* standard in *PSU Association of University Professors v. PSU*, 352 Or 697, 291 P3d 658 (2012)).

In *Burlington*, the US Supreme Court held that a plaintiff alleging a retaliation claim “must show that a reasonable employee would have found the challenged materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” 548 US at 68. The *Burlington* Court noted that the antiretaliation provisions of Title VII “protects an individual not from all retaliation, but from retaliation that produces an injury or harm.” *Id.*, quoting *Oncale v. Sundowner Offshore Services, Inc.*, 523 US 75, 80 (1998). Title VII does not set forth a “a general civility code for the American workplace.” *Id.* The Court reasoned that “normally petty slights, minor annoyances, and simple lack of good manners” would not deter a reasonable worker from making or supporting a charge of discrimination. *Id.* However, under that standard, an employment action can be adverse even where it does not affect “the employee’s compensation, terms, conditions, or privileges of employment.” *Id.* at 61 (internal quotation marks omitted). “Context matters” when determining whether an action is materially adverse. *Id.* at 69.

Joyce clearly perceived a chill in her dealings with Campbell following the May 11, 2018, meeting, as did Chavez. However, there is no evidence showing that Campbell’s behavior toward Joyce was inappropriate or otherwise hostile or offensive. Campbell being cold and short with Joyce following the May 11, 2018, meeting is not a material adverse action nor is it evidence that gives rise to an inference of retaliation.

Similarly, Schmidtke assuming leadership of the weekly leadership meetings is not a materially adverse action. Schmidtke was hired a week or two prior to the May 11, 2018, meeting. Campbell notified Joyce at the time of her hire that he was intending to hire a second Area Sales Manager, which would necessarily have dictated a shifting of Joyce’s responsibilities and a sharing of the leadership role. There is no evidence showing that Campbell directed Schmidtke to take over leadership of the meetings or otherwise prevented Joyce from assuming a greater role. Schmidtke’s assumption of leadership of the weekly meetings and Campbell’s subsequent refusal to intervene on Joyce’s behalf is not a material adverse action nor is it evidence that gives rise to an inference of retaliation.

The Agency also points to the fact that Joyce was not included in any hiring or interviewing new employees after June 8, 2018. While the Agency is correct that no evidence was offered showing that Joyce was invited to any interviews after that date, Joyce offered no evidence showing what interviews were held in her absence or which employees were hired without her input. While it may be a reasonable assumption that interviews were held without Joyce’s input, the forum cannot make such a leap without evidence in the record to support doing so.

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The Agency argues that the reasons offered by Respondent for Joyce's discharge – "staff turnover at [her] assigned stores, issues regarding documenting her store visits, the Central Point store failing to meet its quarterly goals" were issues that Joyce could have addressed if she had been allowed the opportunity to do so. The Agency contends Sis-Q summarily discharged Joyce because her continued employment with Sis-Q had been in danger ever since May 11, 2018, when she opposed the handling of Jensen's complaint.

The forum is not persuaded that Joyce having voiced her concerns regarding the handling of Jensen's complaint approximately four months earlier was a contributing factor in the decision to terminate her on September 17, 2018. *See Meyer*, 292 Or App at 682 (finding that a gap of one to two months between the claimed protected activity and subsequent adverse action is sufficient to raise an issue of fact on causation). Given the span of four months between the May 11, 2018, meeting and Joyce's subsequent termination, and the lack of evidence giving rise to an inference of retaliation, the forum, is not persuaded that Sis-Q acted with a retaliatory animus toward Joyce as a result of her implicit or explicit opposition to an unlawful practice. *See Brunick v. Clatsop County*, 204 Or App 326, 341, 129 P.3d 738 (2006) (citing *Coszalter v. City of Salem*, 320 F3d 968, 978 (9th Cir. 2003)). Therefore, the Agency's Exceptions 18 and 19 are DENIED.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Formal Charges filed against Respondent are hereby dismissed according to the provisions of ORS 659A.850.

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**In the Matter of
WDSA Inc., dba Gresham Schmizza Public
House, dba Gresham Pizza Schmizza
Public House, Respondent, Case No. 50-21**

**Final Order of Commissioner Val Hoyle
Issued July 5, 2022**

SYNOPSIS

The forum granted the Agency's motion for summary judgment involving a respondent corporation that acquired a restaurant business from the employer of seven wage claimants, determining that the respondent was a successor employer and liable for the claimants' wages in the total amount of \$5,227.28. ORS 652.310(1); ORS 652.140(2)(b) 652.332(1).

The above-entitled case was originally assigned to ALJ Cynthia Domas, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The matter was subsequently transferred to ALJ Kari Furnanz.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chief Prosecutor Adam Jeffries, an employee of the Agency. Respondent WDSA Inc., dba Gresham Schmizza Public House, dba Gresham Pizza Schmizza Public House ("WDSA") was represented by its attorney, Joseph N. Fearey, until he withdrew as counsel on July 15, 2021.

After the Agency issued an Order of Determination ("OOD") and an Amended OOD ("AOOD"), the Agency filed a motion for summary judgment, which the ALJ granted.

Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.¹

FINDINGS OF FACT – PROCEDURAL

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

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1) Between October 20, 2019, and November 18, 2019, Claimants Kaleb Calen (“Calen”), Ashley Thomas (“Thomas”), Ashley Bass (“Bass”), Jorge Briceno-Salazar (“Briceno-Salazar”), Kyle Inman (“Inman”), Lynsey Payne (“Payne”) and Gail Betts (“Betts”) filed wage claims and assignments of wages with the Agency. (Agency Exs. 28-34)²

2) The Wage and Hour Division (“WHD”) served an Order of Determination (“OOD”) on WDSA on February 27, 2020. The OOD alleged that Littleton Industries LLC (“Littleton”) employed Claimants, but failed to compensate them for work performed from June 26, 2019, through July 8, 2019. The amount of the alleged unpaid wages was \$5,272. The OOD further alleged that WDSA was a successor employer to WDSA, and is an employer as defined in ORS 652.310(1) who is jointly and severally liable for the Claimants’ unpaid wages. (OOD; Proof of Service)

3) On April 4, 2020, WDSA’s attorney, Joseph N. Fearey, filed an answer and request for hearing denying liability for the wages owed to the wage claimants. (Answer & Req for Hearing)

4) On April 29, 2021, the forum issued a Notice of Hearing to WDSA, the Agency, and Claimants setting the time and place of hearing for September 28, 2021, at 9:30 a.m. at BOLI’s Portland office. Together with the Notice of Hearing, the forum sent a copy of the OOD, a multi-language warning notice, a document entitled “Summary of Contested Case Rights and Procedures” containing the information required by ORS 183.413, a document entitled “Servicemembers Civil Relief Act (SCRA) Notification,” and a copy of the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Notice of Hearing; OOD)

5) On May 13, 2021, the forum issued an interim order which stated:

“Due to the impact of the COVID-19 outbreak, the forum is taking measures in BOLI contested cases to assist the parties in filing documents and receiving interim orders issued by the forum. BOLI offices may not be staffed for periods of time, and some interim orders may be issued by email only. In response to an email inquiry by the forum, the Agency indicated by email that it consents to accept filings by email. [WDSA] did not respond to the forum’s May 3, 2021, email asking whether the parties would consent to email service.

“The parties in this case may temporarily file documents by email only, without the need to file the original document with BOLI’s Contested Case Coordinator. Email filings must be sent to all parties, the ALJ (Cynthia.Domas@state.or.us) and BOLI’s Contested Case Coordinator (diane.anicker@state.or.us). **Since [WDSA] has not yet consented to**

² The citations to Agency exhibits refer to the exhibits that accompanied the Agency’s motion for summary judgment.

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receiving filings by email, the Agency must still send a copy of all filings to [DCP] by mail, in addition to sending the email copy. Parties may still file documents in the manner provided in BOLI's contested case rules, but must also provide courtesy email copies to the other parties and the ALJ as it may be some time before mail is delivered or processed. Any documents filed by email must be submitted no later than 11:59 p.m. PDT on the due date in order to be considered timely filed. These provisions will remain in effect until further notice from the ALJ."

(5/13/2021 Amended Interim Order)

6) On July 9, 2021, the Agency filed a motion to compel discovery. On July 9, 2021, the forum issued an interim order noting that, pursuant to OAR 839-050-0150, WDSA had seven days to respond to the motion. (Interim Order of 7/9/2021)

7) On June 18, 2021, attorney John Moore, of the Moore Law Group PC, filed a motion to withdraw the law firm from the representation of Respondent in the above matter. Moore stated that Fearey had left the firm and that the firm was no longer representing Respondent. (7/16/2021 Interim Orders)

8) On July 15, 2021, Respondent's attorney of record, Joseph N. Fearey, formerly of the Moore Law Group, P.C., filed a motion to withdraw, stating that his desire to withdraw was in accordance with ORPC 1.16. He further stated that he had no knowledge as to whether WDSA had obtained other counsel and that the Agency should continue to use WDSA's address on file with the Agency as the address of record for WDSA. (7/16/2021 Interim Orders)

9) In interim orders issued on July 16, 2021, ALJ Domas ruled that Fearey and Moore Law Group PC were allowed to withdraw from the representation of WDSA. Each of the two interim orders included the following statement: **"[WDSA] is reminded that pursuant to OAR 839-050-0110(1) corporations must be represented at all stages of the contested case proceeding by counsel or an authorized presentative."** (7/16/2021 Interim Orders) (Emphasis in original)

10) The forum issued an interim order ruling on the Agency's motion to compel on July 20, 2021, which stated, in pertinent part:

"OAR 839-050-0200 is the administrative rule governing discovery in this forum. The sections germane to this order are listed below.

"OAR 839-050-0200(1) provides in pertinent part: 'The administrative law judge has the sole discretion to order discovery by a participant in an appropriate case.'

"OAR 839-050-0200(7) states: 'Any discovery request must be reasonably likely to produce information that is generally relevant to the case.'

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“OAR 839-050-0200(8) provides in pertinent part: ‘ * * * Participants must comply with such orders and have a continuing obligation, through the close of the hearing, to provide the other participants with any newly discovered material that is within the scope of the discovery order.’

Production of Documents

“The Agency has requested that Respondent produce 18 categories of documents and has provided details as to why the requested documents will likely lead to information that is generally relevant to the case. The Agency also provided documentation of its attempts to obtain the sought-after information through an informal process. However, the Agency did not receive any response to its informal requests.

“The forum has viewed the requests and determined that the documents requested concern business agreements, the payment of wages, and documents related to the continuation of the business. The requested documents are reasonably likely to produce information that is generally relevant to this case.

“The Agency’s request for the production of documents is **GRANTED**. Respondent shall produce the documents requested by the Agency by August 9, 2021.

Requests for Admissions

“The Agency sent Respondent 18 requests for admission. Requests for admission are specifically allowed in this forum pursuant OAR 839-050-0200(2)(e). While ORCP is not controlling in this forum, the forum may look to ORCP for guidance. See *In the Matter of Arthur Lee*, 22 BOLI 99, 102-3 (2001). The Agency’s motion set out the reasons for its request for admissions and demonstrated how the requests were relevant to the case. The Agency informally requested Respondent to respond to * * * its request. Respondent did not respond to the Agency’s request nor did Respondent respond to the Agency’s motion to compel discovery.

“The requests seek information regarding the business location, the type of businesses at the location during the time period in question, the businesses’ structure and operation, and other information regarding the possible continuation of the business. This information is reasonably likely to provide generally relevant information.

“Therefore, the Agency’s request is **GRANTED**. Respondent shall provide Answers to the Agency’s requests for admission no later than August 9, 2021.

Interrogatories

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“The Agency requested that Respondent respond to seven interrogatories. The Agency attempted to informally obtain responses to the interrogatories before filing its motion to compel discovery but Respondent did not respond to the Agency’s request. In its motion, the Agency set out the relevancy of the interrogatories. Respondent did not respond to the Agency’s motion. The interrogatories are unchallenged.

“The information sought in the interrogatories is similar to the information sought in the Agency’s request for production and request for admissions. The interrogatories also sought information regarding such things as Respondent’s employees and contact information, information about business signage, information about business services provided and information about business websites used by the business. As in the requests for production and the requests for admission, this information is generally relevant to the Agency’s assertion that Respondent is a successor in interest. The information requested in the Agency’s interrogatories is reasonably likely to produce information that is generally relevant to the case.

“Therefore, the Agency’s motion as to the interrogatories is GRANTED. Respondents must provide answers to the Agency’s interrogatories by August 9, 2021.

SANCTIONS

“OAR 839-050-0200(11) provides:

‘The Administrative Law Judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8).’

“OAR 839-050-0200(12) provides:

‘The authority to order and control discovery rests solely with the Administrative Law Judge.’

“In prior cases, the forum has looked to ORCP 45 for guidance in regard to requests for admissions. *In the Matter of Arthur Lee*, page 103. The forum may fashion a remedy for failure to answer requests for admissions that may include deeming the admissions admitted if Respondent does not respond to this order.

“The forum notes that counsel for Respondent has recently withdrawn. OAR 839-050-0110(1) requires that Respondent, a corporation, must be represented at all stages of the contested case proceeding by counsel or an

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authorized representative. For Respondent's convenience, an authorized representative form is included with this order."

(Interim Order of 7/20/21)

11) On August 16, 2021, the Agency filed a motion seeking sanctions against WDSA for failing to produce documents, to provide interrogatory responses and to provide responses to requests for admissions prior to the deadline of August 9, 2021, which was set forth in the forum's interim order of July 20, 2021. The forum issued an interim order on August 16, 2021, informing WDSA that it had seven days to respond to the motion and that, as a corporation, it must be represented by an attorney or authorized representative pursuant to as required by OAR 839-050-0110(1). WDSA did not respond to the motion for sanctions.

12) On August 24, 2021, the forum issued an interim order granting the motion. Pursuant to OAR 839-050-0200(11) and the forum's previous cases providing for discovery sanctions, the interim order stated that WDSA was prohibited from offering evidence at hearing that was not disclosed in compliance with the forum's interim order of July 20, 2021. (Interim Orders of 8/16/21, 8/24/21 and 8/30/21)

13) On August 30, 2021, the Agency filed a motion seeking sanctions against WDSA, specifically requesting that the forum issue a ruling stating that the "Agency's Requests for Admission No. 1 through No. 18 that Respondent failed to answer by August 9, 2021, in response to the Forum's Interim Order Re Agency Motion to Compel Discovery dated July 20, 2021, be deemed admitted." On August 30, 2021, the forum issued an interim order finding that Agency's Requests for Admissions, Nos. 1 through 18, were deemed to be admitted. (Interim Order of 8/30/21)

14) On August 31, 2021, ALJ Domas issued an interim order transferring the case to ALJ Kari Furnanz. (Domas Interim Order of 8/31/21)

15) The Agency filed a motion for summary judgment pursuant to OAR 839-050-0150(4) on August 31, 2021. ALJ Furnanz issued an interim order on August 31, 2021, that explained how to respond to the motion and stated, in part:

"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 Respondent in response to the Agency's motion, in a manner most favorable to Respondent. Respondent's written response, including any opposing affidavits, if applicable, and supporting documents must be filed by **Tuesday, September 7, 2021**. OAR 839-050-0150.

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“PLEASE NOTE: [WDSA] has the burden of producing evidence on any issue raised in the motion as to which the [WDSA] has the burden of persuasion at hearing. See ORCP 47C.

“If [WDSA] 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.”

(Furnanz Interim Order of 8/31/2021) (Emphasis in original)

16) WDSA did not respond to the Agency’s motion for summary judgment. (Forum File)

17) On October 21, 2021, the ALJ issued an interim order granting the Agency’s motion for summary judgment. The pertinent portion of the ALJ’s interim order is reprinted below:

“SUMMARY JUDGMENT STANDARD

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

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

ORCP 47C. In reviewing a motion for summary judgment, this forum draws 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 Derrick’s Custom Painting, Inc.*, 37 BOLI 271, 275 (2020).

“The record considered by the forum in deciding this motion consists of: (1) the AOOD, argument made in support of the Agency’s motion for summary judgment, and the exhibits submitted with the Agency’s motion; and (2) Respondent’s Answer to the original Order of Determination.

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ANALYSIS

“The Agency moves for summary judgment on two grounds. First, the Agency asks the forum to conclude that WDSA is a successor employer to Littleton. Second, the Agency requests a ruling that WDSA owes wages to seven wage claimants that were not paid by Littleton. Following is an analysis of each argument.

A. Successor Employer Discussion

“An ‘employer’ ‘includes any successor to the business of any employer, or any lessee or purchaser of any employer’s business property for the continuance of the same business, so far as such employer has not paid employees in full.’ ORS 652.310(1). Accordingly, WDSA is an employer if (1) it is a successor to the business of Littleton, or (2) it is a lessee or purchaser of Littleton’s business property for the continuance of the same business. Both clauses require the successor entity to conduct essentially the same business as its predecessor. *Blachana, LLC v. Bureau of Labor & Indus.*, 354 Or 676, 692, 318 P3d 735 (2014). Whether a corporation conducts essentially the same business as its predecessor depends on the totality of the circumstances, including:

‘[T]he name and identity of the business, its location, the lapse of time between the previous operation and the new operation, whether the businesses employed substantially the same workforce, whether the same product was manufactured or the same services offered, and whether the same machinery, equipment, or methods of production were used.’

Id. at 695. The forum uses these factors to determine if a respondent is ‘conducting essentially the same business as a predecessor;’ it is not necessary for every one of the listed factors to be present. *Id.* at 695. *See also In the Matter of C.S.R.T., LLC, and Robert P. Sabo*, 33 BOLI 263, 273 (2014). Following is an analysis of each of the listed factors to determine if WDSA was a successor in interest to Littleton.

1. Name and Identity of the Business

“With respect to the business name, Littleton used the assumed business name of ‘Schmizza Public House Gresham’ in its registry with the Corporation Division of Oregon’s Secretary of State. (Ex. 13, p. 3) In its Answer and its registry with the Corporation Division registry, WDSA identified the business name as ‘Gresham Schmizza Public House.’ (Answer; Ex. 14, p. 11) A certificate of insurance identified WDSA as doing business as ‘Gresham Public House.’ (Ex. 19) On its OLCC liquor license application, WDSA completed the box titled ‘Trade Name of the Business (Name Customers Will See)’ with ‘Gresham Pizza Schmizza Public House.’ (Ex. 17)

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“In regard to the identity of the business, the forum has previously stated:

‘The name of a business, although entitled to substantial weight, is only one factor in determining if the identity of an alleged successor business is the same as its defunct predecessor. Other factors include, but are not limited to, an historical common identity, common ownership, common management, and common vendors and clients.’

In the Matter of Blachana, LLC, 30 BOLI 197, 222 (2009), *aff’d Blachana, LLC v. Bureau of Labor and Industries*, 354 Or 676, 318 P3d 375 (2014). The following undisputed facts relate to the identity of the Littleton and WDSA businesses:

- Both operated a restaurant business pursuant to a franchise agreement with Schmizza International Inc. (Ex. 6, p. 3; Ex. 22, Agency’s 1st RQA,² p. 11, ## 8-9)
- The lease of 850 NW Eastman Parkway, Gresham, Oregon 97030 (Plot 850 in the Gresham Town Fair Shopping Center) was assigned to Littleton and later assumed by WDSA. The permitted use of the property under the lease was ‘for the operation of a Pizza Schmizza Public House family restaurant offering an American menu, serving pizza and alcoholic beverages, beer and wine for on-premises consumption.’ (Ex. 6, p. 4; Ex. 18, p. 1)
- The signage outside the restaurant stayed the same during both periods of ownership. (Ex. 22, Agency’s 1st RQA, pp. 10-11; Ex. 25, Ex. 27)
- DaCorsi and Cole, the incorporators of WDSA, previously held ownership interests in the business. (Ex. 6, pp. 20-22; Ex. 11, pp. 7-8; Ex. 15, pp. 1-14)
- Among other things, DaCorsi and Cole purchased the customer lists, and the telephone number and website remained the same. (Ex. 6, p. 22, Ex. 22, Agency’s 1st RQA, pp. 9-10, ## 3-4, 16-17)
- Both Littleton and WDSA operated the business using the words ‘Schmizza,’ ‘Public House,’ and ‘Gresham’ in the title. (Ex. 22, Agency’s 1st RQA, p. 12, #11)

“The forum concludes that the undisputed facts regarding the name and identity of the business indicate successorship.

2. Location

“Both Littleton and WDSA operated a business at the same location: 850 NW Eastman Parkway, Gresham, Oregon. (Answer; Ex. 6, pp. 3, 20; Ex. 13, pp. 7-9; Ex. 14, pp. 1, 3; Ex. 22, Agency’s 1st RQA, p. 9) Additionally, WDSA

² On August 30, 2021, ALJ Domas issued an interim order deeming all of the Agency’s requests for admissions admitted due to WDSA’s failure to respond, pursuant to OAR 839-050-0200(11).

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assumed the lease for the space at 850 NW Eastman Parkway that originated in 2017. (Ex. 18) Because the location of Littleton and WDSA is identical, this factor indicates successorship. See *In the Matter of Blachana, LLC*, 30 BOLI at 223.

3. Lapse of Time Between the Ownership of Littleton and WDSA

“Littleton operated the Gresham Pizza Schmizza restaurant from August 12, 2019, until it was repossessed by Gresham Public House, LLC. (Exs. 6,16) Although there were brief transfers of ownership due to the repossession of Littleton’s interest,³ the business operated continuously until WDSA became the owner 42 days later, on or about November 12, 2019. (Ex. 22, Agency’s 1st RQA, p. 13; Answer) This forum previously held that an interval of 47 days between one business closing and another opening was ‘indicative of successorship.’ *In the Matter of Blachana, LLC*, 30 BOLI at 224. Similarly, in this case, the forum also finds that the interval of 42 days in this case also indicates successorship.

4. Whether Littleton and WDSA Employed Substantially the Same Workforce

“The term ‘same or substantial the same work force’ refers to ‘specific employees, not a generic labor pool.’ *Id.* In its motion, the Agency states that ‘[s]ome of the same staff that worked for Littleton’ were still working there in February of 2020. However, there is no evidence as to the number of employees who were the same or the percentage of employees who remained employed. The Agency acknowledges that this factor does not indicate successorship, and the forum agrees.

5. Whether the Same Product Was Manufactured or the Same Services Offered

“Both Littleton and WDSA operated a restaurant as franchisees of Schmizza International Inc. (Ex. 22, Agency’s 1st RQA, p. 11 ## 8, 9) The same type of food and drinks were served, and each business appeared to use the same menu. (Ex. 27, Bass Decl., p.2) Each business also used the same website.⁴ (Ex. 22, Agency’s 1st RQA, p. 14, ## 16,17) Therefore, this element indicates successorship.

³ Claude DaCorsi and Hannah Cole filed articles of incorporation for WDSA Inc. on October 2, 2019. (Ex. 14) Tyson Brafford, the sole member of in Gresham Public House, LLC sold 100% of the membership interest in Gresham Public House, LLC to DaCorsi and Cole on November 19, 2019. (Ex. 6, pp. 3, 20-25) WDSA admits it became the owner of Gresham Schmizza Public House on or about November 12, 2019. Based on these undisputed facts, the forum infers that DaCorsi and Cole transferred their individual ownership of Gresham Public House, LLC to WDSA on November 12, 2019.

⁴ The address for the website was <https://schmizzapublichouse.com/locations/schmizza-public-house-gresham/>.

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6. Whether the Same Machinery, Equipment, Or Methods of Production Were Used

“The restaurant and the kitchen looked the same during both periods of ownership. (Ex. 25, Calen Decl., p. 1) The inside tables, outdoor signs and umbrellas also looked the same. *Id.* The purchase agreement signed by DaCorsi and Cole stated that the purchaser was to ‘retain ownership of all of its business assets, including the equipment inventory on hand, furniture, goodwill, and customer lists.’ (Ex. 6, p. 20) As previously stated, the individual ownership interests of DaCorsi and Cole were placed into WDSA on the same date as the purchase agreement. Accordingly, this factor also indicates successorship.

7. Conclusion

“As set forth above, five of the six elements of the test indicate that WDSA was a successor employer, with the exception that there is insufficient evidence of whether there was substantially the same workforce. One missing factor is not determinative; rather, the forum analyzes the factors ‘[t]aken as a whole.’ *In the Matter of Blachana, LLC*, 30 BOLI at 224. Accordingly, the forum concludes that WDSA conducted substantially the same business as Littleton and is a successor business responsible for unpaid wages that are owed to Littleton’s former employees.

“In the Answer, WDSA asserts that there is a lack of business succession because ‘WDSA purchased the business from Gresham Public House, LLC,’ not Littleton. The Agency provided evidence that the WHD interprets ORS 652.310(1) as follows: ‘a second subsequent purchaser of a repossessed business may be a successor to the prior purchaser of the business despite a brief intervening period of repossession by the original seller.’ (Ex. 26, WHD Field Operations Manual Successor Employer Interpretation, p. 3) The forum determines that this is a plausible interpretation of ORS 652.310(1), and will apply it to the instant case.⁵ Accordingly, the forum does not find that the brief ownership changes negate WDSA’s status as a successor business.

a. Discussion of Unpaid Wages

“In the AOOD, the Agency asserts that Littleton did not pay the wage claimants all wages due to them as required by ORS 652.140(2)(b), and that WDSA is responsible for paying those wages as a successor employer. ORS 652.140(2)(b) provides that an employee’s ‘wages become due and payable within five days, 276 excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee

⁵ See *Westfall v. State of Oregon*, 355 Or 144, 165, 324 P3d 440 (2014) (“Because the [agency] offered its interpretation of its own policy, we will defer to that interpretation as long as that interpretation is plausible and not inconsistent with the policy in its context or with any other source of law.”).

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has quit, whichever event first occurs.’ In order to prevail in a wage claim case, the Agency must first establish a prima facie case supporting the allegations of its charging document. *In The Matter of Derrick’s Custom Painting, Inc.*, 37 BOLI 271, 276 (2020). In this case, the elements of the Agency’s prima facie case are: 1) WDSA employed each claimant; 2) the agreed upon pay rate, if other than the minimum wage; 3) the amount and extent of work that each claimant performed; and 4) the claimants performed work for which they were not properly compensated. *Id.*

“As set forth above, WDSA is a successor employer and, thus, Element 1 is established. The Agency’s summary judgment motion cites to the FOD issued against Littleton as evidence of Elements 2-4. In order to conclude that the wage claim amounts were already established by the FOD, the forum must determine that issue preclusion applies. Five requirements must be met for issue preclusion to apply. *Nelson v. Emerald People’s Util. Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). One of the five requirements is that “[t]he issue was actually litigated and was essential to a final decision on the merits in the prior proceeding.” *Id.* at 104; see also *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 257 (1999). In the Agency’s prior proceeding against Littleton, the final decision was a default order based on Littleton’s failure to file a timely request for hearing. (Ex. 5) As a result, no actual litigation over the merits of the wage claims occurred. Consequently, the individual merits of each of the seven wage claims must be determined based on the evidence presented with the Agency’s motion. See *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 258 (1999).

Calen

“The Agency seeks \$715.26 in unpaid wages on behalf of Calen. The uncontroverted evidence shows that Calen’s rate of pay was \$13 per hour and that Calen was not paid by Littleton for 55.02 hours worked from September 9 – 22, 2019. (Ex. 28) Accordingly, the forum awards Calen \$715.26 in unpaid wages (55.02 hours x \$13/hour).

Thomas

“The Agency seeks \$851.34 in unpaid wages on behalf of Thomas. The uncontroverted evidence shows that Thomas’s rate of pay was \$14 per hour and that Thomas was not paid by Littleton for 60.81 hours worked from September 11 – 28, 2019. (Ex. 29, pp. 2, 6) Accordingly, the forum awards Thomas \$851.34 in unpaid wages (60.81 hours x \$14/hour).

Bass

“The Agency seeks \$1,234.83 in unpaid wages on behalf of Bass. The uncontroverted evidence shows that Bass’s rate of pay was \$13.50 per hour and that Bass was not paid by Littleton for 115.31 hours worked from September 3 –

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October 8, 2019. (Ex. 30, pp. 6-8) Accordingly, the forum awards Bass \$1,201.22 in unpaid wages (115.31 hours x \$13.50/hour, minus \$355.47 in gross wages already paid).

Briceno-Salazar

“The Agency seeks \$454.95 in unpaid wages on behalf of Briceno-Salazar. The uncontroverted evidence shows that Briceno-Salazar’s rate of pay was \$15 per hour and that Briceno-Salazar was not paid by Littleton for 30.33 hours worked from September 13 – 29, 2019. (Ex. 31, pp. 1, 5) Accordingly, the forum awards Thomas \$454.95 in unpaid wages (30.33 hours x \$15/hour).

Inman

“The Agency seeks \$795.76 in unpaid wages on behalf of Inman. The uncontroverted evidence shows that Inman’s rate of pay was \$14 per hour and that Inman was not paid by Littleton for 57.34⁶ hours worked from September 9 – 25, 2019. (Ex. 32, pp. 1, 5) Accordingly, the forum awards Inman \$802.76 in unpaid wages (57.34 hours x \$14/hour).

Payne

“The Agency seeks \$508.13 in unpaid wages on behalf of Payne. The uncontroverted evidence shows that Payne’s rate of pay was \$12.50 per hour and that Payne was not paid by Littleton for 40.64 hours worked from September 13 – 27, 2019. (Ex. 33, pp. 1, 7) Accordingly, the forum awards Inman \$508.00 in unpaid wages (40.64 hours x \$12.50/hour).

Betts

“The Agency seeks \$693.75 in unpaid wages on behalf of Betts. The uncontroverted evidence shows that Betts’s rate of pay was \$12.50 per hour and that Betts was not paid by Littleton for 55.5 hours worked from September 18 – 29, 2019. (Ex. 34, pp. 1, 5-6) Accordingly, the forum awards Inman \$693.75 in unpaid wages (55.5 hours x \$12.50/hour).

b. Additional Issues in AOOD

“The Agency’s motion requests that the forum ‘enter an order of summary judgment resolving all pending issues in Case No. 50-21.’ The forum notes that the AOOD requests penalty wages and civil penalties solely against Littleton. However, the WHD previously entered a Final Order Default as to Littleton.

⁶ The forum bases this calculation on the total of the hours printed on Ex. 32, p. 5, rather than the handwritten number on that page.

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Accordingly, penalty wages and civil penalties are not at issue with respect to WDSA.

Conclusion

“The Agency's motion for summary judgment is GRANTED in its entirety. The hearing in this matter was previously canceled and will not be rescheduled. A Proposed Order incorporating this ruling will be issued as soon as possible, and the parties will have the opportunity to file exceptions to the Proposed Order pursuant to ORS chapter 183 and OAR 839-050-0380.

“IT IS SO ORDERED.”

(10/12/2021 Interim Order) The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

18) On March 17, 2022, 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 on March 25, 2022.

FINDINGS OF FACT – THE MERITS

1) Beginning on August 12, 2019, Littleton was an Oregon corporation that operated a restaurant using “Gresham Schmizza Public House” as its assumed business name. Between September 3, 2019, and October 8, 2019, Littleton engaged the personal services of one or more employees to perform work in Oregon, including the seven claimants named in the AOOD. (10/12/2021 Interim Order)

2) On or about November 12, 2019, WDSA became the owner of Gresham Schmizza Public House. (10/12/2021 Interim Order)

3) Both Littleton and WDSA operated a restaurant business pursuant to a franchise agreement with Schmizza International Inc. Littleton's property lease was later assumed by WDSA. The permitted use of the property under the lease was “for the operation of a Pizza Schmizza Public House family restaurant offering an American menu, serving pizza and alcoholic beverages, beer and wine for on-premises consumption.” The signage outside the restaurant stayed the same during both periods of ownership. The incorporators of WDSA previously held ownership interests in the business. Among other things, WDSA's incorporators purchased the restaurant's customer lists. The restaurant's telephone number and website remained the same. Both Littleton and WDSA operated the business using the words “Schmizza,” “Public House” and “Gresham” in the title. Littleton and WDSA employed substantially the same work force, used the same equipment and offered the same items on the menu. (10/12/2021 Interim Order)

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- 4) The wages owed to each complainant are computed as follows:

Calen	55.02 hours x \$13/hour	\$715.26
Thomas	60.81 hours x \$14/hour	\$851.34
Bass	115.31 hours x \$13.50/hour (minus \$355.47 paid)	\$1,201.22
Briceno-Salazar	30.33 hours x \$15/hour	\$454.95
Inman	57.34 hours x \$14/hour	\$802.76
Payne	40.64 hours x \$12.50/hour	\$508.00
Betts	55.50 hours x \$12.50/hour	\$693.75

(10/12/2021 Interim Order)

CONCLUSIONS OF LAW

1) During all times material herein, Littleton was an employer and the seven claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Littleton employed the seven claimants. ORS 652.310.

2) WDSA is a “successor to the business” of Littleton within the meaning of ORS 652.310(1) and, as an employer, is subject to the provisions of ORS 652.110 to 652.405.

3) BOLI’s Commissioner has jurisdiction over the subject matter herein. 652.310 to 652.405.

4) Littleton failed to pay the claimants the amounts set out in Finding of Fact #4 – The Merits, and more than five days have elapsed since Claimants’ employment ceased. ORS 652.140(2).

5) WDSA is liable for Littleton’s failure to pay the claimants all wages earned and unpaid when their employment terminated. ORS 652.310(1).

6) Under the facts and circumstances of this record, and according to the applicable law, BOLI’s Commissioner has the authority to order WDSA to pay the seven claimants their earned, unpaid, due and payable wages. ORS 652.332.

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OPINION

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

Exceptions to the Proposed Order

In its Exceptions, the Agency requests that the forum make corrections to scrivener's errors and add a citation. These exceptions are well taken, and the Exceptions are GRANTED as reflected in this Final Order.

ORDER

NOW, THEREFORE as authorized by ORS 652.140, ORS 652.150, and ORS 652.332, and as payment of unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **WDSA Inc., dba Gresham Schmizza Public House, dba Gresham Pizza Schmizza Public House**, to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

- (1) A certified check payable to the Bureau of Labor and Industries in trust for Kaleb Calen in the amount of **SEVEN HUNDRED FIFTEEN DOLLARS AND TWENTY-SIX CENTS (\$715.26)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.
- (2) A certified check payable to the Bureau of Labor and Industries in trust for Ashley Thomas in the amount of **EIGHT HUNDRED FIFTY-ONE DOLLARS AND THIRTY-FOUR CENTS (\$851.34)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.
- (3) A certified check payable to the Bureau of Labor and Industries in trust for Ashley Bass in the amount of **ONE THOUSAND TWO HUNDRED ONE DOLLARS AND TWENTY-TWO CENTS (\$1,201.22)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.
- (4) A certified check payable to the Bureau of Labor and Industries in trust for Jorge Briceno-Salazar in the amount of **FOUR HUNDRED FIFTY-FOUR DOLLARS AND NINETY-FIVE CENTS (\$454.95)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.
- (5) A certified check payable to the Bureau of Labor and Industries in trust for Kyle Inman in the amount of **EIGHT HUNDRED TWO DOLLARS AND SEVENTY-SIX CENTS (\$802.76)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.

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(6) A certified check payable to the Bureau of Labor and Industries in trust for Lynsey Payne in the amount of **FIVE HUNDRED EIGHT DOLLARS (\$508)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.

(7) A certified check payable to the Bureau of Labor and Industries in trust for Gail Betts in the amount of **SIX HUNDRED NINETY-THREE DOLLARS AND SEVENTY-FIVE CENTS (\$693.75)**, plus interest at the legal rate on that amount from the date the Final Order is issued until paid.

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**In the Matter of
Melissa and Aaron Klein dba Sweetcakes
by Melissa, Respondents, Case Nos. 44-14
& 45-14**

**Amended Final Order of Commissioner Val Hoyle
Issued July 12, 2022**

SYNOPSIS

The Agency's Formal Charges alleged that Respondents refused to make a wedding cake for two Complainants based on their sexual orientation and that Respondents published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. In addition, the Formal Charges alleged that Aaron Klein aided and abetted Melissa Klein in the commission of those violations. In this Amended Final Order, the Commissioner concludes that: (1) A. Klein, acting on behalf of Sweetcakes by Melissa, refused to make a wedding cake for Complainants based on their sexual orientation, thereby violating ORS 659A.403; (2) M. Klein did not violate ORS 659A.403; (3) A. Klein did not aid and abet M. Klein in violation of ORS 659A.406 and (4) neither A. nor M. Klein violated ORS 659A.409. The Commissioner held that, as partners, A. Klein and M. Klein are jointly and severally liable for all violations. On remand, the Commissioner awards Complainants \$20,000 and \$10,000, respectively, in damages for emotional and mental suffering resulting from the denial of service.

Following issuance of the original Final Order in this matter, that order was appealed to the Oregon Court of Appeals. The Court of Appeals reversed the order in part and affirmed in part. *Klein v. Oregon Bureau of Labor and Industries*, 289 Or. App. 507, 410 P.3d 1051 (2017) *rev. den.*, 363 Or. 224, 434 P.3d 25 (2018) (*Klein I*). The Court of Appeals reversed that order as to the findings that Respondents Aaron Klein and Melissa Klein violated ORS 659A.409 and the related injunctive relief. On further appeal, the United States Supreme Court granted certiorari and vacated and remanded the judgment back to the Oregon Court of Appeals for further consideration in light of its decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 584 U.S. ___, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018). *Klein v. Oregon Bureau of Labor and Industries*, ___ U.S. ___, 139 S. Ct. 2713, 204 L. Ed. 2d 1107 (2019) (*Klein II*). On January 26, 2022, the Oregon Court of Appeals issued its opinion on remand, again reversing the findings that Aaron Klein and Melissa Klein violated ORS 659A.409 and the related injunctive relief, reversing and remanding the order as to damages, and otherwise affirming the order. *Klein v. Oregon Bureau of Labor and Industries*, 317 Or. App. 138, 140-41, 506 P.3d 1108 (2022) (*Klein III*).

This Amended Final Order is issued on remand from the Oregon Court of

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Appeals. In this Amended Final Order, the finding of a violation of ORS 659A.409 and the associated injunctive relief has been amended consistent with the Court of Appeal's ruling. Further findings on the damages award are made below, reducing the noneconomic damages awarded to Complainants to \$20,000 and \$10,000 respectively and clarifying the basis for the commissioner's award. Otherwise, the original final order is affirmed.

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

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

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

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by BOLI's chief prosecutor, Jenn Gaddis, and Cristin Casey, administrative prosecutor, both employees of the Agency. Paul Thompson, Complainants' attorney, was present throughout the hearing. Complainants Rachel Bowman-Cryer and Laurel Bowman-Cryer were both present throughout the hearing. Respondents Melissa Klein and Aaron Wayne Klein were both present throughout the hearing and were represented by Herbert Grey, Tyler Smith, and Anna Harmon, attorneys at law.

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

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

At hearing, the forum received into evidence:

- a) Administrative exhibits X1 through X95.
- b) Agency exhibits A1 through A12, A23 (pp. 1-4), A25, and A27 through A29 were received. Exhibit A30 was offered but not received.
- c) Respondents' exhibits R2 (selected "posts" on pp. 3 and 9), R2 through R5, R6 (pp. 1-2), R7 through R12, R13 (pp. 7-18), R15, R16, R18 through R24, R26, R27, R28 (pp. 1-3, part of p. 4, pp. 14-28), R29, R30, R32, R33 (pp. 5-8), and R34 through

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R41 were received. Exhibits R1, R14, and R17 were offered but not received.

Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact¹, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT - THE MERITS²

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

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

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

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

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

² Except for Finding of Fact #43 - The Merits, the findings of fact relevant to the forum's determination of whether Respondents violated ORS 659A.403, ORS 659A.406, and ORS 659A.409 are set out in the forum's ruling on Respondents' Renewed Motion for Summary Judgment and the Agency's Cross-Motion for Summary Judgment. See Finding of Fact #28 - Procedural, *supra*. They are duplicated in these Findings of Fact - The Merits only to the extent necessary to provide context to Complainants' claim for 1) damages.

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

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

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

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

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

8) On January 17, 2013, RBC and CM visited Sweetcakes's bakery shop in Gresham, Oregon for their cake tasting appointment, intending to order a cake for RBC's wedding to LBC. (Respondents' Admission; Affidavit of AK; Testimony of RBC, CM, AK)

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

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

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"holding [her] head in her hands, just bawling." (Affidavit of AK; Testimony of RBC, CM)

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

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

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

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

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

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

⁵ RBC credibly testified as follows:

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

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Cryer)

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

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

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

"Hi Lauren,

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

"I even spoke with them at the Portland Wedding Show and made an appointment then for 1 pm today. When we showed up for the appointment it was with Melissa's husband. I did not catch his name because the appointment did not last long enough for me to ask. He took us in the office and asked what the bride and groom names were. When we told him that our names were Rachel and Laurel, he quickly said that they don't do gay weddings because they are Christians and don't believe same-sex marriage is right. My mother asked why they had no problem taking my money when I purchased her cake. She told them that we are a Christian family as well and that she used to believe like he believed until God blessed her with two gay children.

"I was stunned and crying. This is twice in this wedding process that we have faced this kind of bigotry. It saddens me because we moved from Texas so that my brother and I could be more accepted in the community.

"We wanted to inform you of all of this because you have a right to know so that other same-sex couples don't have to go through this in the future. It surprisingly that both the West End Ballroom and the caterers we chose, Premier Catering, recommend (sic) Sweet Cakes and yet neither mentioned to us that they don't do gay weddings. I figure that this must be because no one ever

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speaks up to let you know. I didn't want to let this pass without saying something.

"My fiance and I have been together for 10 years. We are adopting our two foster children and wanted to get married as a sign of our commitment to each other and the family that we are creating. It saddens me that my children will grow up in a world where people are an abomination because they love each other. It is my responsibility to set an example for them that you should speak up when you see injustice because that is how we make progress.

"Thank you for your fast response to both my mother and L I realize that you are not responsible for their poor behavior, and thank you for your understanding. If there is anymore info that I can provide for you please let me know.

"Sincerely,
Rachel Cryer & Laurel Bowman"

(Testimony of LBC; Ex. R32)

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

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

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

"In november of 2011 my fiance and I purchased a wedding cake from this establishment for her mother's wedding. We spent 250. When we decided to get married ourselves chose to back and purchase a second cake. Today, January 17, 2013, we went for our cake tasting. When asked for a grooms name my soon to be mother in law informed them of my name.

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

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The owner then proceeded to say we were abominations unto the lord and refused to make another cake for us despite having already paid 250 once and having done business in the past. We were then informed that our money was not equal, my fiance reduced to tears. This is absolutely unacceptable."

(Testimony of LBC; Exhibit R3)

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

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

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

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

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

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

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

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

"We have received the enclosed consumer complaint about your business. We understand that there are often two sides to a problem, and we would appreciate your prompt review of this matter.

"We do not represent the complainant. We do, however, review all complaints to determine whether grounds exist to warrant action by us. Your response to the allegations in the complaint would help us to make that determination.

"In the interest of efficiency, we prefer that you respond directly to the complainant and e-mail copy of the response to our office. Please include the file number shown above on the subject line of your e-mail. Alternatively, you may respond to us by regular mail."

On January 29, AK posted a copy of the first page of LBC's DOJ complaint on his Facebook page, prefaced by his comment "[t]his is what happens when you tell gay people you won't do their 'wedding cake.'" At that time, AK only had 17 "friends" on his Facebook page. (Testimony of LBC, AK; Exs. R3, A4)

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

30) On February 1, 2013, LBC went to the emergency room of a local hospital at approximately 8:00 p.m. because of an injury to her shoulder that she had suffered three weeks earlier when lifting one of her foster children above her head when they were playing. While in the hospital, she became aware that AK's refusal to make their wedding cake was on the news. This made her very upset and she cried when she was

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examined by a doctor, telling the doctor that she had an "unpleasant interaction with a business owner, and now this information is on the news." (Testimony of LBC; Exs. A6, R7)

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

32) As soon as they became aware that LBC's DOJ complaint had become public knowledge through the media, both Complainants greatly feared that E and A would be taken away from them by the state of Oregon's foster care system.⁷ Earlier, they had been instructed that it was their responsibility to make sure that the girls' information was protected and that the state would "have to readdress placement" of the girls with complainants if any information was released concerning the girls. (Testimony of RBC, LBC)

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

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

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

R. Bowman-Cryer

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

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

L. Bowman-Cryer

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

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

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

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

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

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

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

"Members of the Media:

"I would like to begin by thanking each of you for your interest in this story. As you know, I represent the lesbian couple who were denied a wedding cake by Sweet Cakes by Melissa. I ask that their names not be printed in regards to this statement, as they would appreciate privacy in this matter.

"The Press Release reads:

"We are grateful for the outpouring of support we have received from friends, family, members of the LGBT community, and our allies. We are especially thankful that LGBT-supportive companies have graciously offered their services to make our special day perfect.

"At this time, the support of the community and other well-wishers is all we require. We ask that individuals and companies that want to provide support, direct their donations in our name to Pride Northwest, our pride organization in Portland, Oregon. They have accepted our request to direct donations and gifts to further awareness of issues affecting the LGBT community, including marriage equality and families. Interested parties can contact Cory L Murphy of Pride Northwest with any questions.
* * *

"We have decided to accept the gracious offer from Mr. Duff Goldman of Charm City Cakes and the TV show 'Ace of Cakes.' At the time Mr. Goldman made his offer we had already contracted with and paid for another local bakery, Pastrygirl, to make our wedding cake. It is extremely important to us to honor that contract. With that in mind we have humbly asked Mr. Goldman and Charm City Cakes to prepare a Bride's cake for us in place of the traditional Groom's cake. We are grateful to both bakeries for being a part of making our wedding date incredibly special.

"While we are humbled by the support and mindful of people's interest, this matter has placed us in the media spotlight against our wishes. In order to maintain our privacy, we will not be granting interviews and are asking everyone to respect our privacy at this time.

"Please direct any media inquiries to our attorney, Paul Thompson[.]"

(Exs. A7, R28)

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

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

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

"Hey everyone,

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

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

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

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hurt her and made her very angry at her sister. (Testimony of LBC, RBC, CM; Ex. A 16)

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

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

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

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

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

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

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

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

"BOLI finds substantial evidence of unlawful discrimination in bakery civil

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rights complaint *Sweet Cakes complaint will now move into conciliation to determine whether settlement can be reached*

"Portland, OR - A Gresham bakery violated the civil rights of a same-sex couple when it denied service based on sexual orientation, a Bureau of Labor and Industries (BOLi) investigation has found.

"The couple filed the complaint against Sweetcakes by Melissa under the Oregon Equality Act of 2007, a law that protects the rights of gays, lesbians, bisexual and Transgender Oregonians in employment, housing and public places.

"* * * * *

"Copies of the complaint are available upon request. * * *"

(Ex. R24)

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

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

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

49) Although AK has been interviewed by the media on a number of occasions about the case, he did not initiate any contacts with the media. Other than posting LBC's DOJ complaint on his Facebook page, there is no evidence that AK gave Complainants' names to the media. Finally, there is no evidence in the record of any untruthful statements that AK or MK made to public media regarding their case.⁸ (Testimony of AK; Entire Record)

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

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

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

52) For the most part, CM's testimony was credible, even though her answers frequently strayed from the subject of the questions. However, the forum did not believe her earlier statements to Ponaman that RBC was "throwing up" because she was so nervous and that "for days [RBC] couldn't get out of bed" because RBC did not testify to those facts and because RBC spent 30 minutes talking with LBC and A. Cryer the night of January 17, 2023 and went to a cake tasting at Pastry Gril on January 21, 2013. Due to these exaggerations, the forum has only credited CM's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of CM)

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

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

54) LBC was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events. On cross examination, she argued repeatedly with Respondents' counsel and had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the denial of service and how it affected her. Her testimony was inconsistent in several respects with more credible evidence. First, she testified that she had a "major blowout" and "really bad fight" with A. Cryer between January 17 and January 21, 2013. In contrast, A. Cryer testified, when asked if he fought with LBC, "I wouldn't say we fought." He also testified that this case did not affect his relationship with LBC. Second, she testified that her blood pressure spiked in the

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hospital to 210/165 on February 1, 2013, when she learned that her DOJ complaint had hit the media, requiring the immediate attention of a doctor and four nurses. Her treating doctor's report notes that she was upset and crying about her situation hitting the news, but there is no mention of a blood pressure spike. Third, she testified that the media were standing outside her and RBC's apartment on February 1, 2013, when she talked to RBC from the hospital. RBC, who was at the apartment at that time, testified that the media were not outside their apartment at that time. Fourth, LBC testified that RBC stayed in bed the rest of the day after she returned from the cake tasting at Sweetcakes. In contrast, A. Cryer testified that he, LBC, and RBC had a 30-minute conversation that evening. Like RBC, the forum has only credited her testimony about media exposure when she testified about specific incidents. The forum has only credited LBC's testimony when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony. (Testimony of LBC)

CONCLUSIONS OF LAW

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

2) At all times material herein, Sweetcakes by Melissa was a "place of public accommodation" as defined in ORS 659A.400.

3) At all times material herein, AK and MK were individuals and "person[s]" under ORS 659A.010(9), ORS 659A.403, ORS 659A.406, and ORS 659A.409.

4) At all times material herein, Complainants' sexual orientation was homosexual.

5) AK denied the full and equal accommodations, advantages; facilities and privileges of Sweetcakes by Melissa to Complainants based on their sexual orientation, thereby violating ORS 659A.403.

6) AK did not violate ORS 659A.406.

7) AK and MK did not violate ORS 659A.409.

8) Complainants suffered emotional and mental suffering as a result of AK's violation of ORS 659A.403.

9) As partners, AK and MK are jointly and severally liable for AK's violation of ORS 659A.403.

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

11) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded to Complainants and the orders to cease and desist violating ORS 659A.403 are an appropriate exercise of that authority.

OPINION

Introduction

In his ruling on Respondents' motion and the Agency's cross-motion for summary judgment, the ALJ concluded that Respondents did not violate ORS 659A.409.⁹ This amended final order accepts that decision consistently with the Court of Appeals opinion in *Klein I*.

Damages

The Formal Charges seek damages for emotional, mental and physical-suffering in the amount of "at least \$75,000" for each Complainant. In addition to any emotional suffering experienced by Complainants as a direct result of Sweetcakes' refusal to bake them a cake ("denial of service"), the Agency also seeks damages for suffering caused to Complainants by media publicity and social media responses to this case.

In *Klein III*, the Court of Appeals again affirmed that BOLI's finding of a violation of ORS 659A.403 was correct. However, the Court found that the noneconomic damages were based on what was said by AK and how that was relayed to complainants, which according to BOLI's own ALJ, differed from the statement and AK made to Cheryl. The Court of Appeals found that the "specter of non-neutrality materializes into the affirmative conclusion that BOLI at least subtly departed from principles of neutrality when it awarded noneconomic damages based on Aaron's quotation of Leviticus." *Klein III* at 163. Therefore, BOLI's remaining responsibility in this Amended Final Order is to review and reassess the amount, if any, of non-economic damages to be awarded to Complainants.

This is a public accommodations case. Complainants were denied full and equal accommodations, advantages, facilities, and privileges in violation of Oregon Law. Noneconomic damages, if assessed, eliminate the effects of that unlawful practice by compensating complainants' actual damages.

⁹ See Finding of Fact #28 - Procedural, *infra*. In the AU's ruling on the motions for summary judgment, he noted that the Agency did not allege that AK violated ORS 659A.409, but did not consider this paragraph. See footnote 26.

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The forum, on review of the record, evaluates whether an award of damages is appropriate, and considers whether an amount is consistent with awards in instances of finding similar violations in similar circumstances.

The forum expressly disavows the statements of the administrative prosecutor in the hearing that identify Respondents' religious beliefs with "prejudice". These statements do not reflect the position of the Commissioner in the application of Oregon law within this order. The forum further expressly disavows any award of damages in connection with Aaron Klein's quotation of Leviticus. Damages are awarded based on consideration of the harm resulting from the denial of service alone, as described below, and on the need of the forum to act consistently in similar circumstances.

1. EXTENT AND CAUSE OF COMPLAINANTS' EMOTIONAL SUFFERING

A. R. Bowman-Cryer

a. Emotional suffering from the denial of service

Prior to the cake tasting, LBC had been asking RBC to marry her for nine years. Until October 2012, RBC did not want to be married because of her personal experience of failed marriages. At that time, RBC decided that they should get married to give their foster children a sense of "permanency and commitment." After her long-standing matrimonial reticence, RBC became excited to get married and to start planning the wedding,¹⁰ wanting a wedding that was as "big and grand" as they could afford. Obtaining a cake from Sweetcakes like the one purchased for CM's wedding two years earlier was part of that grand scheme, and both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's wedding.

The record shows two causes of RBC's emotional suffering: 1) the denial of services by AK and 2) CM's recitation of AK's comments following the denial of services.

RBC's emotional suffering began at the January 17, 2013, cake tasting when AK told RBC and CM that Sweetcakes did not make wedding cakes for same-sex ceremonies. In response, RBC began to cry. She felt that she had humiliated her mother and was concerned that CM, who had believed that homosexuality was wrong until only a few years earlier, was ashamed of her. Walking out to the car and in the car, RBC became hysterical and kept apologizing to CM. When CM returned to the car after talking with AK, RBC was still "bawling" in the car.

When CM told her that AK had called her "an abomination," this made RBC cry

¹⁰ The forum acknowledges that Complainants' "wedding" on June 27, 2013, was only a commitment ceremony, not a legal "marriage." See, *infra*.

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even more. RBC, who was brought up as a Southern Baptist, interpreted AK's use of the word "abomination" to mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved, have a family, or go to heaven. She continued to cry all the way home and after she arrived at home, where she immediately went upstairs to her bedroom and lay in her bed, crying.

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

In the days following January 17, 2013, RBC had difficulty controlling her emotions and cried a lot, and Complainants argued with each other because of RBC's inability to control her emotions. They had not argued previously since moving to Oregon. In addition, RBC also became more introverted and distant in her family relationships. She and A. Cryer have always been very close, and their connection was not as close "for a little bit" after January 17, 2013. A week later, RBC still felt "very sad and stressed," felt concerned about still having to plan her wedding, and felt less exuberant about the wedding. On January 21, 2013, she experienced anxiety during her cake tasting at Pastry Girl because of AK's January 17, 2013, refusal and her fear of subsequent refusals. After January 17, 2013, although RBC relied on CM to contact potential wedding vendors, RBC still experienced some anxiety over possible rejection because her wedding was a same-sex wedding. During this same period of time, A. Cryer credibly analogized RBC's demeanor as similar to that of a dog who had been abused.

b. Emotional suffering from publicity about the case

On February 1, 2013, RBC became aware that the media was aware of AK's refusal to make a wedding cake for Complainants when she received a telephone call from Lars Larson, an American conservative talk radio show host based in Portland, Oregon, who told her that he had spoken with AK and wanted to see what RBC "had to say about the pending case." This upset RBC, and she became greatly concerned that E and A would be taken away from them by the foster care system because they had been told that the girls' information had to be protected and that the state would "have to readdress placement" of the girls with Complainants if any information was released concerning the girls. This concern continued until their adoption became final sometime after December 2013.

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

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The publicity from the case and accompanying threats on social media from third parties made RBC "scared" for the lives of A, E, LBC, and herself. In addition, RBC was also upset by a confrontation with her sister who learned about the DOJ complaint through the media and posted a comment in support of Respondents on Respondents' Facebook.

Without giving any specific examples, RBC credibly testified that, in a general sense, the denial of service has caused her continued emotional suffering up to the time of hearing.¹¹

B. L. Bowman-Cryer

a. Emotional suffering from the denial of service

LBC had been asking RBC to marry her for nine years before RBC finally accepted in October 2012. RBC's acceptance in October 2012 of LBC's marriage proposal made LBC "extremely happy." Both Complainants were excited about the cake tasting at Sweetcakes because of how much they liked the cake Respondents had made for CM's earlier wedding. However, LBC, unlike RBC, did not go to the cake tasting.

As with RBC, the record shows two causes of LBC's emotional suffering: 1) the denial of services by AK and 2) CM's recitation of AK's comments following the denial of services.

When CM and RBC arrived home on January 17, 2013, after their cake tasting at Sweetcakes, CM told LBC that AK had told them that Sweetcakes did "not do same-sex weddings" and that AK had told CM that "your children are an abomination."

LBC was "flabbergasted" at AK's statement about same-sex weddings. This upset her and made her very angry.

LBC, who was raised as a Roman Catholic, recognized AK's statement to CM as a reference from Leviticus. She was "shocked" to hear that AK had referred to her as an "abomination." Based on her religious background, she understood the term

¹¹ The following is RBC's only testimony about her emotional suffering due to the denial of service after the case began to be publicized. It occurred during the Agency's redirect examination:

Q: "You testified earlier about the media attention being sort of a secondary layer of stress, and I believe that that term you used during Mr. Smith's cross examination of you. During my examination of you, you testified at length as to the emotional harm that you suffered directly from the refusal of service alone. Do you still feel that harm from the refusal itself -- the January 17, 2013 refusal?"

A. "Yes, I still experience that."

Q. "Was the primary harm, the harm that resulted from the refusal of service itself, persistent throughout the times where you experienced media attention?"

A. "Yes, the harm was still present during the media attention."

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"abomination" to mean "this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life."

Her immediate thought was that this never would have happened, had she had not asked RBC to marry her. Because of that, she felt shame. Like RBC, she also worried about how it would affect CM's relatively recent acceptance of RBC's sexual orientation.

LBC views herself as RBC's protector. After RBC climbed into bed, crying, LBC got into bed with RBC and tried to soothe her. RBC became even more upset and pushed RBC away. In response, LBC lost her temper because she could not "fix" things.

When LBC went back downstairs, E, the older of Complainants' foster daughters was extremely agitated from events at school that day. LBC tried to calm her, but she refused to be calmed, repeatedly calling out for RBC, with whom she had a special bond. Eventually, E cried herself to sleep. LBC's inability to calm E was very frustrating to her. That night, LBC was very upset, cried a lot, and was hurt and angry. Later that same evening, she filed her DOJ complaint.

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

b. Emotional suffering from publicity about the case.

On February 1, 2013, LBC went to the emergency room of a local hospital because of pain from a shoulder injury that she had suffered three weeks earlier and her concern that she might have a broken shoulder. While in the hospital, she heard that AK's refusal to make their wedding cake was on the news. This made her very upset and she was crying when she was examined by a doctor. Based on the media, potential media exposure, and social media attention related to her DOJ complaint after February 1, 2013, LBC's headaches increased. She also felt intimidated and became fearful.

After LBC's DOJ complaint was publicized in the media, LBC also had an "devastating" confrontation with her aunt who had learned about her DOJ complaint against Respondents through the media and threatened to shoot LBC in the face if she ever set foot on LBC's family's property again.¹²

¹² LBC's intense and visceral display of emotions while testifying about her aunt's behavior made it clear that her aunt's behavior caused her extreme upset.

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After February 1, 2013, LBC, like RBC, was also greatly concerned that their foster children would be taken away from them because of media exposure.

LBC testified that she still feels emotional effects from the denial of service because E, A, and RBC "were" still suffering and that "was" tearing me apart.¹³

2. EMOTIONAL SUFFERING DAMAGES BASED ON MEDIA AND SOCIAL MEDIA ATTENTION.

In its closing argument, the Agency asked the forum to award Complainants \$75,000 each in emotional suffering damages stemming directly from the denial of Service. In addition, the Agency asked the forum to award damages to Complainants for emotional suffering they experienced as a result of the media and social media attention generated by the case from January 29, 2013, the date AK posted LBC's DOJ complaint on his Facebook page, up to the date of hearing. The Agency's theory of liability is that since Respondents brought the case to the media's attention and kept it there by repeatedly appearing in public to make statements deriding Complainants, it was foreseeable that this attention would negatively impact Complainants, making Respondents liable for any resultant emotional suffering experienced by Complainants. The Agency also argues that Respondents are liable for negative third-party social media directed at Complainants because it was a foreseeable consequence of the media attention.

The Commissioner concludes that complainants' emotional harm related to the denial of service continued throughout the period of media attention and that the facts related solely to emotional harm resulting from media attention do not adequately support an award of damages. No further analysis regarding the media attention as a causative factor is, therefore, necessary.

2. AMOUNT OF DAMAGES

There is ample evidence in the record of specific, identifiable types of emotional suffering both Complainants experienced because of the denial of service. In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. The actual amount depends on the facts presented by each aggrieved person. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of C. C. Slaughters, Ltd.*, 26 BOLI 186, 196 (2005). In public accommodation cases, "the duration of the discrimination does not determine either the degree or duration of the effects of discrimination." *In the Matter of Westwind Group of Oregon, Inc.*, 17 BOLI 46, 53 (1998).

In this case, the ALJ proposed that \$75,000 and \$60,000, are appropriate awards

¹³ See footnote 7, *supra*. LBC testified in the past tense.

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to compensate Complainants RBC and LBC, respectively, for the emotional suffering they experienced from Respondents' denial of service. The proposal for LBC is less because she was not present at the denial and the ALJ found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects. In this particular case, the demeanor of the witnesses was critical in determining both the sincerity and extent of the harm that was felt by RBC and LBC.

The ALJ's previous damages award, which BOLI accepted, was based on the emotional harms caused to RBC and LBC by 1) the denial of services itself and 2) CM's recitation of AK's quotation of Leviticus. In light of the Court of Appeals opinion in *Klein II*, the forum reassesses the damages award based solely on the emotional harms caused by the denial of services itself and does not award any damages for the emotional suffering that resulted from CM's conversation with AK after the denial of services. Based on the facts found by the ALJ, the forum finds that \$20,000 is an appropriate award to compensate Rachel Bowman-Cryer and \$10,000 is an appropriate award to compensate Laurel Bowman-Cryer for the emotional suffering that they each experienced as a result of Respondents' unlawful denial of services. The forum further finds that this non-economic award is consistent with the forum's prior orders, specifically in public accommodations discrimination proceedings.¹⁴

¹⁴ See *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2 (2014) (Complainant, an individual with multiple disabilities who has been prescribed a service dog and uses service dogs to mitigate her disabilities, was not allowed to shop in Respondent's convenience store in April 2013 while accompanied by her service dogs. Respondent violated ORS 659A.142(4). The forum awarded Complainant \$60,000 in damages for physical, emotional, and mental suffering.); *In the Matter of Blachana, LLC, dba Twilight Room Annex aka The P Club, and Christopher Penner, Individually*, 32 BOLI 220 (2013) (Respondent Penner, and Respondent Blachana, through Respondent Penner, denied access to the P Club to the Rose City T-Girls based on the sexual orientation of the Rose City T-Girls' members, in violation of ORS 659A.403, by leaving voice mails with the T-Girls' spokesperson in which Penner asked the T-Girls not to come back to the P Club on Friday nights, their regular gathering night at the P Club. By this action, Respondent Penner also aided and abetted Blachana in its denial, thereby violating ORS 659A.406. Through the voice mails, Penner and Blachana issued a discriminatory "notice" or "communication" in violation of ORS 659A.409. The forum awarded a total of \$400,000 in mental, emotional, and physical suffering damages to 11 members of the T-Girls who testified at hearing. Individual noneconomic damages ranged from \$20,000 to \$50,000, with the largest award going to complainant who received the discriminatory "notice" or "communication" from business owner.); *In the Matter of CC Slaughters, Ltd.*, 26 BOLI 186 (2005) (Respondent, a nightclub that offered food, beverages, and music to the public, evicted Complainant from its premises on June 12 and June 14, 2004, because he had Parkinson's Disease, a disability. Complainant experienced substantial emotional distress as a result of Respondent's violation of ORS 659A.142(3) and the commissioner awarded Complainant \$25,000 in damages for emotional distress.); *In the Matter of The Westwind Group of Oregon, Inc., dba Burger King*, 17 BOLI 46 (1998) (Where respondent, a public accommodation, operated a fast-food restaurant, and where respondent's assistant manager, who was white, ignored and failed to serve complainant, who was black, but then promptly and courteously served a white customer who came to the counter behind complainant, the commissioner found that the assistant manager discriminated against complainant because of her race, in violation of former ORS 30.670. The commissioner awarded complainant \$15,000 for her mental suffering caused by respondent's actions.)

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ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to eliminate the effects of the violation of ORS 659A.403 by **Respondent Aaron Klein**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby finds **Respondents Aaron Klein and Melissa Klein** must pay to the Bureau of Labor and Industries, in trust for Complainants **Rachel Bowman-Cryer and Laurel Bowman-Cryer** the amount of:

1) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for emotional, mental, and physical suffering, to be apportioned as follows:

Rachel Bowman-Cryer: \$20,000

Laurel Bowman-Cryer: \$10,000

As Respondents have previously delivered to the Bureau of Labor and Industries the sum of \$135,000 in satisfaction of the original final order, BOLI shall deduct and retain from this previously paid figure the amount of \$30,000 as levied herein and shall refund the remainder held in trust to Respondents.

B. NOW, THEREFORE, as authorized by ORS 659A.850(4), and to further eliminate the effect of the violation of ORS 659A.403 by Respondent Aaron Klein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Aaron Klein and Melissa Klein to cease and desist from denying the full and equal accommodations, advantages, facilities, and privileges of Sweetcakes by Melissa to any person based on that person's sexual orientation.

APPENDIX

FINDINGS OF FACT – PROCEDURAL

1) On August 8, 2013, R. Bowman-Cryer (“RBC”) filed a verified complaint with the Agency’s Civil Rights Division (“CRD”) alleging that Aaron Klein and Melissa Klein, dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. RBC’s complaint was subsequently amended to name both Kleins as aiders and abettors under ORS 659A.406. (Ex. A-27)

2) On November 7, 2013, L. Bowman-Cryer (“LBC”) filed a verified complaint with the Agency’s Civil Rights Division (“CRD”) alleging that Aaron Klein (“AK”) and Melissa Klein (“MK”), dba Sweetcakes by Melissa, refused to make her a wedding cake based on her sexual orientation and published and displayed a communication to that effect, in violation of ORS 659A.403 and ORS 659A.409. LBC’s complaint was subsequently amended to name AK and MK as aiders and abettors under ORS 659A.406. (Ex. A-28)

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3) On January 15, 2014, after investigating RBC's and LBC's complaints, the CRD issued a Notice of Substantial Evidence Determination in each case in which the CRD found substantial evidence of unlawful discrimination in public accommodation against Respondents in violation of ORS 659A.403, ORS 659A.406, and ORS 659A.409 (Ex. A29)

4) On June 4, 2014, the Agency issued two sets of Formal Charges, one alleging unlawful discrimination against RBC (case no. 44-14) and the other alleging unlawful discrimination against LBC (case no. 45-14) that alleged the following:

(a) At all times material, Sweetcakes by Melissa ("Sweetcakes") was an assumed business name of Respondent MK doing business in Gresham, Oregon, that offered goods and services to the public, including wedding cakes;

(b) At all times material, AK was registered with the Oregon Sec. of State Business Registry as the authorized representative of MK, dba Sweetcakes by Melissa;

(c) On January 17, 2013, RBC and her mother went to Sweetcakes for a cake tasting related to RBC's wedding ceremony to LBC;

(d) AK conducted the tasting and asked for the names of a bride and groom. RBC said there would be two brides for her ceremony and gave her name and LBC's name. AK told RBC that Sweetcakes did not do "same-sex couples" because it "goes against our religion";

(e) Complainants were injured by Respondents' refusal to provide them with a wedding cake;

(f) MK discriminated against Complainants based on their sexual orientation, in violation of ORS 659A.403(3) and ORS 659.409;

(g) AK aided or abetted MK as the owner of Sweetcakes in MK's violation of ORS 659A.403(3) and ORS 659.409; thereby violating ORS 659A.406;

(h) Complainants are each entitled to damages for emotional, mental, and physical suffering in the amount of "at least \$75,000" and out-of-pocket expenses "to be proven at hearing."

(i) Respondents published or issued a communication, notice that its accommodation, advantages would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409.

On the same day, BOLI's Contested Case Coordinator issued Notices of Hearing in both cases stating the time and place of the hearing as August 5, 2014, beginning at 9:00 a.m., at BOLI's Portland, Oregon office. (Exs. X2, X4)

5) On June 6, 2014, Respondents filed a motion to postpone the hearing because Respondent's attorney Herbert Grey had "pre-paid non-refundable vacation

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plans" during the time scheduled for hearing. The forum granted Respondents' motion. (Ex. X5)

6) On June 18, 2014, Respondents, through attorneys Grey, Tyler Smith, and Anna Adams, filed an "Election to Remove to Circuit Court (ORS 659A.870(4)(b))" and "Alternative Motion to Disqualify BOLI Commissioner Brad Avakian" from deciding issues in these cases. Respondents requested oral argument on both issues. On June 25, 2014, the Agency filed objections to Respondents' motions. On June 26, 2014, the ALJ denied Respondents' request for oral argument. (Exs. X8, X11)

7) On June 19, 2014, the ALJ held a prehearing conference and rescheduled the hearing to start on October 6, 2014. The ALJ also consolidated the cases for hearing. (Ex. X7)

8) On June 24, 2014, Respondents timely filed an answer and response to both sets of Formal Charges. Respondent admitted that AK had declined RBC's request to design and provide a cake for Complainants' same-sex ceremony but denied that any unlawful discrimination occurred. Respondents raised numerous affirmative defenses, including:

- The Formal Charges fail to state ultimate facts sufficient to constitute a claim.
- Because the Oregon Constitution did not provide for or recognize same-sex unions in January 2013 and the state of Oregon did not issue marriage licenses to same-sex couples at that time, BOLI lacks "any legitimate authority to compel Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions."
- BOLI is estopped from compelling Respondents to engage in free expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.
- The statutes underlying the Formal Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the state of Oregon under the Fourteenth Amendment, in one or more of the following particulars, by unlawfully: (a) infringing on Respondents' right of conscience; (b) infringing on Respondents' right to free exercise of religion; (c) infringing on Respondents' right to free speech; (d) compelling Respondents to engage in expression of a message they do not want to express; (e) denying Respondents' right to due process; and (f) denying Respondents the equal protection of the laws.

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- The statutes underlying the Formal Charges, as applied, violate Respondents' fundamental rights arising under the Oregon Constitution in one or more of the following particulars, by unlawfully: (a) violating Respondents' freedom of worship and conscience under Article I, §2; (b) violating Respondents' freedom of religious opinion under Article I, §3; (c) violating Respondents' freedom of speech under Article I, §8; (d) compelling Respondents to engage in expression of a message they did not want to express; (e) violating Respondents' privileges and immunities under Article I, §20; and (f) violating Article XV, §3.
- The statutes underlying the Formal Charges are facially unconstitutional in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.

Respondents also raised four Counterclaims, including:

- Respondents are entitled to costs and attorney fees if they are determined to be the prevailing party.
- The State of Oregon, acting by and through BOLI, has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents, causing economic damages to Respondents in an amount not less than \$100,000. BOLI has knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights in the basis of religion without taking similar action against county clerks and other state of Oregon officials similarly denying same-sex couples goods and services related to same-sex unions, disparately impacting Respondents and causing economic damages to Respondents in an amount not less than \$100,000.
- During the period from February 5, 2013 to the present, BOLI's Commissioner published, circulated, issued, displayed, or cause to be published, circulated, issued, displayed, communications on Facebook and in print media to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.
- Under 42 USC § 1983, BOLI is liable to Respondents for depriving Respondents of their rights and protections guaranteed by the United States Constitution "under color of any statute, ordinance, regulation, custom or usage of any State."

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(Ex. X10)

8) On July 2, 2014, the ALJ issued an interim order ruling on Respondents' June 18, 2014, motions. That order is reprinted below in pertinent part.¹⁵

"Respondents' Putative Election to Circuit Court"

"Respondents assert that they have a 'unqualified right to have these matters removed to the circuit court of either Clackamas, Marion or Multnomah Counties pursuant to ORS 659A.870(4)(b).' ORS 659A.870(4)(b) provides, in pertinent part:

'(b) A respondent or complainant named in a complaint filed under ORS 659A.820 or 659A.825 alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law may elect to have the matter heard in circuit court under ORS 659A.885. The election must be made in writing and received by the commissioner within 20 days after service of formal charges under ORS 659A.845. If the respondent or the complainant makes the election, the commissioner shall pursue the matter in court on behalf of the complainant at no cost to the complainant.'

"To establish jurisdiction, the Agency's Formal Charges each allege: (1) both cases originated as verified complaints filed by Complainants Rachel Cryer and Laurel Bowman-Cryer; (2) both Complainants were authorized to file their complaints under the provisions of ORS 659A.820; and (3) that the Agency issued a Notice of Substantial Evidence Determination in both cases. Respondents deny that they engaged in discrimination based on sexual orientation or any other grounds set forth in ORS chapter 659A but do not dispute these jurisdictional allegations. Accordingly, the forum concludes that respondents were named in a complaint filed under ORS 659A.820. Under ORS 659A.870(4)(b), if the Formal Charges allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, Respondents are entitled to elect to have the matter heard in circuit court under ORS 659A.885, subject to the requirement that such election must be made in writing within 20 days of service of the Formal Charges.

"ORS 659A.145 is titled '**Discrimination against individual with disability in real property transactions prohibited; advertising discriminatory preference prohibited; allowance for reasonable modification; assisting discriminatory practices prohibited.**' As indicated by its title, the provisions of ORS 659A.145 are exclusively limited to real property transactions involving people with disabilities. ORS 659A.421 is titled

¹⁵ Footnotes from this interim order and other interim orders quoted at length in the Proposed Findings of Fact – Procedural that are not critical to an understanding of the order have been deleted. The deletions are indicated by a "▲" symbol.

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'Discrimination in selling, renting or leasing real property prohibited' and prohibits discrimination in real property transactions based on the race, color, religion, sex, sexual orientation, national origin, marital status, familial status or source of income of any person.

"In contrast, these cases allege violations of ORS 659A.403(3), ORS 659A.406, and ORS 659A.409. All three of these statutes appear in a section of ORS chapter 659A titled **'ACCESS TO PUBLIC ACCOMMODATIONS'** that includes ORS 659A.400 to ORS 659A.415. Neither of the Formal Charges contains any allegations related to discrimination under federal housing law or discrimination based on real property transactions. Rather, the Formal Charges both identify Respondent Melissa Klein's business as a 'place of public accommodation' and allege that Respondent Melissa Klein's business, as a public accommodation, discriminated against Complainants based on their sexual orientation.

"Since the Formal Charges do not allege an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, they are not subject to the provisions of ORS 659A.870(4)(b) and Respondents have no statutory right to elect to have the matter heard in circuit court.

"MOTION TO DISQUALIFY BOLI COMMISSIONER AVAKIAN BASED ON AVAKIAN'S ACTUAL BIAS

"Respondents ask that Commissioner Avakian be disqualified from deciding the issues presented in the Formal Charges because he has 'publicly demonstrated actual bias against Respondents and others similarly situated, both as a candidate for re-election and as Commissioner.' Based on that alleged actual bias, Respondents contend that the Commissioner's fulfillment of his statutory role by deciding and issuing a Final Order in these cases will deprive Respondents of due process and other constitutional rights. Respondents concede that BOLI administrative rules OAR 839-050-000 *et seq* contain no provision related to the disqualification of a BOLI Commissioner deciding and issuing a Final Order. However, both Respondents and the Agency acknowledge that procedural due process requires a decision maker free of actual bias and that Respondents have the burden of showing that bias. See *Teledyne Wah Chang v. Energy Facility Siting Council*, 298 Or 240, 262 (1985), *citing Boughan v. Board of Engineering Examiners*, 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980).

"To show the Commissioner's actual bias and demonstrate that he has already pre-judged this case, Respondents submitted exhibits containing numerous copies of statements made by Commissioner Avakian to the media, in e-mails sent to Respondents' attorney Herb Grey, or on Facebook posts during the Commissioner's candidacy for re-election and as Commissioner. Summarized, those exhibits include the following statements:

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"E-Mails sent to Respondents' attorney Herb Grey by 'Avakian for Labor Commissioner'

- "February 16, 2013, in which the Commissioner identified himself as 'Oregon's chief civil rights enforcer,' and (1) noting his effort to convince the Veterans Affairs Department to grant a waiver to retired Air Force Lt. Col. Linda Campbell and her spouse, Nancy Campbell, making them the 'first same-sex couple to receive equal military burial rights' and endorsing the 'Oregonians United for Marriage * * * campaign to bring full marriage equality to Oregon.'
- "April 4, 2013, again noting the Commissioner's efforts on behalf of Linda Campbell, and quoting the comments made by Campbell on the steps of the U.S. Supreme Court a week earlier during the debate on marriage equality.
- "December 10, 2013, in which Commissioner Avakian urged Grey to co-sign his letter to House Speaker Jon Boehner to bring the Employment Non-Discrimination Act up for a vote.
- "December 19, 2013, in which Commissioner Avakian notes his 'progressive' priorities and states '[t]hat's why I defend public education, take on unlawful discrimination, and stand up for equal rights for every last Oregonian.'
- "January 10, 2014, in which Commissioner Avakian stated '[a]t the Bureau of Labor and Industries, it's my job to protect rights of Oregonians in the workplace * * * and protect everyone's civil rights in housing and public accommodations.'
- "March 4, 2014, in which Commissioner Avakian stated: 'I believe in an Oregon where everyone has the opportunity to get married, raise a family and get ahead. Gay or straight, male or female, white, black, or brown -- everyone deserves an equal shot at making it in Oregon. That's why I will continue to fight for marriage equality, a woman's right to choose, better wages, and robust non-discrimination laws that protect gays and lesbians.'
- "March 12, 2014, in which Commissioner Avakian noted that no one filed to run against him as Labor Commissioner and stated, among other things: 'We built a coalition of civil rights champions, business leaders, educators, working families and labor leaders, and many, many more. Just think -- it wasn't very long ago that right-wing activists were calling for my head because of our strong support for civil rights and equality laws in Oregon.'
- "May 19, 2014, in which Commissioner Avakian stated: 'A few minutes ago, we received word that all Oregonians, including same-sex couples, will now have the freedom to marry the person they love. As many had hoped, our federal court ruled Oregon's ban on same-sex marriage unconstitutional under the United States Constitution. This is an important moment in our state's history. The ruling also reflects what so many others have felt all along -- that Oregonians always eventually open their hearts to equality and freedom. The victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. Thank you. The win comes after news earlier this month that the Oregon Family Council has abandoned its campaign for a ballot measure to allow corporations to discriminate against

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loving same-sex couples. As a result, Oregon's law will continue to say that no corporation can deny service, housing or employment based on sexual orientation or gender identity. And as always, I will continue to hold those responsible that violate the rights of Oregonians and enthusiastically support those that go the extra mile for fairness. Here's to two significant victories that expand freedom for Oregonians – and the incredible efforts by friends and neighbors that made today possible. It's been a remarkable journey.'

"Independent Media

- "August 14, 2013, Oregonian article written by Maxine Bernstein entitled 'Lesbian couple refused wedding cake files state discrimination complaint' that contains quotes by Complainant Cryer, Respondent Melissa Klein, and Commissioner Avakian. Commissioner Avakian was quoted as follows:
 - 'We are committed to a fair and thorough investigation to determine whether there is substantial evidence of unlawful discrimination,' said Labor Commissioner Brad Avakian.
 - 'Everybody's entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, speaking generally.
 - 'The goal is never to shut down a business. The goal is to rehabilitate,' Avakian said. 'For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.'

"Facebook Posts on Commissioner Avakian's Facebook Page

- "April 26, 2012: 'Today, Basic Rights Oregon honored me with the 2012 Equality Advocate Award. I appreciate this recognition, but I am far more appreciative of all the efforts and accomplishments that BRO has made for Oregon's LGBT community. Thank you for including me in the incredible work that you do.'
- "February 15, 2013, with the same text included in February 16, 2013, e-mail to Herb Grey.
- "February 5, 2013, with a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com:' 'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'
- "March 13, 2013: 'Tomorrow morning, I'll be testifying before the U.S. Senate about Oregon Lt. Col. Linda Campbell; she made history when she was the first person to ever get approval to bury her same-sex spouse in a national cemetery...'
- "March 22, 2013, with a link to 'Speakers announced for marriage equality rally in D.C.-Breaking News-Wisconsin Gazette – Lesbian www.wisconsin Gazette.com:'

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'Thrilled to see Lt. Col. Linda Campbell among the headliners for next week's rally in front of the U.S. Supreme Court. LIKE this status if you support marriage equality for all loving, caring couples.'

- "March 26, 2013: 'Our country is on a journey of understanding. As more and more people talk to gay and lesbian friends and family about why marriage matters, they're coming to realize that this is not a political issue. This is about love, commitment and family. I'll be joining Oregon United for Marriage for a rally at the Mark O. Hatfield Courthouse in downtown Portland at 5pm. Join us!'
- "June 8, 2013: 'Proud to support Sen. Jeff Merkley's fight for the Non-Discrimination Act in Congress. All Americans deserve a fair shot at a good job and the opportunity for a better life. – at Q Center.'
- "June 26, 2013: 'Huge day for equality across America! In a few minutes, I'm heading to a celebration rally with Oregon United for Marriage at Terry Schunk Plaza in downtown Portland – see you there?'
- "March 27, 2013: Link to Commissioner Avakian speaking 'on the importance of people gathering in front of the Hatfield Courthouse on the day the Supreme Court heard arguments on Prop. 8.' and statement 'I just got off the phone with Lt. Col. Linda Campbell, who said that the crowd in front of the Supreme Court was awesome and absolutely electric.'
- "May 9, 2013, with a link to 'Victory! Discrimination measure Withdrawn – Oregon United for Marriage:' 'Really great news. It's also a tribute to the fact that Oregonians are fundamentally fair and have little stomach for such a needlessly divisive fight.'
- "March 12, 2014, shared link: 'Conservative Christian group's call for Labor Commissioner Brad Avakian's ouster falls flat. www.oregonlive.com. Oregon Labor Commissioner Brad Avakian, despite criticism of his enforcement action against a Gresham bakery that refused to serve a lesbian wedding, wound up with no opponent in this year's election.'
- "May 19, 2014: 'Today's victory is a testament to the strength and energy of so many who dedicated themselves to making our laws match our highest ideals. If you've talk to your neighbors, collected signatures, or attended a marriage rally, you've played an important role in Oregon's story. Thank you -- and congratulations!'

"Summarized, these exhibits fall into two categories: (1) the Commissioner's e-mails and Facebook posts generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon and not addressed to these cases; and (2) remarks specific to the present cases. The vast majority of exhibits fall into the first category. Only two exhibits fall into the second category -- the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article.

"ORS chapter 659A contains Oregon's anti-discrimination laws related to employment, public accommodations, and real property transactions and delegates the enforcement of those laws to BOLI's Commissioner. The

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Legislature's purpose in adopting the provisions of ORS chapter 659A is set out in ORS 659A.003. In pertinent part, ORS 659A.003 provides that:

'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on race, color, religion, sex, sexual orientation, national origin, marital status, age, disability or familial status.'

"ORS 651.030(1) provides that '[t]he Bureau of Labor and Industries shall be under the control of the Commissioner of the Bureau of Labor and Industries * * *.' As such, BOLI's Commissioner has the duty to see that the stated purpose of ORS chapter 659A is carried out. In addition to enforcing the various statutes contained in that chapter through the administrative process created by the Legislature,¹⁶ the Commissioner's duties include, among other things, initiating programs of 'public education calculated to eliminate attitudes upon which practices of unlawful discrimination because of * * * sexual orientation * * * are based.' In short, the Commissioner has been instructed by the Legislature itself to raise public awareness about practices that the Legislature has declared to be unlawful discrimination in ORS chapter 659A. The forum finds that all of the Commissioner's remarks contained in the first category – remarks generally opposing discrimination against gays and lesbians and advocating the legality of same-sex marriage in Oregon – fall within the scope of this particular job duty. As more articulately stated by the Agency in its objections, '[n]one of this material is inconsistent with the exercise of the commissioner's statutory obligations as an elected official.'

"The forum next examines the two exhibits that fall within the second category that contain remarks specific to the present cases – the Commissioner's February 5, 2013, Facebook post and the August 14, 2013, Oregonian article. The Commissioner's February 5, 2013, Facebook post contains the following content, consisting of a link to 'Ace of Cakes offers free wedding cake for Ore. gay couple www.kgw.com' and the following remark by the Commissioner that Respondents contend shows actual bias:

'Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws already in place. Having one set of rules for everybody assures that people are treated fairly as they go about their daily lives. The Oregon Department of Justice is looking into a complaint that a Gresham bakery refused to make a wedding cake for a same-sex marriage. It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake.'

¹⁶ See footnote 21.

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"The Oregonian article, printed six days after the two Complainants filed their complaints with BOLI's CRD, contains two remarks attributed to the Commissioner that Respondents contend demonstrate his actual bias against Respondents. Those remarks are:

- "Everyone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate," Avakian said, speaking generally.'
- "The goal is never to shut down a business. The goal is to rehabilitate," Avakian said. "For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon."

"In *Samuel v. Board of Chiropractic Examiners*, 77 Or App 53, 712 P2d 132 (1985), Samuel, a chiropractor, had his chiropractor's license suspended and his right to perform minor surgery permanently revoked by the Board of Chiropractic Examiners after he performed a vasectomy on a patient. The issue before the Board was whether Samuels had exceeded the scope of his license by performing 'major' surgery, whereas chiropractors are only allowed to perform 'minor' surgery. In their decision, the Oregon Court of Appeals, after determining that a vasectomy was 'major' surgery, considered whether the Board's decision should be overturned based on the alleged bias of two members of the Board, Bolin and Camerer, who participated in the disciplinary hearing and resulting decision to suspend Samuels. Prior to Samuels's hearing, Bolin opined that a vasectomy was not minor surgery. The Court, citing *Trade Comm'n v. Cement Institute*, 333 U.S. 683 (1948), held that Bolin's expression of opinion, which the Court characterized as 'a preconceived point of view concerning an issue of law' -- was 'not an independent basis for disqualification' of Bolin. Camerer, in contrast, met with four chiropractors at a restaurant, brought the Board's file on Samuels, and allowed the other chiropractors to examine it. Prior to the Board's suspension decision, Samuels sought censure against Camerer and sued Camerer for disclosing the contents of the file. The Court held:

'As a defendant in the lawsuit which arose out of the very matter pending before the Board, Camerer may have harbored some animosity towards [Samuels]. The possibility of personal animosity and the appearance of a substantial basis for bias is sufficient that, under the circumstances, he should have disqualified himself.'

"To show that the Commissioner has prejudged the cases before the Forum, Respondents quote the Commissioner's two 'second category' statements as follows: 'Respondents are "disobey[ing] laws" and need to be "rehabilitated."' However, this 'quote' combines selected portions of remarks made at two different times and misquotes the latter. Respondents seek to create an inference of bias that cannot reasonably be drawn from Respondents' exhibits as a whole. The Forum finds that the accurately quoted 'second category' remarks, while made in the context of Respondents' alleged discriminatory actions and the Complainants' complaints, are remarks reflecting

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the Commissioner's attitude generally about enforcing Oregon's anti-discrimination laws and, at most, show 'a preconceived point of view concerning an issue of law' that, under *Samuels*, is not a basis for disqualification due to bias.

"RESPONDENTS' ADDITIONAL ARGUMENTS"

"In addition to their 'actual bias' argument, Respondents contend that the Commissioner should be disqualified for two other reasons: (1) The Commissioner's participation as a decision maker in these cases would violate the policy expressed in ORS 244.010 regarding ethical standards for public officials because of his conflict of interest; and (2) His participation as a decision maker in these cases would violate Oregon Rules of Professional Conduct (ORPC) 3.6 related to lawyers making public statements about matters in litigation¹⁷ and Oregon's Code of Judicial Ethics.

"Ethical Standards for Public Officials – ORS chapter 244 & Conflict of Interest"

"Respondents contend that the Commissioner's actual bias and conflict of interest demonstrate a partiality towards these cases that requires the Commissioner to disqualify himself from this case. As noted earlier, Respondents have not demonstrated actual bias on the Commissioner's part. Respondents assert that, under ORS chapter 244, 'the state of Oregon and its respective agencies, including BOLI, cannot ethically sit in judgment of Respondents for conduct of which it may be legally culpable,' and cite the following 'multiple conflicts of interest on the part of the Commissioner and BOLI as grounds for disqualification:

'(1) [T]he Oregon Constitution and ORS 659A.003, *et seq*, not to mention the U.S. Constitution, require BOLI to respect and protect Respondents' constitutionally-protected religion, conscience and speech rights to an even greater degree than it does complainants' statutory rights; and

'(2) [T]he State of Oregon, including BOLI itself, has potential legal liability as a place of public accommodation under ORS 659A.400(1)(b) and (c) because, at the time of the original defense and the filing of complaints by complainants, the state of Oregon itself refused to recognize same sex marriage relationships, just as Respondents have chosen not to participate in complainants' same-sex ceremony.'

"'Conflict of interest'" is defined under ORS chapter 244 in ORS 244.020:

¹⁷ Commissioner Avakian is an attorney and a member of the Oregon State Bar.

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‘(1) “Actual conflict of interest” means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person’s relative or any business with which the person or a relative of the person is associated unless the pecuniary benefit or detriment arises out of circumstances described in subsection (12) of this section.

‘* * * * *

‘(12) “Potential conflict of interest” means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person’s relative, or a business with which the person or the person’s relative is associated[.]’

“Respondents identify no conflict of interest by the Commissioner based on a pecuniary benefit or detriment that fits within these definitions. As noted by the Agency in its response, the Oregon Government Ethics Commission, not the Administrative Law Judge, is responsible for determining the Commissioner’s ethical obligations under ORS chapter 244. ORS 244.250 *et seq.*

“ORPC & Canons of Judicial Ethics

“The Administrative Law Judge does not have the authority to enforce the ORPC or Code of Judicial Ethics. However, I note that Respondents have not shown that any of Commissioner Avakian’s remarks contained in Respondents’ exhibits ‘will have a substantial likelihood of materially prejudicing’ this contested case proceeding. *ORPC 3.6*. The Code of Judicial Ethics does not apply to the Commissioner because he is not ‘an officer of a judicial system performing judicial functions.’¹⁸

“Conclusion

“Respondents’ motion to disqualify Commissioner Avakian from deciding the issues presented in the Formal Charges and issuing a Final Order is **DENIED.**”

(Ex. X12)

9) On August 13, 2014, the ALJ issued an interim order that reset the hearing to begin on October 6, 2013, noting that the Agency and Respondents had both

¹⁸ See ORS 1.210 – “Judicial officer defined. A judicial officer is a person authorized to act as a judge in a court of justice.” BOLI does not operate a “court of justice,” but is an administrative agency whose contested case proceedings are regulated by the Administrative Procedures Act, ORS 183.411 to ORS 183.470.

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stated in an earlier prehearing conference it might take up to a week to complete the hearing. The same day, the ALJ issued an interim order requiring case summaries and setting a filing deadline of September 22, 2014. (Ex. X14)

10) On August 25, 2014, Respondents moved to postpone the hearing based on Respondents' prescheduled plans to be out of town on October 6, 2014. The Agency did not object and the ALJ reset the hearing to begin on October 7, 2014. (Ex. X17, X18)

11) On September 4, 2014, Respondents filed motions to depose Complainants and Cheryl McPherson and for a discovery order related to the Agency's objections to Respondents' informal discovery request for admissions, interrogatory responses, and documents. The Agency filed timely objections to both motions. (Exs. X20 through X24)

12) On September 11, 2014, the Agency moved for a discovery order for the production of four types of documents. (Ex. X25)

13) On September 15, 2014, Respondents filed a motion for summary judgment "on each or all of the claims asserted against them." (Ex. X26)

14) On September 16, 2014, the Agency moved for a Protective Order regarding Complainants' medical records both informally requested by Respondents and in Respondents' motion for a discovery order. The Agency attached five pages of medical records related to LBC and asked that the forum conduct an *in camera* inspection "to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents." After conducting an *in camera* review, the ALJ made minor redactions unrelated to LBC's medical diagnosis and released the records to Respondents, accompanied by a Protective Order. (Exs. X27, X44)

15) The ALJ held a prehearing conference on September 18, 2014. After the conference, the ALJ issued an interim order summarizing his oral rulings, including his decision to postpone the hearing to give him time to rule on Respondents' motion for summary judgment before the hearing began. (Ex. X32)

16) On September 24, 2014, the Agency filed Amended Formal Charges in both cases. (Ex. X38)

17) On September 25, 2014, the ALJ issued an interim order ruling on Respondents' motion for a discovery order for documents, interrogatory responses, and admissions. In pertinent part, the ruling read:

"As an initial matter, the Agency argues that Complainants are not subject to discovery rules under OAR 839-050-0020 because they are not 'parties' and therefore are not 'participants' under OAR 839-050-0200(1). In numerous prior

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cases with the forum * * * a respondent has been allowed to request a discovery order to obtain documents and information from a complainant through the Agency that are discoverable under OAR 839-050-0020(7). See *In the Matter of Toltec*, 8 BOLI at 152 (noting that although the complainant was not a party, complainant still was ‘a compellable witness’ and the Agency was ordered to produce evidence over which it had power or authority). See also *In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 259-61 (2013)(requiring complainant to verify that the interrogatory responses were true, and that complainant respond to a specific interrogatory request to which the Agency had objected); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 100 (2012) (requiring the Agency to produce any documents responsive to respondents’ requests that appeared reasonably likely to produce information generally relevant to the case, including complainant’s tax returns for relevant years).

A. “Interrogatories

“Respondents requested an order requiring the Agency to fully respond to four separate interrogatories. To the extent this order requires Complainants, through the Agency, to respond to the interrogatories, Complainants must sign them under oath as required by OAR 839-050-0200(6).

“Interrogatory No. 7

“Respondents requested that the Agency explain in detail the nature of the physical harm Complainants allege in the Formal Charges (‘Charges’). The Agency responded that both Complainants experienced ‘varying physical manifestations of stress’ and that ‘[a]ny further medical information will be provided pursuant to a protective order.’ I agree that Respondents are entitled to know more specifically what physical damages have been allegedly sustained. I order the Agency to have Complainants, through the Agency, respond to this interrogatory.

“Interrogatory No. 8

“Respondents requested an explanation ‘in detail [of] the nature of the mental harm Complainants alleged resulted from the events alleged in the Complaint.’ The Agency objected on the grounds that the request was redundant and vague, as it was unclear how the interrogatory differed from the interrogatory asking for information as to emotional harm allegedly suffered by Complainants. In its response to the motion, the Agency ‘stipulates’ that ‘emotional, mental’ suffering is any suffering not attributed to physical suffering, and that information was provided in response to Interrogatory No. 6. Based on the Agency’s stipulation that ‘emotional [and] mental’ suffering are the same, the response to this Interrogatory appears to be sufficient and, therefore, I DENY Respondents’ request for additional information in response to this interrogatory.

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“Interrogatory No. 11

“This interrogatory also relates to damages. With this interrogatory, Respondents requested an explanation as to the actions taken by Complainants to remove their public social media profiles after a complaint was filed with the Department of Justice on January 18, 2013. The Agency objected on the basis of relevancy. Respondents assert that this request is relevant because ‘[m]uch, if not all of the damage Complainants have alleged to this point revolve around the media attention they received as a result of Complainant Laurel Bowman-Cryer’s filing a Complaint with the Department of Justice.’ Respondents further assert that Complainants have told Respondents they had to travel out of town because of attention and publicity. Respondents claim that the removal of social media profiles is relevant to the assessment of damages or mitigation of damages. In its response to the motion, the Agency reiterates its objection on the basis of relevance, but does not directly address the arguments made in Respondents’ motion as to damages allegedly caused by publicity and media attention. On September 22, 2014, the Agency timely filed a statement addressing this issue. In pertinent part, the Agency stated:

“Respondents caused substantial harm to Complainants, in part, through their intentional posting of the Department of Justice complaint on their social media website, which included Complainants’ home address. This affected Complainants by exposing them to unwanted and, sometimes, unnerving contact from the public. * * * Complainants have had little to no contact with media, except through their attorney Mr. Paul Thompson. * * * The agency’s position is that Complainants’ damages were a direct result of Respondents intentionally posting the DOJ complaint on the Internet.”

Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 11 is ‘reasonably likely to produce information that is generally relevant to the case.’ Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

“Interrogatory No. 12

“Respondents have requested an explanation ‘in detail [of] any involvement or communication Complainants had with any group involved in boycotting Respondents’ business.’ The Agency objected on the basis of relevance, over breadth, and because the requested information is outside the possession or control of the agency. As to relevancy, I view this request as similar to Interrogatory No. 11. Based on the information and representations before me, I am unable to determine at this time if Interrogatory No. 12 is

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reasonably likely to produce information that is generally relevant to the case. Therefore, the Agency is not required to respond to this interrogatory. If Respondents establish the relevance of this interrogatory in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this interrogatory.

"B. Production of Documents

"* * * * *

"Request No. 2

"Respondents requested a copy of records 'in the Agency's possession' as to the state policy in January of 2013 for issuing marriage licenses to same sex couples. The Agency objected on the basis of relevance and also states that such documents are not within the possession or control of the Agency. Respondents claim such documents are relevant to show whether the "Agency is aware" that same sex marriage was not recognized in Oregon at the time of the acts in question in this case. I deny Respondents' motion because (1) the Agency's awareness of the status of same sex marriage in Oregon is not likely to lead to relevant evidence[^]; (2) the same sex marriage laws in Oregon are a matter of public record; and (3) the Agency has indicated it has no such documents in its possession.

"Request No. 7

"This request seeks medical records for any medical visits relating to Complainants' request for emotional, mental or physical damages. Respondents' motion is GRANTED. * * *

"Request No. 9

"Each of these requests for production seeks documentation and photographs of the actual wedding cake served at Complainants' wedding ceremony. The Agency objected to these requests on the basis of relevancy. The fact that a cake was purchased from another cake baker is likely relevant and, thus, I grant this motion only as to a receipt or invoice for showing the purchase of the cake and one photograph of the cake. Any other requested information is overly broad. Furthermore, for the reasons set forth below regarding Request for Production No. 10, the Agency need not produce photographs of Complainants, their families, and the actual wedding ceremony.

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“Request No. 10

“In this request, Respondents have asked for photos, videos, or audio recordings of Complainants’ wedding ceremony. The Agency has objected on the grounds that the requested documents are irrelevant. The Agency further explains that Complainants are wary of turning over these materials to Respondents because Respondents previously posted Complainants’ home address on a social media site. Unless the Agency is intending to offer photos, videos or audio recordings as evidence at the hearing, then I agree with the Agency’s objections and DENY the motion as to these documents. If the Agency intends to offer them as evidence at hearing, then the Agency must turn them over to Respondents.

“Request No. 11

“Request No. 11 seeks communications made by Complainants to the media or on social media sites ‘relating to Respondents and the events leading to the filing of Formal Charges against Respondents.’ I find that this request is reasonably likely to produce information that is generally relevant to the case. * *

* Respondents’ request is GRANTED.

“Request No. 12

“Request No. 12 seeks ‘[a]ny social media posts, blog posts, emails, text messages, or other record or communication showing Complainant’s involvement with a boycott of Respondents or their business.’ Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents’ request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

“Request No. 16

“Request No. 16 seeks the “names and addresses of any person, media outlet, or other entity with whom Complainants or Cheryl McPherson spoke regarding the events leading to this Complaint or the Complaint filed with the Department of Justice.” I find that Respondents’ request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case, and is GRANTED. Respondents’ request with regard to Cheryl McPherson is DENIED.

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“Request No. 17

“Request No. 17 seeks the production of ‘[a]ny receipt, invoice, contract, or other writing memorializing the purchase of the cake by Complainants from Respondent for Cheryl McPherson's wedding.’ I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

“Request No. 18

“Request No. 18 seeks the production of ‘[a]ny photos, videos, or other record of the cake Complainants purchased from Respondent for Cheryl McPherson's wedding.’ I find that Respondents' request is not reasonably likely to produce information that is generally relevant to the case. Respondents' request is DENIED.

“Request No. 22

“Request No. 22 seeks ‘[a]ll posting by Complainants or Cheryl McPherson to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present.’ I find that this request, with respect to Complainants, is reasonably likely to produce information that is generally relevant to the case. * * * However, Complainants are only required to provide postings that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages. Respondents' request with regard to Cheryl McPherson is DENIED.

“Request No. 23

“Request No. 23 seeks ‘[a]ny recording or documents showing that Complainants ever removed any public social media profiles or caused to be hidden from public view.’ Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents' request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

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B. “Requests for Admissions

“* * * * *

“Request No. 4

“Respondents ask the Agency to admit that the State of Oregon did not recognize same sex marriage on or about January 17 and 18, 2013. The Agency objected on the basis of relevancy. For the reasons set forth above in regards to *Request for Production No. 2*, Respondents’ request is DENIED.

“Requests Nos. 7 & 8

“Respondents ask the Agency to admit that Complainants Laurel Bowman-Cryer and Rachel Cryer ‘did not at any time on or after January 17, 2013, delete or remove her public Facebook profile.’ The Agency objects on the basis of relevance. Based on the information and representations currently before me, I am unable to determine at this time if this request is reasonably likely to produce information that is generally relevant to the case. Therefore, Respondents’ request is DENIED. If Respondents establish the relevance of this request in their depositions of Complainants, Respondents may renew their motion for a discovery order regarding this request.

“Request No. 9

“Respondents ask the Agency to admit that Complainants were not issued a marriage license between January 17, 2013, and May 18, 2014. The Agency objects for the same reasons it objected to *Request for Production No. 2*, which sought similar information. This request is DENIED for the same reasons set out in my denial to *Request for Production No. 2*.

(Ex. X41)

18) On September 25, 2014, the ALJ issued an interim order ruling on Respondents’ motion for a discovery order for depositions. In pertinent part, the ruling read:

“Complainants Laurel Bowman-Cryer and Rachel Cryer

“I agree with the Agency that, given the availability of other discovery methods, the forum typically does not allow for depositions, as well as the fact that the Agency typically produces an investigative file with detailed notes of interviews of witnesses. However, this case poses two unique circumstances. First, based on the information I have received to date from Respondents and the Agency, I have been unable to determine whether or not information and documents sought in response to Interrogatories Nos. 11 and 12 and Requests

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for Production Nos. 12 and 23 are reasonably likely to produce information that is generally relevant to the case. If so, it may result in the production of evidence that bears a significant relationship to Complainants' alleged damages. Respondents should be able to ascertain this in a deposition and, as stated in my interim order related to those Interrogatories and Requests for the Production, may renew their request for a discovery order if they can show that testimony given during the depositions shows those requests are reasonably likely to produce information is generally relevant to the case. I also note that there appears to be a unique damages claim for reimbursement of expenses for out-of-town trips to Seattle, Tacoma (two trips), and Lincoln City, with expenses for lodging, gas, and food at a number of establishments. As Respondents point out in their motion, they 'would use all of their 25 interrogatories just trying to determine exactly how one or two of these alleged expenses was at all related to Respondents' alleged unlawful conduct.' I am persuaded by Respondents that they have sought informal discovery on the issue of damages through other methods and do not have adequate information as to damages.

"In this unusual set of circumstances, I find that Respondents should be permitted to briefly depose Complainants, with the scope of the depositions limited to Complainants' claim for damages. Unless unexpected circumstances arise that require an ALJ's intervention, the depositions should take no longer than 90 minutes per Complainant. After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating a deadline for when the depositions should be completed. The Agency and Complainants' counsel are instructed to cooperate with Respondents so that the depositions can be conducted by that deadline. Respondents are responsible for any court reporter costs associated with the deposition, and Respondents and the Agency must each pay for their own copy of transcripts if transcripts are prepared.

"Cheryl McPherson

"Respondents argue that they are entitled to depose Cheryl McPherson, a material witness in this case, because they:

"strongly dispute some of the factual claims made by the complainants, Respondents need to know whether Cheryl McPherson will validate complainant's (sic) testimony under oath before the hearing. * * * In this case, multiple parties to the same conversations recall substantially different events, and subtle differences in retelling will substantially affect a credibility determination that Administrative Law Judge must make. Without being able to compare such testimony prior to hearing, the Respondents are substantially prejudiced."

"I do not find that Respondents have demonstrated the need to depose witness Cheryl McPherson. I note that Respondents are typically provided with

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notes from investigative interviews of witnesses. Neither the Agency nor Respondents have provided information as to whether that occurred in this case. However, unless Respondents did not receive the usual investigative notes of the Agency's interview with Cheryl McPherson or no such notes exist because McPherson was never interviewed, I deny Respondents' request to take her deposition."

(Ex. X42)

19) On September 25, 2014, the ALJ issued a discovery order requiring Respondents to produce documents in three of the four categories sought by the Agency in its September 11, 2014, motion. (Ex. X43)

20) On September 29, 2014, the ALJ held a prehearing conference. During the conference, mutually acceptable new hearing dates, discovery status and a possible alternative to depositions, and filing deadlines were discussed and the ALJ made several rulings, summarized in a September 30, 2014 interim order that stated:

"(1) Subject to the availability of Respondents and Complainants, the hearing is reset to begin at 9:00 a.m. on Tuesday, March 10, 2015, at the Tualatin Office of Administrative Hearings. If the hearing is not concluded by late afternoon on Friday, March 13, the hearing will reconvene at 9:00 a.m. on Tuesday, March 17, 2015, at the same location. The Agency and Respondents' counsel will let me know this week of the availability of Respondents and Complainants on those dates.

"(2) Respondents have until October 2, 2014, to file answers to the Amended Formal Charges.

"(3) The Discovery ordered in my rulings on the Agency's and Respondents' motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014. This does not include Complainants' depositions.

"(4) My order requiring Complainants to submit to depositions by Respondents is 'on hold' for the present.

"(5) As a potential means for avoiding the necessity of depositions, Respondents proposed that they be allowed to serve 30 additional interrogatories to the Agency for Complainants' responses. The Agency objected to 30 but agreed to 25. I agreed and ruled that Respondents could serve 25 additional interrogatories to the Agency for Complainants' response, with the responses due 14 days after the date of service. At the Agency's request, I also ruled that, should they elect to do so, the Agency may also serve up to 25 interrogatories to Respondents' counsel for Respondents' response, noting that the Agency is also entitled to do that under the rules since they have issued no prior interrogatories.

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“(6) Case Summaries must be filed no later than February 24, 2015.

“(7) We also discussed the most efficient means of procedure regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency has filed Amended Formal Charges since Respondents filed a motion for summary judgment. Respondents' counsel stated their intention in filing the motion was to resolve both cases in their entirety, if possible. After discussion, I ruled that the Agency did not need to respond to Respondents' pending motion for summary judgment and I will not rule on that motion. Rather, Respondents will file another motion for summary judgment that will incorporate the matters raised in the Amended Formal Charges so that all outstanding issues can be addressed in my ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its written response. Accordingly, I order that Respondents must file their amended motion for summary judgment no later than October 24, 2014, and the Agency must file its response no later than November 21, 2014. Respondents' counsel asked if oral argument would be allowed on the motion and I ruled that it would not.

“(8) The Agency stipulated that it is not seeking reimbursement for the out-of-pocket expenses listed in response to Respondents' Interrogatory #16. In response to my question, the Agency stated that it is not willing to stipulate that those trips are not relevant to the issue of damages.”

(Ex. X50)

21) On October 2, 2014, Respondents filed Answers to the Agency's Amended Formal Charges. (Ex. X51)

22) On October 24, 2014, Respondents re-filed their motions for summary judgment. (Ex. X53)

23) On November 21, 2014, the Agency filed a response to Respondents' motion for summary judgment and a cross-motion for partial summary judgment “on the same issues moved upon by Respondents.” (Ex. X54)

24) On December 8, 2014, the Agency filed a second motion for a discovery order. On December 15, 2014, Respondents filed a response stating that they had “now provided the Agency with all responsive documents * * * not subject to the attorney-client privilege.” On December 18, 2014, the Agency withdrew its motion for a discovery order, stating that Respondents had satisfied the Agency's request for production. (Ex. X57)

25) On December 19, 2014, Respondents filed a response to the Agency's cross-motion for summary judgment. (Ex. X61)

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26) On January 15, 2015, the Agency moved for a Protective Order regarding “additional medical documentation from Complainants that is subject to discovery.” The Agency attached 13 pages of medical records, dated September 30, 2014, through January 20, 2015, related to LBC and asked that the forum conduct an *in camera* inspection “to determine what, if any, of the information contained within these records is relevant or calculated to lead to the discovery of admissible evidence and must be turned over to Respondents.” Before ruling, the ALJ instructed the Agency to tell the forum whether the Agency contended “that Bowman-Cryer continued to experience “emotional, mental, and physical suffering” caused by Respondents’ alleged unlawful actions during the period of time covered by these records. (Ex. X64)

27) On January 15, 2014, Respondents renewed their motion to depose Complainants, based on part on Complainant’s alleged inadequate responses to Respondents second set of interrogatories. On January 22, 2014, the Agency objected to Respondents’ motion. On January 29, 2014, the ALJ issued an interim order instructing Respondents to provide a copy of the interrogatories and the Agency’s responses before the ALJ ruled on Respondents’ motion. (Exs. X62, X63, X66)

28) On January 29, 2015, the ALJ issued an interim order ruling on Respondents’ re-filed motion for summary judgment and the Agency’s cross-motion for summary judgment. The interim order is reprinted verbatim below, pursuant to OAR 839-050-0150(4)(b):

“Introduction

“Respondents operate a bakery under the name of Sweetcakes by Melissa.¹⁹ These cases arise from Respondents’ refusal to provide a wedding cake for Complainants Rachel Cryer (‘Cryer’) and Laurel Bowman-Cryer (‘Bowman-Cryer’) after Respondents Aaron Klein (‘A. Klein’) and Melissa Klein (‘M. Klein’) learned that the wedding would be a same-sex wedding.

“As an initial matter, the forum notes Respondents’ request for oral argument with regard to their motion. Respondents’ request for oral argument is **DENIED.**

“Procedural History

“On June 4, 2014, the Civil Rights Division of the Oregon Bureau of Labor and Industries (‘Agency’) issued two sets of Formal Charges alleging that M. Klein violated ORS 659A.403(3) by refusing to provide Complainants a wedding cake for their same-sex wedding based on their sexual orientation and that A.

¹⁹ At the time of the alleged discrimination, Sweetcakes by Melissa was an inactive assumed business name. On February 1, 2013, Sweetcakes by Melissa was re-registered as an assumed business name with the Oregon Secretary of State Business Registry, with M. Klein listed as the registrant and A. Klein listed as the authorized representative.

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Klein aided and abetted M. Klein, thereby violating ORS 659A.406. The Charges further alleged that M. Klein and A. Klein, who was acting on behalf of M. Klein, 'published, circulated, issued or displayed or caused to be published, circulated, issued or displayed, a communication, notice, advertisement or sign to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation,' causing M. Klein to violate ORS 659A.409 and A. Klein to violate ORS 659A.406 by aiding and abetting M. Klein in her violation of ORS 659A.409. The Agency sought \$75,000 in damages for 'emotional, mental, and physical suffering' for each Complainant, plus 'out of pocket expenses to be proven at hearing.' On June 19, 2014, the ALJ consolidated the two cases for hearing.

"Respondents, through joint counsel Herbert Grey, Tyler Smith, and Anna Adams (now Anna Harmon), timely filed Answers to both sets of Formal Charges, raising numerous affirmative defenses and four counterclaims.

"On September 15, 2014, Respondents filed a motion for summary judgment with respect to both sets of Charges, based primarily on legal argument supporting the constitutional affirmative defenses raised in their Answers. On September 16, 2014, the Agency moved for an extension of time to respond to Respondents' motion until September 26, 2014. On September 17, 2014, the ALJ granted the Agency's motion. On September 17, 2014, the ALJ held a prehearing conference in which it became apparent that he had ruled on the Agency's motion before Respondents had seen the motion. Accordingly, the ALJ gave Respondents an opportunity to file objections. On September 18, 2014, Respondents filed objections to Agency's motion for extension. On September 22, 2014, the ALJ issued an interim order that sustained his September 17, 2014, order.

"On September 24, 2014, the Agency amended both sets of Charges to allege that M. Klein and A. Klein both violated ORS 659A.403(3) and that A. Klein, 'in the alternative,' aided and abetted M. Klein in her violation of ORS 659A.403(3), thereby violating ORS 659A.406. Additionally, the Agency alleged that, 'in the alternative,' A. Klein aided and abetted M. Klein's violation of ORS 659A.409.²⁰

"On September 29, 2014, the ALJ held a prehearing conference. During the conference, the participants discussed the most efficient means of proceeding regarding Respondents' motion for summary judgment and the Agency's pending response, considering the fact that the Agency had filed Amended Formal Charges ('Charges') since Respondents filed their motion for summary judgment. After discussion, it was agreed that, instead of the Agency filing a response to Respondents' original motion, it would be more efficient for

²⁰ The Agency's amended Charges did not allege that A. Klein violated ORS 659A.409.

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Respondents to file an amended motion for summary judgment that would incorporate the matters raised in the Charges so that all outstanding issues could be addressed in the ALJ's ruling on Respondents' motion. It was mutually agreed that Respondents could have until October 24, 2014, to file an amended motion for summary judgment and that the Agency would have until November 21, 2014, to file its response.

"On October 2, 2014, Respondents filed Amended Answers ('Answers') to the Charges. On October 24, 2014, Respondents timely filed an amended motion for summary judgment. On November 21, 2014, the Agency timely filed a response and cross motion asking that Respondents' motion be denied in its entirety and that the Agency be granted partial summary judgment as to the issues on which Respondents sought summary judgment. On November 25, 2014, the forum granted Respondents' unopposed motion for an extension of time until December 19, 2014, to respond to the Agency's cross motion. Respondents filed a response on December 19, 2014.

"Summary Judgment Standard

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

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

The 'record' considered by the forum consists of: (1) the amended Formal Charges and Respondents' amended Answers to those Charges; (2) Respondents' motion, with attached exhibits; (3) the Agency's response and cross-motion to Respondents' motion, with an attached exhibit; and (4) Respondents' response to the Agency's motion.

"Analysis

A. Facts of the Case

"The undisputed material facts of this case relevant to show whether Respondents violated ORS chapter 659A as alleged in the Charges are set out below.

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Findings of Fact

- 1) "Complainants Cryer and Bowman-Cryer are both female persons."²¹ (Formal Charges)
- 2) "In January 2013, Sweetcakes by Melissa ('Sweetcakes') was a business owned and operated as an unregistered assumed business name by Respondents M. Klein and A. Klein. At all material times, Sweetcakes was a place or service that offered custom designed wedding cakes for sale to the public. (Respondents' Admission; Affidavits of A. Klein, M. Klein)
- 3) "Before and throughout the operation of Sweetcakes, Respondents M. Klein and A. Klein have been jointly committed to live their lives and operate their business according to their Christian religious convictions. Based on specific passages from the Bible, they have a sincerely held belief that that God 'uniquely and purposefully designed the institution of marriage exclusively as the union of one man and one woman' and that 'the Bible forbids us from proclaiming messages or participating in activities contrary to Biblical principles, including celebrations or ceremonies for uniting same-sex couples.' (Affidavits of A. Klein, M. Klein)
- 4) "In the operation of Sweetcakes, A. Klein bakes the cakes, cuts the layers, adds filling, and applies a base layer of frosting. M. Klein then does the design and decorating. A. Klein delivers the cake to the wedding or reception site in a vehicle that has 'Sweet Cakes by Melissa' written in large pink letters on the side and assembles the cake as necessary. A. Klein also sets up the cake and finalizes any remaining decorations after final assembly and placement. In that capacity, he often interacts with the couple or other family members and often places cards showing that Sweetcakes created the cake. (Affidavits of A. Klein, M. Klein)
- 5) "In or around November 2010, Respondents designed, created, and decorated a wedding cake for Cryer's mother, Cheryl McPherson, for which Cryer paid. (Affidavit of M. Klein)
- 6) "On January 17, 2013, Cryer and McPherson visited Sweetcakes for a previously scheduled cake tasting appointment, intending to order a cake for Cryer's wedding ceremony to Bowman-Cryer. (Respondents' Admission; Affidavit of A. Klein)
- 7) "A. Klein conducted the cake tasting at Sweetcakes' bakery shop located in Gresham, Oregon. M. Klein was not present during the tasting. During the

²¹ The Charges do not identify either Complainant as a female, but the forum infers from their names and the Agency's reference to each Complainant as "her" that Complainants are both female.

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- tasting, A. Klein asked for the names of the bride and groom, and Cryer told him there would be two brides and their names were 'Rachel and Laurel.' (Respondents' Admission; Affidavit of A. Klein)
- 8) "A. Klein told Cryer that Sweetcakes did not make wedding cakes for same-sex ceremonies because of A. and M. Klein's religious convictions. In response, Cryer and McPherson walked out of Sweetcakes. (Respondents' Admission; Affidavit of A. Klein)
- 9) "Before driving off, McPherson re-entered Sweetcakes by herself to talk to A. Klein. During their subsequent conversation, McPherson told A. Klein that she used to think like him, but her 'truth had changed' as a result of having 'two gay children.' A. Klein quoted Leviticus 18:22 to McPherson, saying 'You shall not lie with a male as one lies with a female; it is an abomination.' McPherson then left Sweetcakes. (Affidavit of A. Klein)
- 10) "On February 1, 2013, Sweetcakes by Melissa was registered as an assumed business name with the Oregon Secretary of State, with the 'Registrant/Owner' listed as Melissa Elaine Klein and the 'Authorized Representative' listed as Aaron Wayne Klein. (Exhibit A1, p. 2, Agency Response to Motion for Summary Judgment and Cross-Motion for Summary Judgment)
- 11) "On August 8, 2013, both Complainants filed verified written complaints with BOLI's Civil Rights Division ('CRD') alleging unlawful discrimination by Respondents on the basis of sexual orientation. After investigation, the CRD issued a Notice of Substantial Evidence Determination on January 15, 2014, in both cases, and sent copies to Respondents. (Respondents' Admission)
- 12) "At some time prior to September 2, 2013, A. Klein and M. Klein took part in a video interview with Christian Broadcast Network (CBN) in which A. Klein explained the reasons for declining to provide a wedding cake for Complainants. On September 2, 2013, CBN broadcast a one minute, five seconds long presentation about Complainants' complaints. The broadcast begins and ends with a CBN announcer describing the complaints filed by Cryer and Bowman-Cryer against Respondents while pictures of the bakery are broadcast. A. and M. Klein appear midway in the broadcast, standing together outdoors, and make the following statements:^{22 23}

A. Klein: 'I didn't want to be a part of her marriage, which I think is wrong.'

²² There is nothing in the video to show whether these statements were made in response to a question or if it was part of a longer interview.

²³ This transcript was made by the ALJ from a DVD provided to the forum by Respondents. The DVD includes the September 2, 2013, CBN video, and an mp4 recording of a February 13, 2014, interview with Tony Perkins.

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M. Klein: 'I am who I am and I want to live my life the way I want to live my life and, you know, I choose to serve God.'²⁴

A. Klein: 'It's one of those things where you never want to see something you've put so much work into go belly up, but on the other hand, um, I have faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future.'

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

- 13) "In September 2013, M. and A. Klein closed their bakery shop in Gresham and moved their business to their home, where they continued to offer custom designed wedding cakes for sale to the public. (Affidavits of A. Klein, M. Klein)
- 14) "On February 13, 2014, A. Klein was interviewed live on a radio show by Tony Perkins called 'Washington Watch.' Perkins's show lasted approximately 15 minutes. In pertinent part, the interview included the following exchange that occurred, starting at four minutes, 30 seconds into the interview and ending at six minutes, twenty-two seconds into the interview:²⁵

Perkins: '* * * Tell us how this unfolded and your reaction to that.'

Klein: 'Well, as far as how it unfolded, it was just, you know, business as usual. We had a bride come in. She wanted to try some wedding cake. Return customer. Came in, sat down. I simply asked the bride and groom's first name and date of the wedding. She kind of giggled and informed me it was two brides. At that point, I apologized. I said "I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes." And she got upset, noticeably, and I understand that. Got up, walked out, and you know, that was, I figured the end of it.'

Perkins: 'Aaron, let me stop you for a moment. Had you and your wife, had you talked about this before; is this something that you had discussed? Did you think, you know, this might occur and had you thought through how you might respond or did this kind of catch you off guard?'

Klein: 'You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said "well I can see it is going to become an issue but we have to stand firm. It's our

²⁴ M. Klein's statement is only included to provide context, as the Agency did not allege that her statement was a violation of Oregon law.

²⁵ See footnote 29.

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belief and we have a right to it, you know.” I could totally understand the backlash from the gay and lesbian community. I could see that; what I don't understand is the government sponsorship of religious persecution. That is something that just kind of boggles my mind as to how a government that is under the jurisdiction of the Constitution can decide, you know, that these people's rights overtake these people's rights or even opinion, that this person's opinion is more valid than this person's; it kind of blows my mind.’

(Exhibit 1-I, Respondents’ Motion for Summary Judgment)

“B. Analysis of Complainants’ Claims on the Merits

“The forum first analyzes whether Respondents’ actions violated the applicable public accommodation statutes. If so, the forum moves on to a determination of whether Respondents have established one or more of their affirmative defenses that rely on the Oregon and U. S. Constitution. See *Tanner v. OHSU*, 157 Or App 502, 513 (1998), *rev den* 329 Or 528, citing *Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Or 562, 564, 687 P2d 785 (1984); *Young v. Alongi*, 123 Or App 74, 77–78, 858 P2d 1339 (1993). See also *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 138-39 (1995)(before considering constitutional issues, court must first consider pertinent subconstitutional issues).

“In its Charges, the Agency alleged that Respondents operated Sweetcakes, a place of public accommodation under ORS 659A.400, and violated ORS 659A.403, 659A.406, and 659A.409 by refusing to provide Complainants a wedding cake based on their sexual orientation, by aiding and abetting that refusal, and by communicating their intent to discriminate based on sexual orientation.

“Although Respondents’ affirmative defenses apply to the forum’s ultimate disposition of each alleged statutory violation, the forum is able to draw several legal conclusions from the undisputed material facts relevant to the Agency’s allegations that are unaffected by those affirmative defenses.

“First, at all times material, A. Klein and M. Klein owned and operated Sweetcakes as a partnership. ORS 67.055 provides, in pertinent part:

‘(1) Except as otherwise provided in subsection (3) of this section, the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership.

* * * * *

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‘(d) It is a rebuttable presumption that a person who receives a share of the profits of a business is a partner in the business * * *.’

In affidavits dated October 23, 2014, signed by M. Klein and A. Klein and submitted in support of Respondent’s motion for summary judgment, they both aver: ‘Together we have operated Sweetcakes by Melissa as a business since we opened in 2007. * * * Until recent months, we both worked actively in the business, primarily derived our family income from the operation of the business, and jointly shared the profits of the business.’ The Agency does not dispute the factual accuracy of these statements. Accordingly, the forum concludes that M. Klein and A. Klein were joint owners of Sweetcakes and operated it as a partnership and unregistered assumed business name in January 2013, and as a registered assumed business name since February 1, 2013. As such, they are jointly and severally liable for any violations of ORS chapter 659A related to Sweetcakes.

“Second, ORS 659A.403, 659A.406, and 659A.409 all require that discrimination must be made by a ‘person’ acting on behalf of a ‘place of public accommodation.’ ‘Person’ includes ‘[o]ne or more individuals.’ ORS 659A.001(9)(a). The undisputed facts establish that A. Klein and M. Klein are ‘individual[s]’ and ‘person[s].’ A ‘place of public accommodation’ is defined in ORS 659A.400 as ‘(a) Any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise.’ The undisputed facts show that, at all material times, Sweetcakes was a place or service offering goods and services – wedding cakes and the design of those cakes – to the public. Accordingly, the forum concludes that Sweetcakes, at all material times, was a ‘place of public accommodation.’

“Third, as germane to this case, ORS 659A.403 and 659A.406 prohibit any ‘distinction, discrimination or restriction’ based on Complainants’ ‘sexual orientation.’ This requires the forum to determine Complainants’ actual or perceived sexual orientation. As used in ORS chapter 659A, ‘sexual orientation’ is defined as ‘an individual’s actual or perceived heterosexuality, homosexuality, bisexuality, or gender identity, regardless of whether the individual’s gender identity, appearance, expression or behavior differs from that traditionally associated with the individual’s assigned sex at birth.’ OAR 839-005-0003(16). The forum infers²⁶ that Complainants’ sexual orientation is homosexual and that A. Klein perceived they were homosexual from four undisputed facts: (a) Complainants were planning to have a same-sex marriage; (b) A. Klein told Cryer and McPherson that Respondents do not make wedding cakes for same-sex ceremonies; (c) McPherson told A. Klein that she had ‘two gay children’; and (d)

²⁶ Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum’s task to decide which inference to draw. See, e.g., *In the Matter of Income Property Management*, 31 BOLI 18, 39 (2010).

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In response to McPherson's statement, A. Klein quoted a reference from Leviticus related to male homosexual behavior.

"Fourth, A. Klein's verbal statements made in the CBN and Tony Perkins interviews that were publicly broadcast constitute a 'communication' that was 'published' under ORS 659A.409.

"C. Failure to State Ultimate Facts Sufficient to Constitute a Claim

"Before determining the merits of the Agency's ORS 659A.403(3) allegations, the forum first evaluates Respondents' pleading – 'fail[ure] to state ultimate facts sufficient to constitute a claim' -- that Respondents categorize as their first 'affirmative defense.' As a procedural matter, the forum views this defense as a straightforward denial of the allegations in the pleadings rather than as an affirmative defense.²⁷ As argued by Respondents in their motion for summary judgment, this defense goes to two issues. First, whether Bowman-Cryer's absence when A. Klein made his alleged discriminatory statement on January 13, 2013, deprives her of a cause of action under ORS 659A.403 and 659A.406. Second, whether Respondents' refusal to provide a wedding cake for Complainants was on account of their sexual orientation.

"Bowman-Cryer's absence on January 13, 2013 does not deprive her of standing

"It is undisputed is the fact that Complainants sought a wedding cake from Sweetcakes based on Cryer's previous experience in purchasing a wedding cake from Sweetcakes for McPherson's wedding. It is also undisputed that Bowman-Cryer was not present at Sweetcakes on January 13, 2013, when A. Klein told Cryer and McPherson that Sweetcakes would not make a wedding cake for a same-sex wedding.

"Respondents argue as follows:

'Additionally, if as it appears on the face of the pleadings, one or more of the complainants were not actually potential customers requesting a wedding cake issue, and they were also not the ones denied services, and their claims must fail as a matter of law. In particular, the record is Laurel

²⁷ 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.

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Bowman-Cryer was not present for the cake tasting and was never denied services. Therefore, either Rachel Cryer or Cheryl McPherson was the only person who was denied services according to Complainants['] own record. Claims made by anyone else must fail.'

The forum rejects this argument, as it relies on the false premise that a person cannot be discriminated against unless they are physically present to witness an alleged act of discrimination perpetrated against them. In this case, the 'full and equal accommodation' sought by both Complainants was a wedding cake to celebrate their same-sex wedding, an occasion in which they would be joint celebrants. The forum takes judicial notice that a wedding cake has long been considered a customary and important tradition in weddings in the United States. Respondents themselves acknowledge the special significance of wedding cakes in their affidavits, in which A. Klein and M. Klein each aver:

'The process of designing, creating and decorating a cake for a wedding goes far beyond the basics of baking a cake and putting frosting on it. Our customary practice involves meeting with customers to determine who they are, what their personalities are, how they are planning a wedding, finding out what their wishes and expectations concerning size, number of layers, colors, style and other decorative detail, which often includes looking at a variety of design alternatives before conceiving, sketching, and custom crafting a variety of decorating suggestions and ultimately finalizing the design. Our clients expect, and we intend, that each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate so it is a special part of their holy union.'

Because the wedding cake was intended to equally benefit both Cryer and Bowman-Cryer, the forum finds that Bowman-Cryer has the same cause of action against Respondents under ORS 659A.403 and .406 as Cryer. *Macedonia Church v. Lancaster Hotel Ltd.*, 498 F. Supp 2d 494 (2007), though not binding on this forum, illustrates this point. In *Macedonia*, a group of individuals associated with Macedonia Church, a predominantly African-American congregation, alleged that they were denied accommodations because of their race. Defendants moved to dismiss the complaint as to all but four plaintiffs on the grounds that the only plaintiffs who had standing to pursue the complaint were the four who actually visited defendants' facility. As stated by the court, 'the defendants' argument appears to assume that unless each plaintiff had a first-hand contact with the defendants, he or she could not [have] suffered any "personal and individual" injury.' The court denied defendants' motion, holding:

'Whether there was first-hand contact between the individual plaintiffs and the defendants is not material to the question of whether the individual plaintiffs suffered a personal and individual injury. Each of the Non-

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organizer Plaintiffs alleges that he or she was denied accommodations on the basis of race or color. The fact that the defendants informed the plaintiffs that their refusal to provide them with accommodations by communicating with the Organizers instead of with each of the Non-organizer plaintiffs does not alter the fact that those plaintiffs were denied accommodations. Nor is it material that the plaintiffs were unaware of the discrimination until sometime after it occurred.’

***“Nexus between Complainants’ sexual orientation and Respondents’ refusal to provide a wedding cake for their same-sex wedding*”**

“Respondents argue that there is no evidence of any connection between Complainants’ sexual orientation and Respondents’ alleged discriminatory action. Respondents’ argument is two-pronged. First, Respondents argue that their prior sale of a wedding cake to Cryer for her mother’s wedding proves Respondents’ lack of animus towards Complainant’s sexual orientation. Second, Respondents attempt to isolate Complainants’ sexual orientation from their proposed²⁸ wedding, arguing that their decision was not on account of Complainants’ sexual orientation, but on Respondents’ objection to participation in the event for which the cake would be prepared.

“Respondents’ first argument fails for the reason that there is no evidence in the record that A. Klein, the person who refused to make a cake for Complainants while acting on Sweetcakes’ behalf, had any knowledge of Complainants’ sexual orientation in November 2010 when Cryer purchased a cake for her mother’s wedding. Even if A. Klein was aware of Cryer’s sexual orientation in November 2010, not discriminating on one occasion does not inevitably lead to the conclusion that A. Klein did not discriminate on a subsequent occasion.

“Respondents rely on *Tanner v. OHSU* to support their second argument. In *Tanner*, OHSU, in accordance with State Employees’ Benefits Board (SEBB) eligibility criteria, permitted employees to purchase insurance coverage for ‘family members.’ Under the SEBB criteria, unmarried domestic partners of employees were not ‘family members’ who were entitled to insurance coverage. Plaintiffs, three lesbian nursing professionals with domestic partners, applied for insurance coverage and were denied on the ground that the domestic partners did not meet the SEBB eligibility criteria. Plaintiffs sued, alleging disparate impact sex discrimination in violation of *then* ORS 659.030(1)(b) in that OHSU’s policy had the effect of discriminating against homosexual couples because, unlike heterosexual couples, they could not marry and become eligible for insurance benefits. Significant to this case, the court stated that plaintiffs were a member of

²⁸ The forum uses the term “proposed” because there is no evidence in the record to show whether Complainants were actually ever married. [NOTE: At hearing, evidence was presented that Complainant’s were legally married in 2014, a few days after Oregon’s ban on same-sex marriage was struck down in federal court. See Proposed Finding of Fact #47 -- The Merits, *infra*.

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a protected class under ORS 659.030 and that they made out a disparate impact claim because ‘OHSU’s practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners. That is because, under Oregon law, homosexual couples may not marry.’ *Id.* at 516. The court then held that OHSU did not violate *then* ORS 659.030(1)(b) because plaintiffs did not prove that OHSU engaged ‘in a subterfuge to evade the purposes of this chapter’ under *then* ORS 659.028. *Id.* at 517-19. The language that Respondents quote to support their argument is not the holding of the case, but merely a bridge between the court’s evaluation of plaintiffs’ case based on different treatment and disparate impact theories. Accordingly, *Tanner* does not assist Respondents. Also significant to this case, plaintiffs alleged a violation of Article I, section 20, of the Oregon Constitution. The court found that plaintiffs, as homosexual couples, were members of a ‘true class,’ and also members of a ‘suspect class’ based on their sexual orientation. *Id.* at 524.

“Respondents’ attempt to divorce their refusal to provide a cake for Complainants’ same-sex wedding from Complainants’ sexual orientation is neither novel nor supported by case law. As the Agency argues in support of its cross-motion, ‘[t]here is simply no reason to distinguish between services for a wedding ceremony between two persons of the same sex and the sexual orientation of that couple. The conduct, a marriage ceremony, is inextricably linked to a person’s sexual orientation.’

“The U. S. Supreme Court has rejected similar attempts to distinguish between a protected status and conduct closely correlated with that status. In *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971 (2010), students at Hastings College of the Law formed a chapter of the Christian Legal Society (‘CLS’) and sought formal recognition from the school. The CLS required its members to affirm their belief in the divinity of Jesus Christ and to refrain from ‘unrepentant homosexual conduct.’ *Id.* at 2980. Hastings refused to recognize the organization on the ground that it violated Hastings’ nondiscrimination policy, which prohibited exclusion based on religion or sexual orientation. The CLS argued that ‘it does not exclude individuals because of sexual orientation, but rather “on the basis of a conjunction of conduct and the belief that the conduct is not wrong.”’ *Id.* at 2990. The Court rejected this argument, stating:

‘Our decisions have declined to distinguish between status and conduct in this context. See *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S Ct 2472, 156 L.Ed.2d 508 (2003) (“When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination.” (emphasis added)); *id.*, at 583, 123 S.Ct. 2472 (O’Connor, J., concurring in judgment) (“While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such

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circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons as a class.”); cf. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”).’

In conclusion, the forum holds that when a law prohibits discrimination on the basis of sexual orientation, that law similarly protects conduct that is inextricably tied to sexual orientation. See *Elane Photography, LLC v. Willock*, 309 P3d 53, 62 (2013), *cert den* 134 S. Ct. 1787 (2014). Applied to this case, the forum finds that Respondents’ refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing to provide a cake because of Complainants’ sexual orientation.

“D. Respondent A. Klein violated 659A.403

With regard to its ORS 659A.403 claims, the Agency alleges the following in paragraph III.12 in both sets of Charges:

‘12. Respondents discriminated against Complainant because of her sexual orientation.

- a. Melissa Elaine Klein denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).
- b. Respondent Aaron Wayne Klein, dba Sweetcakes by Melissa denied full and equal accommodations, advantages, facilities and privileges of her [sic] business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3).**
- c. **In the alternative**, Respondent Aaron Wayne Klein aided or abetted Melissa Elaine Klein in violating ORS 659A.403(3), in violation of ORS 659A.406.’

(emphasis bolded by Agency in its Amended Formal Charges to show amendments to original Formal Charges)

ORS 659A.403 provides, in pertinent part:

‘(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.

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‘(2) Subsection (1) of this section does not prohibit:

“(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or

“(b) The offering of special rates or services to persons 50 years of age or older.

‘(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.’

“The prima facie elements of the Agency’s 659A.403 case are: 1) Complainants were a homosexual couple and were perceived as such by A. Klein and M. Klein; 2) Sweetcakes was a place of public accommodation; 3a) A. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; 3b) M. Klein, a person acting on behalf of Sweetcakes, denied full and equal accommodations to Complainants; and 4) the denials were on account of Complainants’ sexual orientation. Elements 1, 2, 3a are established by undisputed facts. Element 4 is established in the preceding section’s discussion of ‘Nexus.’ Accordingly, the forum concludes that A. Klein violated ORS 659A.403 and that the Agency is entitled to summary judgment on the merits as to Cryer’s and Bowman-Cryer’s 659A.403 claims against A. Klein. Since there is no evidence that M. Klein took any action to deny the full and equal accommodations, advantages, facilities and privileges of Sweetcakes to Complainants, the forum concludes that M. Klein did not violate ORS 659A.403. However, M. Klein, as a joint owner of Sweetcakes with A. Klein, is jointly and severally liable for any damages awarded to Complainants stemming from A. Klein’s violation.

“E. ORS 659A.406 -- Aiding and Abetting a Violation of ORS 659A.403(3)

“The Agency seeks to hold A. Klein liable as an aider and abettor under ORS 659A.406 for M. Klein’s alleged violation of ORS 659A.403(3). Respondents assert that A. Klein cannot be held liable as an aider and abettor under ORS 659A.406 because he is a co-owner of Sweetcakes and, as a matter of law, cannot aid and abet himself. The Agency argues to the contrary, based on the ‘plain text’ of the statute.

“ORS 659A.406 provides, in pertinent part:

“Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction,

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discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.”

In the previous section, the forum concluded that M. Klein did not violate ORS 659A.403(3) as alleged in paragraph III.12.a and that A. Klein, the joint owner of Sweetcakes, violated ORS 659A.403(3) as alleged in paragraph II.12.b. Since M. Klein did not violate ORS 659A.403, A. Klein cannot be held liable to have aided and abetted her violation.²⁹

“F. Notice that Discrimination will be made in Place of Public Accommodation – ORS 659A.409

“In section IV of its Charges,³⁰ the Agency alleges: (a) Respondent M. Klein ‘published, issued * * * a communication, notice * * * that its accommodation, advantages * * * would be refused, withheld from or denied to, or that discrimination would be made against, a person on account of his or her sexual orientation, in violation of ORS 659A.409’; (b) Respondent A. Klein, ‘dba Sweetcakes by Melissa, denied full and equal accommodations, advantages, facilities and privileges of her business to [Complainant] based on her sexual orientation, in violation of ORS 659A.403(3)’; and (c) In the alternative, Respondent A. Klein ‘aided or abetted M. Klein in violating ORS 659A.409, in violation of ORS 659A.406.’

“In its Charges, the Agency alleges in paragraphs II.8 & 9 that A. Klein made statements that were broadcast on television on September 2, 2013, and on the radio on February 13, 2014, that communicate an intent to discriminate based on sexual orientation. The full text of the relevant part of those broadcasts is set out in Findings of Fact ##12 and 14, *supra*. The Agency’s cross-motion for summary judgment singles out the statements made on those two occasions as proof that Respondents violated ORS 659A.409.³¹

“ORS 659A.409 provides, in pertinent part:

“* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or

²⁹ As pointed out in the previous section, there is a difference between committing a violation and being liable for the consequences of that violation. In this case, M. Klein’s liability stems from her partnership status, not from any violation that she committed.

³⁰ Section IV is prefaced by the caption “UNLAWFUL PRACTICE: DISCRIMINATION BY PUBLICATION, CIRCULATION, ISSUANCE, OR DISPLAY OF A COMMUNICATION, NOTICE, ADVERTISEMENT, OR SIGN OF A DENIAL OF ACCOMMODATIONS, ADVANTAGES, FACILITIES, SERVICES OR PRIVILEGES BY A PLACE OF PUBLIC ACCOMMODATION BASED ON SEXUAL ORIENTATION.”

³¹ The Agency’s cross-motion also discusses the sign on Sweetcakes’ door after it closed for business, but since the Agency did not allege the existence or contents of the sign as a violation, the forum does not consider it.

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displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.’

The alleged unlawful statements made by A. Klein were:

‘I didn’t want to be a part of her marriage, which I think is wrong.’
(*September 2, 2013 CBN interview*)

‘I said “I’m very sorry, I feel like you may have wasted your time. You know we don’t do same-sex marriage, same-sex wedding cakes.” * * * You know, it was something I had a feeling was going to become an issue and I discussed it with my wife when the state of Washington, which is right across the river from us, legalized same-sex marriage and we watched Masterpiece Bakery going through the same issue that we ended up going through. But, you know, it was one of those situations where we said “well I can see it is going to become an issue but we have to stand firm. It’s our belief and we have a right to it, you know.”’ (*February 13, 2014, Tony Perkins interview*)

In their motion for summary judgment, Respondents argue that ‘ORS 659A.409 by its terms requires a statement of *future intention* that is entirely absent in this instance.’ Respondents further argue that:

‘A review of the videotape record of the CBN broadcast * * * clearly shows that Aaron Klein spoke only of the reason why he and his wife declined to participate in complainants’ ceremony. The same is true of the Perkins radio broadcast. * * * A statement of future intention in either media event is conspicuously absent.’

The Agency does not dispute the correctness of Respondents’ argument that ORS 659A.409 is directed towards communications relating a prospective intent to discriminate, but argues that A. Klein’s statements are a prospective communication:

‘Reviewed in context, Respondents communicated quite clearly that same-sex couples would not be provided wedding cake services at their bakery. These are not descriptions of past events as alleged by Respondents. Respondents stated their position in these communications and notify the public that they “don’t do same sex weddings,” they “stand firm,” are “still in business” and will “continue to stay strong.”’

Whatever Respondents’ post-January 2013 intentions may have been or may still be with regard to providing wedding cake services for same-sex weddings, the

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forum finds that A. Klein's above-quoted statements, evaluated both for text and context, are properly construed as the recounting of past events that led to the present Charges being filed. In other words, these statements described what occurred on January 17, 2013, and thoughts and discussions the Kleins had before January 2013, not what the Kleins intended to do in the future.³² To arrive at the conclusion sought by the Agency requires drawing an inference of future intent from the Kleins's statements of religious belief that the forum is not willing to draw. Accordingly, the forum concludes that A. Klein's communication did not violate ORS 659A.409.³³

"In addition, the forum notes that M. Klein cannot be held to have violated ORS 659A.409 because she made no communication. Therefore, the forum finds that A. Klein did not aid or abet M. Klein to commit a violation of that statute and Respondents are entitled to summary judgment on this issue.

"G. Respondents' Counterclaims

"Before addressing Respondents' affirmative defenses, the forum addresses Respondents' counterclaims. First, Respondents allege that BOLI, through its actions in prosecuting this case, has 'knowingly and selectively acted under color of state law to deprive Respondents of their fundamental constitutional and statutory rights on the basis of religion' in violation of ORS 659A.403 and 'deprive[d] the Respondents of fundamental rights and protections guaranteed by the First and Fourteenth amendments to the United States Constitution,' thereby generating liability under 42 USC § 1983. Second, Respondents allege that the BOLI's Commissioner violated ORS 659A.409 by publishing, circulating, issuing, or displaying communications on Facebook and in print media 'to the effect that its accommodations, advantages, facilities, services or privileges would be refused, withheld from or denied to, or the discrimination would be made against Respondents and other persons similarly situated on the basis of religion in violation of ORS 659A.409.' Respondents seek damages in the amount of \$100,000 for economic damages, \$100,000 for non-economic damages, court costs, and reasonable attorney fees.

³² In contrast, had A. Klein told Perkins "I said 'I'm very sorry * * * You know we don't do same-sex marriage, same-sex wedding cakes' *and we take the same stand today*," the forum's ruling would be different, assuming the Agency had plead a violation of ORS 659A.409 by A. Klein.

³³ *Compare In the Matter of Blachana, LLC*, 32 BOLI 220 (2013), *appeal pending* (Respondent found to have violated ORS 659A.409 when member of the LLC left a telephone message with the organizer of a group of transgender individuals who had visited the LLC's nightclub regularly on Friday nights during the previous 18 months asking "not to come back on Friday nights."); *In the Matter of The Pub*, 6 BOLI 270, 282-83 (1987)(Respondent found to have violated ORS 659.037, the predecessor of ORS 659A.409, by posting a on front door of pub, immediately under another sign that said "VIVA APARTHEID," a sign that said "NO SHOES, SHIRTS, SERVICE, NIGGERS," and a sign inside the pub, with chain and spikes attached at each end, that read "Discrimination. Webster – to use good judgment" on the front and "Authentic South African Apartheid Nigger 'Black' Handcuffs Directions Drive Through Wrists and Bend Over Tips" on the back).

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“The authority of state agencies is limited to that granted to them by the legislature. See *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) (‘an agency has only those powers that the legislature grants and cannot exercise authority that it does not have’). ORS 659A.850(4) gives the Commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding. There is no corresponding statute that authorizes the Commissioner to award the damages sought by Respondents in their counterclaims. With regard to attorney fees or court costs, the legislature has only granted authority to the Commissioner to award these in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421.³⁴

“In conclusion, the forum lacks jurisdiction to adjudicate Respondents’ counterclaims and may neither grant nor deny them. The only relief available to Respondents through this forum is dismissal of any Charges not proven by the Agency under ORS 659A.850(3).³⁵

“H. Respondents’ Affirmative Defenses

“Respondents’ affirmative defenses include estoppel and the unconstitutionality of ORS 659A.403, .406, and .409, both facially and as applied. As an initial matter, the forum notes that the Oregon Court of Appeals has held that an Agency has the authority to decide the constitutionality of statutes. See *Eppler v. Board of Tax Service Examiners*, 189 Or App 216, 75 P3d 900 (2003), citing *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 362-65, 723 P.2d 298 (1986) and *Nutbrown v. Munn*, 311 Or. 328, 346, 811 P.2d 131 (1991). In BOLI contested cases, the Commissioner has delegated to the ALJ the authority to rule on motions for summary judgment, with the decision ‘set forth in the Proposed Order’ and subject to ratification by the Commissioner in the Final Order. OAR 839-050-0150(4). Accordingly, the ALJ has the initial authority to rule on the constitutional issues raised by Respondents in their motion for summary judgment.³⁶

“Estoppel

“In their answers, Respondents phrase their estoppel defense as follows:

³⁴ See ORS 659A.850(1)(b)(B).

³⁵ See, e.g., *Wallace v. PERB*, 245 Or App 16, 30, 263 P3d 1010 (2011) (when plaintiff sought compensatory damages in an APA contested case proceeding based on alleged financial loss after PERS placed a limit on how often he could transfer funds he had invested in the Oregon Savings Growth Plan, the court held that, since it had no authority under ORS 183.486(1)(b) to award compensatory damages to plaintiff, plaintiff was also unable to recover those damages in the contested case proceeding).

³⁶ *Eppler*, *Cooper*, and *Nutbrown* impliedly overruled the forum’s holding in the case of *In the Matter of Doyle’s Shoes*, 1 BOLI 295 (1980), a Final Order issued before the *Eppler*, *Cooper*, and *Nutbrown* decisions in which the forum held that it was beyond the Commissioner’s discretion to determine the constitutionality of legislative enactments. The forum now explicitly overrules that holding.

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“The state of Oregon, including the Bureau of Labor and Industries[,] is estopped from compelling Respondents to engage in creative expression or otherwise participate in same-sex ceremonies not recognized by the state of Oregon contrary to their fundamental rights, consciences and convictions.”

Estoppel is a legal doctrine whereby one party is foreclosed from proceeding against another when one party has made ‘a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it.’ *State ex rel. State Offices for Services to Children and Families v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P.2d 1084 (1999). In order to establish estoppel against a state agency, a party must have relied on the agency's representations and the party's reliance must have been reasonable. *Id.*, *citing Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995).³⁷

“Here, Respondents do not identify any false representation made by BOLI or any other state agency upon which Respondents relied in refusing to provide a wedding cake to Complainants. Although it is undisputed that the Oregon Constitution did not recognize same-sex marriages in January 2013, the affidavits of A. Klein and M. Klein establish that the refusal was because of Respondents’ religious convictions stemming from Biblical authority, not on their reliance on Oregon’s Constitutional provision rejecting same-sex marriage or their attempt to enforce that provision.”³⁸

“In conclusion, Respondents present no facts, articulate no legal theory, and cite no case law to support their argument that BOLI should be estopped from litigating this case based on the doctrine of estoppel. The Agency is entitled to summary judgment on this issue.

³⁷ See also *In the Matter of Sunnyside Inn*, 11 BOLI 151, 162 (1993) (Equitable estoppel may exist when one party (1) has made a false representation; (2) the false representation is made with knowledge of the facts; (3) the other party is ignorant of the truth; (4) the false representation is made with the intention that it should be relied upon by the other party; and (5) the other party is induced to act upon it to that party's detriment); *In the Matter of Portland Electric & Plumbing Company*, 4 BOLI 82, 98-99 (1983) (estoppel only protects those who materially change their position in reliance on another's acts or representations).

³⁸ In A. Klein's affidavit, he states that, after Cryer told him “something to the effect ‘Well, there are two brides, and their names are Rachel and Laurel,’” he “indicated we did not create wedding cakes for same-sex ceremonies because of our religious convictions, and they left the shop.” In the same paragraph, he states “I believed that I was acting within the bounds of the Oregon Constitution and the laws of the State of Oregon which, at that time, explicitly defined marriage as the union of one man and prohibited recognition of any other type of union as marriage.”

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“Respondents’ Constitutional Defenses – Introduction

“Due to the number and complexity of Respondents’ constitutional defenses, the forum summarizes them, as plead in Respondents’ answers, before analyzing them. They include the following:

- “The statutes underlying the Charges are unconstitutional as applied in that they violate Respondents’ fundamental rights arising under the Oregon Constitution by: (a) unlawfully violating Respondents’ freedom of worship and conscience under Article I, §2; (b) unlawfully violating Respondents’ freedom of religious opinion under Article I, §3; (c) unlawfully violating Respondents’ freedom of speech under Article I, §8; (d) unlawfully compelling Respondents to engage expression of a message they did not want to express; (e) unlawfully violating Respondents’ privileges and immunities under Article I, §20; and (f) violating Article XV, §5a.
- “The statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents’ fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.
- “The statutes underlying the Charges are unconstitutional as applied to Respondents to the extent they do not protect the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment, by: (a) unlawfully infringing on Respondents’ right of conscience, right to free exercise of religion, and right to free speech; (b) unlawfully compelling Respondents to engage expression of a message they did not want to express; and (c) unlawfully denying Respondents’ right to due process and equal protection of the laws.
- “The statutes underlying the Charges are facially unconstitutional to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated arising under the First and Fourteenth Amendments to the United States Constitution, as applied to the State of Oregon under the Fourteenth Amendment.

When both state and federal constitutional claims are raised, Oregon courts first evaluate the state claim. *Sterling v. Cupp*, 290 Or 611, 614, 625 P2d 123 (1981). The forum does likewise. For continuity’s sake, the forum follows the analysis of each state claim with an analysis of the parallel federal claim. The forum only addresses the constitutionality of ORS 659A.403, since the forum has already

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concluded, on a subconstitutional level, that Respondents did not violate ORS 659A.406 and 659A.409.

“Oregon Constitution

“Article I, Sections 2 and 3: Freedom of worship and conscience; Freedom of religious opinion

“The forum addresses these interrelated defenses together. Article I, Sections 2 and 3 of the Oregon Constitution provide:

‘Section 2. Freedom of worship. All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.’

‘Section 3. Freedom of religious opinion. No law shall in any case whatever control the free exercise, and enjoyment of religious [sic] opinions, or interfere with the rights of conscience.’

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

“The forum first analyzes a series of Oregon Supreme Court cases interpreting Article I, sections 2 and 3, then applies them to ORS 659A.403. Beginning with *City of Portland v. Thornton*, 174 Or 508, 149 P2d 972 (1944), the Oregon Supreme Court applied U.S. Supreme Court precedents under the First Amendment to the U.S. Constitution when interpreting Article I, Sections 2 and 3 of the Oregon Constitution. In *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or 471, 486-87, 695 P2d 25 (1985), an inter-denominational Christian school argued that the state’s requirement that it pay unemployment tax violated Article I, sections 2 and 3. The court held that ‘the state had not infringed upon the school’s right to religious freedom when all similarly situated employers in the state were subject to [unemployment tax].’ Significant to this case, the *Salem* court interpreted Article I, sections 2 and 3 in light of the text and historical context in which they arose, without reference to U.S. Supreme Court decisions and without reference to its own prior decisions that had relied on federal First Amendment precedent. *Id.* at 484.

“In 1986, in the next case involving the application of Article I, sections 2-7, the Oregon Supreme Court made explicit what was implicit in *Salem College*.

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In *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or. 358, 369-70, 723 P2d 298, 306-07 (1986), the court stated:

‘This court sometimes has treated these guarantees and the First Amendment’s ban on laws prohibiting the free exercise of religion (footnote omitted) as “identical in meaning,” *City of Portland v. Thornton*, 174 Or. 508, 512, 149 P.2d 972 (1942); but identity of ‘meaning’ or even of text does not imply that the state’s laws will not be tested against the state’s own constitutional guarantees before reaching the federal constraints imposed by the Fourteenth [sic] Amendment, or that verbal formulas developed by the United States Supreme Court in applying the federal text also govern application of the state’s comparable clauses.’ (footnote omitted).

Since *Cooper*, the Oregon Supreme Court has decided a trio of cases interpreting Article I, sections 2 and 3 that are relevant to the present case.

“In *Smith v. Employment Div., Dept. of Human Resources*, 301 Or 209, 721 P2d 445 (1986), *vacated on other grounds sub nom., Employment Div. v. Smith*, 485 US 660 (1988), a drug counselor was fired for misconduct based on his ingestion of peyote, a sacrament in the Native American Church, during a Native American Church service and denied unemployment benefits. Smith claimed that the denial of unemployment benefits placed ‘a burden on his freedom to worship according to the dictates of his conscience’ under the Oregon Constitution, Article I, sections 2 and 3. Citing *Salem College*, the court held that there was no violation of Article I, sections 2 and 3 because the statute and rule defining misconduct were ‘completely neutral toward religious motivations for misconduct’ and ‘[claimant] was denied benefits through the operation of a statute that is neutral both on its face and as applied.’ *Id.* at 215-16.

“In *Employment Div., Department of Human Resources v. Rogue Valley Youth for Christ*, 307 Or 490, 498-99, 770 P2d 588 (1989), the court rejected a religious organization’s claim that payment of unemployment tax would violate its rights under Article I, sections 2 and 3. Relying on *United States v. Lee*, 455 U.S. 252, 256–57, 102 S.Ct. 1051, 1054–55, 71 L.Ed.2d 127, 132 (1982), the court stated:

‘When governmental action is challenged as a violation of the Free Exercise Clause of the First Amendment it must first be shown that the governmental action imposes a burden on the party’s religion. Assuming that imposing unemployment payroll taxes on all religious organizations will burden at least some of those groups, (although not necessarily their freedom of belief or worship), that assumption “is only the beginning, however, and not the end of the inquiry. Not all burdens on religious liberty are unconstitutional. * * * The state may justify a limitation on religion by showing that it is essential to accomplish an overriding governmental

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interest.” In the present case the State of Oregon has two governmental interests which, when taken together, are sufficiently important to support the burden on religion represented by unemployment payroll taxes.

‘There are few governmental tasks as important as providing for the economic security of its citizens. A strong unemployment compensation system plays a significant role in providing this security. * * * [A]ny state's unemployment tax must, as a practical matter, comply with FUTA's (Federal Unemployment Tax Act) requirements or the state's employers would face a double tax. Such a double tax would, in turn, create a very undesirable business climate in the state. This, combined with Oregon's constitutional interest in treating all religious organizations equally, creates an overriding state interest in applying the unemployment payroll taxes to all religious organizations. Our construction of the coverage of Oregon's unemployment compensation taxation scheme does not offend the First Amendment's Free Exercise Clause or Article I, section 3 of the Oregon Constitution.’ (internal citations and footnotes omitted)

Rogue Valley, at 498-99.

“In *Meltebeke v. Bureau of Labor and Industries*, 322 Or 132, 903 P2d 351 (1995), the court considered a constitutional challenge to BOLI's rule that ‘verbal or physical conduct of a religious nature’ in the workplace was unlawful if it had ‘the purpose or effect of unreasonably interfering with the subject's work performance or creating an intimidating, hostile or offensive working environment.’ *Id.* at 139. As Respondents note, the court introduced its discussion of Article I, sections 2 and 3, with this sweeping statement:

‘These provisions are obviously worded more broadly than the federal First Amendment, and are remarkable in the inclusiveness and adamancy with which rights of conscience are to be protected from governmental interference.’

Id. at 146. The court then launched into a brief history of governmental intolerance towards religion enforced by criminal laws in England before summarizing its *Salem College* decision and concluding:

‘A general scheme prohibiting religious discrimination in employment, including religious harassment, does not conflict with any of the underpinnings of the Oregon constitutional guarantees of religious freedom identified in *Salem College*: It does not infringe on the right of an employer independently to develop or to practice his or her own religious opinions or exercise his or her rights of conscience, short of the employer's imposing them on employees holding other forms of belief or nonbelief; it does not discourage the multiplicity of religious sects; and it

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applies equally to all employers and thereby does not choose among religions or beliefs.

‘The law prohibiting religious discrimination, including religious harassment, honors the constitutional commitment to religious pluralism by ensuring that employees can earn a living regardless of *their* religious beliefs. The statutory prohibition against religious discrimination in employment and, in particular, the BOLI rule at issue, when properly applied, will promote the ‘[n]atural right’ of employees to ‘be secure in’ their ‘worship [of] Almighty God according to the dictates of their own consciences,’ Or. Const. Art. I, § 2, and will not be a law controlling religious rights of conscience or their free exercise.’

Meltebeke at 148-49. The court then moved on to a review of *Smith*, stating that *Smith* stood for the principle that ‘[a] law that is neutral toward religion or nonreligion as such, that is neutral among religions, and that is part of a general regulatory scheme having no purpose to control or interfere with rights of conscience or with religious opinions does not violate the guarantees of religious freedom in Article I, sections 2 and 3.’ *Meltebeke* at 149. The court held as follows:

‘We conclude that, under established principles of state constitutional law concerning freedom of religion, discussed above, BOLI’s rule is constitutional on its face. The law prohibiting employment discrimination, including the regulatory prohibition against religious harassment, is a law that is part of a general regulatory scheme, expressly neutral toward religion as such and neutral among religions. Indeed, its purpose is to support the values protected by Article I, sections 2 and 3, not to impede them.’

Id. at 150-51.

“Next, the *Meltebeke* court analyzed whether the BOLI rule, *as applied*, violated Article I, sections 2 and 3. Following *Smith*, the court stated:

‘Because sections 2 and 3 of Article I are expressly designed to prevent government-created homogeneity of religion, the government may not constitutionally impose sanctions on an employer for engaging in a **religious practice** without knowledge that the practice has a harmful effect on the employees intended to be protected. If the rule were otherwise, fear of unwarranted government punishment would stifle or make insecure the employer’s enjoyment and exercise of religion, seriously eroding the very values that the constitution expressly exempts from government control.’ (emphasis added)

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Id. at 153. Based on facts set out in BOLI's Final Order, the court found that the employer's complained-of conduct constituted a 'religious practice,' that the employer did not know his conduct created an intimidating, hostile, or offensive working environment,³⁹ and that the employer had established an affirmative defense under Article I, sections 2 and 3 because BOLI's rule did not require that the employer 'knew in fact that his actions in exercise of his religious practice had an effect forbidden by the rule.'⁴⁰ *Id.* In contrast, here Respondents' affidavits establish that their refusal to make a wedding cake for Complainants was not a religious practice, but *conduct* motivated by their religious beliefs.⁴¹ Accordingly, *Meltebeke* does not aid Respondents.

"The general principle that emerges from these cases is that a law that is part of a general regulatory scheme, expressly neutral and neutral among religions, is constitutional under Article I, sections 2 and 3. ORS 659A.403 is such a law. Additionally, there is also "an overriding governmental interest" present, explicitly expressed by Oregon's legislature in ORS 659A.003 in the following words:

'The purpose of this chapter is * * * to ensure the human dignity of all people within this state and protect their health, safety and morals from the consequences of intergroup hostility, tensions and practices of unlawful discrimination of any kind based on * * * sexual orientation * * *.'

"Respondents further contend that 'the statutes underlying the Charges are facially unconstitutional under the Oregon Constitution in that they violate Respondents' fundamental rights arising under the Oregon Constitution to the extent there is no religious exemption to protect or acknowledge the fundamental rights of Respondents and persons similarly situated.' There is no requirement under the Oregon Constitution for such an exemption.⁴² The exclusions and

³⁹ See *In the Matter of James Meltebeke*, 10 BOLI 102, 105-07 (1992) (BOLI Commissioner's Findings of Fact included detailed findings that employer believed he was commanded to preach his beliefs to others under "any and all circumstances" or "he would be lost").

⁴⁰ In a footnote, the court distinguished "a religious practice" from "conduct that may be motivated by one's religious beliefs" in stating: "Conduct that may be motivated by one's religious beliefs is not the same as conduct that constitutes a religious practice. The knowledge standard is considered here only in relation to the latter category. In this case, no distinction between those categories is called into play, because a fair reading of BOLI's revised final order is that BOLI found that all of Employer's religious activity respecting Complainant is part of Employer's religious practice." *Meltebeke* at 153, fn. 19.

⁴¹ Cf. *State v. Beagley*, 257 Or App 220, 226, 305 P3d 147 (2013) ("First, we conclude that, regardless of where the line between religious practice and religiously motivated conduct is drawn, there are some behaviors that fall clearly to one side or the other. A Catholic taking communion at mass is clearly and unambiguously engaging in a religious practice; on the other side of the line, allowing a child to die for lack of life-saving medical care is clearly and unambiguously—and, as a matter of law—conduct that may be motivated by one's religious beliefs.")

⁴² The legislature did choose to enact certain exemptions to civil rights laws. Actions by bona fide churches or other religious institutions regarding housing and use of facilities are not unlawful practices if based on a bona fide religious belief about sexual orientation. Actions by bona fide churches or other religious institutions regarding employment are not unlawful practices if based on a bona fide religious

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prohibitions in ORS 659A.400(2) and 659A.403(2) do not lead to the conclusion that the law is not neutral. Respondents' reliance on *Hobby Lobby*⁴³ fails because *Hobby Lobby* was not decided on constitutional grounds, but decided under the Religious Freedom Restoration Act ("RFRA") of 1993 and because the RFRA does not apply to the states. *City of Boerne v. Flores*, 521 US 507 (1997).

"Based on the above, the forum finds ORS 659A.403 to be constitutional with respect to Article I, sections 2 and 3 of the Oregon Constitution. With respect to whether ORS 659A.403 is constitutional 'as applied,' *Meltebeke* does not aid Respondents for the reason that Respondents' refusal to make a wedding cake for Complainants was not a 'religious practice,' but conduct motivated by their 'religious beliefs.' *Meltebeke* at 153.

"United States Constitution

"First Amendment: Unlawfully infringing on Respondents' right of conscience and right to free exercise of religion

"Respondents contend that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute, on its face and as applied, unlawfully infringes on Respondents' right of conscience and right to free exercise of religion. In pertinent part, the First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * * .'

"Respondents argue that the forum should apply the 'strict scrutiny' test set out by the U.S. Supreme Court in *Sherbert v. Verneer*, 374 US 398 (1963), claiming that *Sherbert* and the U.S. Supreme Court's subsequent decisions in *Wisconsin v. Yoder*, 406 US 205 (1972), *Thomas v. Review Board*, 450 US 707 (1981), *Pacific Gas and Elec. Co. v. Public Utilities Commissioner.*, 475 US 1 (1986), *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993), *Hosanna-Tabor Ev. Lutheran Church & School v. EEOC*, 132 SCt 694 (2012), *Gonzalez v. O Centro*, 546 US 418 (2006), *Brown v. Entertainment Merchants Assn.*, 131 SCt 2729 (2011), and *Wooley v. Maynard*, 430 US 705 (1977) compel the application of that test.

belief about sexual orientation if the actions fall under one of three specific circumstances. Preference for employment applicants of a particular religion is not an unlawful practice by a bona fide church or other religious institution if it passes a three part test. The housing, use of facilities and employment exemptions do not apply to commercial or business activities of the church or institution. See ORS 659A.006. The existence of this statute, last amended in 2007, does not support Respondents' argument that the public accommodation statutes are unconstitutional because they do not contain such exemptions. Rather, it supports the Agency. If the legislature intended such exemptions be applied to the public accommodation statutes it would have enacted them.

⁴³ *Burwell v. Hobby Lobby*, 573 US ___, 134 SCt 2751 (June 30, 2014).

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“The forum begins its analysis by noting that *Wooley*, *Pacific Gas*, *Hosanna-Tabor*, *Gonzalez*, and *Brown* are inapplicable to Respondents’ free exercise claim for the following reasons:

- “*Wooley* and *Pacific Gas* involved religion but were decided exclusively upon free speech grounds.
- “*Hosanna-Tabor* was an employment discrimination suit brought by the EEOC on behalf of a minister challenging the church’s decision to fire her as an ADA violation in which the court held only that ‘the ministerial exception bars such a suit.’ *Hosanna-Tabor* at 710.
- “*Gonzalez*, like *Hobby Lobby*, is inapplicable to this case because it was decided under the RFRA and because the RFRA does not apply to the states.
- “*Brown* was a free speech case that did not involve a free exercise claim.

“In *Sherbert*, a Seventh Day Adventist (‘appellant’) was denied unemployment benefits because she refused to work on Saturdays based on her religious beliefs. She appealed on the grounds that South Carolina’s law violated the free exercise clause of the First Amendment. The court held that the law was constitutionally invalid because it imposed a burden on appellant’s free exercise of her religion and there was no ‘compelling state interest enforced in the eligibility provisions of the South Carolina statute [that] justifies the substantial infringement of appellant’s First Amendment rights.’ *Id.* at 404, 406-07.

“In *Wisconsin*, the Supreme Court held that the state of Wisconsin could not compel Amish students to attend school beyond the eighth grade when that requirement conflicted with Amish religious beliefs, stating:

“[I]n order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause.”

“Relying on *Sherbert* and *Wisconsin*, the *Thomas* court reversed the denial of unemployment benefits to a Jehovah’s Witnesses who quit his job because his job duties changed from working with sheet metal to manufacturing turrets for tanks, a war-related task that he opposed based on his religious beliefs. In upholding appellant’s claim, the court stated:

‘The mere fact that the petitioner’s religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest.’

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Thomas, at 718.

“In 1990, the *Smith* case, upon which both the Agency and Respondents rely, came before the court on appeal from the Oregon Supreme Court. The Oregon Supreme Court held that the state’s denial of unemployment benefits based on the prohibition of sacramental peyote use was valid under the Oregon Constitution but invalid under the free exercise clause in the First Amendment of the U. S. Constitution based on *Sherbert* and *Thomas*. The U.S. Supreme Court characterized the issue before it as follows:

“This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.”

Smith at 874. *Smith* argued that ‘prohibiting the free exercise [of religion]’ includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires).’ *Id.* at 878. The court rejected *Smith*’s argument, holding that the State of Oregon, ‘consistent with the free exercise clause,’ could deny *Smith* unemployment benefits when *Smith*’s dismissal resulted from the use of peyote, a use that was constitutionally prohibited under Oregon law. *Id.* at 890. The court specifically declined to apply *Sherbert*’s ‘compelling interest’ test, stating:

‘Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to * * * laws, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, “cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development.” To make an individual’s obligation to obey such a law contingent upon the law’s coincidence with his religious beliefs, except where the State’s interest is compelling - permitting him, by virtue of his beliefs, “to become a law unto himself,” - contradicts both constitutional tradition and common sense.’ (internal citations omitted)

Id. at 884-85. The court concluded that the ‘right of free exercise does not relieve an individual of the obligation to comply with a “valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).”’ *Id.* at 879, citing *United States v. Lee*, 455 U.S. 252, at 263, n. 3. Related to one of Respondents’

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arguments here, the court also discussed the concept of 'hybrid' cases and concluded that *Smith* was not a 'hybrid' case.⁴⁴

"In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520 (1993), the Church of the Lukumi Babalu Aye, Inc. ('church') and its congregants practiced the Santeria religion, a religion that employed animal sacrifice as one of its principal forms of devotion. During that devotion, animals are killed by cutting their carotid arteries, then cooked and eaten following Santeria rituals. After the church leased land in Hialeah and announced plans to establish a house of worship and other facilities there, the city council held an emergency public session and passed a resolution which noted city residents' 'concern' over religious practices inconsistent with public morals, peace, or safety, and adopted three substantive ordinances addressing the issue of religious animal sacrifice.

Using the *Smith* test, the Supreme Court found that the ordinances were neither neutral⁴⁵ nor of general applicability⁴⁶ and held that 'a law burdening

⁴⁴ With respect to "hybrid claims," the *Smith* court stated: "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell v. Connecticut*, 310 U.S., at 304-307, 60 S.Ct., at 903-905 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett v. McCormick*, 321 U.S. 573, 64 S.Ct. 717, 88 L.Ed. 938 (1944) (same), or the right of parents, acknowledged in *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925), to direct the education of their children, see *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school). Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 3251-52, 82 L.Ed.2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed.") (footnotes omitted)

⁴⁵ The court examined the history behind the ordinances before concluding:

"In sum, the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion. The pattern we have recited discloses animosity to Santeria adherents and their religious practices; the ordinances by their own terms target this religious exercise; the texts of the ordinances were gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings; and the ordinances suppress much more religious conduct than is necessary in order to achieve the legitimate ends asserted in their defense. These ordinances are not neutral, and the court below committed clear error in failing to reach this conclusion." *Lukumi* at 542.

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religious practice that is not neutral or not of general application’ can only survive if there is a ‘compelling’ governmental interest and the law is ‘narrowly tailored in pursuit of those interests.’ *Id.* at 546-47.

“Respondents argue that the *Smith* ‘neutrality’ test should not be applied here for two reasons. First, this is a ‘hybrid’ case in which the law ‘substantially burden[s] multiple rights combining religion and speech’ that the *Smith* court distinguished from cases that only involve free exercise claims. This argument fails because neither Respondents’ free exercise nor free speech claims are independently viable⁴⁷ and the two claims together are not greater than the sum of their parts.⁴⁸ Second, Respondents argue that ORS 659A.403 is neither ‘neutral’ nor of ‘general applicability.’ Applying the *Smith* test, the forum finds that ORS 659A.403 is a ‘valid and neutral law of general applicability.’ As such, it is constitutional under the First Amendment’s free exercise clause, both facially and as applied.

“Oregon Constitution

“Article I, Section 8: freedom of speech

“Article I, Section 8 of the Oregon Constitution provides:

‘Section 8. Freedom of speech and press. No laws shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right.’

ORS 659A.403 provides, in pertinent part:

‘(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation * * *.

⁴⁶ In concluding that Hialeah’s ordinances were not of “general applicability,” the court found that the ordinances “were drafted with care to forbid few killings but those occasioned by religious sacrifice,” that they did not prohibit and approved many kinds of “animal deaths or kills for nonreligious reason,” that the city’s purported concern for public health resulting from improper disposal of animal carcasses only addressed religious sacrifice and not disposal by restaurants or hunters, that more rigorous standards of inspection were imposed on animals killed for religious sacrifice and eaten than animals killed by hunters or fishermen, and that small commercial slaughterhouses were not subject to similar requirements related to the city’s “professed desire to prevent cruelty to animals and preserve the public health.” *Id.* at 543-45.

⁴⁷ See discussion in “free speech” section, *infra*.

⁴⁸ See *Elane Photography, LLC v. Willock*, 309 P3d 53 (2013), *cert. den.* ___ US ___, 134 SCt 1787 (2014).

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* * * * *

‘(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section.’

The issues considered by the forum are:

(1) Is ORS 659A.403 facially unconstitutional?

(2) If ORS 659A.403 is facially constitutional, is it unconstitutional by requiring Respondents to participate in ‘compelled speech’ by making and providing a wedding cake for Complainants?

“*State v. Robertson*, 293 Or 402, 649 P.2d 569 (1982), is the seminal Oregon case in this area. *Robertson* involved an Article I, Section 8 challenge to ORS 163.275, a statute defining the crime of coercion, in which ‘speech [was] a statutory element in the definition of the offense.’ *Id.* at 415. In *Robertson*, the Oregon Supreme Court established a basic framework, comprised of three categories, for determining whether a law violates Article I, section 8. That framework was most recently described in *State v. Babson*, 355 Or 383, 391, 326 P3d 559, 566 (2014).

‘Under the first category, the court begins by determining whether a law is “written in terms directed to the substance of any ‘opinion’ or any ‘subject’ of communication.” If it is, then the law is unconstitutional, unless the scope of the restraint is “wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.” If the law survives that inquiry, then the court determines whether the law focuses on forbidden effects and “the proscribed means [of causing those effects] include speech or writing,” or whether it is “directed only against causing the forbidden effects.” If the law focuses on forbidden effects, and the proscribed means of causing those effects include expression, then the law is analyzed under the second *Robertson* category. Under that category, the court determines whether the law is overbroad, and, if so, whether it is capable of being narrowed. If, on the other hand, the law focuses only on forbidden effects, then the law is in the third *Robertson* category, and an individual can challenge the law as applied to that individual’s circumstances.’ (internal citations omitted)

“Robertson Category One

“In analyzing a law under *Robertson*’s first category, Oregon courts have looked to the text of the law to see whether it expressly regulates expression.

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Babson at 395. In *Babson*, the issue was the constitutionality of a guideline adopted by the Legislation Administration Committee ('LAC') that prohibited all overnight use of the capitol steps, including protests like defendants' vigil. Defendants and the LAC agreed that a person could violate the guideline without engaging in expressive activities, if, for example, a person used the steps as a shortcut while crossing the capitol grounds after 11:00 p.m. when there were no hearings or floor sessions taking place. *Id.* at 396-97. The court held that the guideline was not unconstitutional under *Robertson's* first category because it was not 'written in terms directed to the substance of any "opinion" or any "subject" of communication.' *Id.* ORS 659A.403, like the LAC guideline in *Babson*, is not "written in terms directed to the substance of any 'opinion' or any "subject" of communication." Rather, it is a law focused on proscribing the pursuit or accomplishment of a forbidden result – in this case, discrimination by places of public accommodations against individuals belonging to specifically enumerated protected classes. As such, it is not susceptible to a *Robertson* category one facial challenge.

"Respondents argue that ORS 659A.403 expressly regulates expression because the word 'deny' in section (3) shows that, when properly interpreted, 'the statute prohibits *communication* that services are being denied for a prohibited reason, which implicates both speech and opinion.' (emphasis in original). Under Respondents' expansive interpretation, all laws implicating any form of communication whatsoever would be facially unconstitutional under Article I, Section 8. This is not what the court held in *Robertson* and *Babson*.⁴⁹

"Based on the above, the forum concludes that ORS 659A.403 is not subject to a *Robertson* category one Article I, Section 8 facial challenge.

⁴⁹ See *State v. Robertson*, 293 Or 402, 416-417, 649 P.2d 569 (1982) ("As stated above, article I, section 8, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences. * * * It means that laws must focus on proscribing the pursuit or accomplishment of forbidden results rather than on the suppression of speech or writing either as an end in itself or as a means to some other legislative end.") See also *State v. Garcias*, 296 Or 688, 697, 679 P.2d 1354, 1359 (1984) (menacing statute held constitutional under *Robertson* category one analysis even though it prohibited threatening words because "[t]he fact that the harm may be brought about by use of words, even by words unaccompanied by a physical act, does not alter the focus of the statute, which remains directed against attempts to cause an identified harm, rather than prohibiting the use of words as such"); *State v. Moyle*, 299 Or 691, 701, 705 P2d 740 (1985)(statute criminalizing telephonic or written threats held constitutional under *Robertson* category one analysis because "the effect that it proscribes, causing fear of injury to persons or property, merely mirrors a prohibition of words themselves"); *City of Eugene v. Miller*, 318 Or 480, 489, 871 P2d 454 (1994)(defendant, who sold joke books on the city sidewalk, was convicted of violating an ordinance prohibiting vendors from selling merchandise on city sidewalks; ordinance held valid under first category of *Robertson* because it banned the sale of all expressive material on the sidewalk and therefore was content neutral); *State v. Illig-Renn*, 341 Or 228, 237, 142 P3d 62 (2006)("the fact that persons seek to convey a message by their conduct, that words accompany their conduct, or that the very reason for their conduct is expressive, does not transform prohibited conduct into protected expression or assembly").

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“Robertson Category Two

“A law falls under the second category of *Robertson* if it is ‘directed in terms against the pursuit of a forbidden effect’ and ‘the proscribed means [of causing that effect] include speech or writing.’ *Babson* at 397, quoting *Robertson* at 417-18. Oregon courts examine a statute in the second category for ‘overbreadth’ to determine if ‘the terms of [the] law exceed constitutional boundaries, purporting to reach conduct protected by guarantees such as * * * [A]rticle I, section 8. * * * If a statute is overbroad, the court then must determine whether it can be interpreted to avoid such overbreadth.’ *Id.* at 397-98, quoting *Robertson* at 410, 412.

“In *State v. Illig Renn*, 341 Or 228 (2006), the defendant challenged as overbroad a statute that made it a crime to ‘[r]efuse[] to obey a lawful order by [a] peace officer’ if the person knew that the person giving the order was a peace officer. In addressing the state’s argument that the statute was not subject to an overbreadth challenge because it did not ‘expressly’ restrict expression, the court stated that a statute is subject to a facial challenge under the first or second category of *Robertson* if it ‘expressly or obviously proscribes expression,’ leaving statutes with ‘[m]arginal and unforeseen applications to speech and expression’ to as-applied challenges under the third category.⁵⁰ *Illig-Renn*, at 234. The court went on to state that facial challenges generally would not be permitted ‘if the statute’s application to protected speech [was] not traceable to the statute’s express terms.’ *Id.* at 236. Based on that interpretation of Article I, section 8, the court concluded that the defendant could challenge the statute that prohibited interfering with a peace officer only as applied, under the third category of *Robertson*, and not on its face, under the other two categories. *Id.* at 237.

“Respondents’ argument resembles defendants’ argument in *Babson*, which the court characterized in the following words:

‘Defendants instead argue that, even if the [law] targets some harm—rather than targeting expression—the [law] has an “obvious and foreseeable” application to speech, and it is overbroad. That is, defendants argue that the text of the statute does not have to refer to expression or include expression as an element to fall under category two, as long as it has an obvious application to expression.’

Babson at 398. The *Babson* court rejected this argument, stating:

‘We agree with the state that the statement in *Robertson* on which defendants rely does not extend Article I, section 8, overbreadth analysis

⁵⁰ The court referred to this type of statute as a “speech-neutral” statute, one that “doe[s] not by its terms forbid particular forms of expression.” *Illig-Renn* at 233-34.

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to every law that the legislature enacts. When expression is a proscribed means of causing the harm prohibited in a statute, it is apparent that the law will restrict expression in some way because expression is an element of the law. For that type of law, the legislature must narrow the law to eliminate apparent applications to *protected* expression. See *Robertson*, 293 Or. at 417–18, 649 P2d 569 (noting that when a law focused on harmful effects includes expression as a proscribed means of causing those effects, the court must determine whether the law “appears to reach *privileged* communication” (emphasis added)). However, if expression is not a proscribed means of causing harm, and is not described in the terms of the statute, the possible or plausible application of the statute to protected expression is less apparent. That is, in the former situation, every time the statute is enforced, expression will be implicated, leading to the possibility that the law will be considered overbroad; in the latter situation, the statute may never be enforced in a way that implicates expression, even if it is possible, or even apparent, that it *could* be applied to reach protected expression. When a law does not expressly or obviously refer to expression, the legislature is not required to consider all apparent applications of that law to protected expression and narrow the law to eliminate them. The court's statement in *Robertson*, on which defendants rely, does not extend the second category overbreadth analysis to statutes that do not, by their terms, expressly or obviously refer to protected expression.’

Id. at 400. The *Babson* court went on to explain that ‘obviously,’ as used in the last sentence of the above-quoted statement, did not ‘extend Article I, section 8, scrutiny [under the first two *Robertson* categories] to any statute that could have an apparent application to speech; rather, the [*Robertson*] court used the word ‘obviously’ to make it clear that creative wording that does not refer directly to expression, but which could *only* be applied to expression, would be scrutinized under the first two categories of *Robertson*.’ *Id.* at 403. The *Babson* court concluded its *Robertson* category two analysis by stating:

‘Similarly, here, although the guideline does not directly refer to speech, the guideline does have apparent applications to speech, as defendants contend. A restriction on use of the capitol steps will prevent people like defendants from protesting or otherwise engaging in expressive activities on the capitol steps overnight. That fact alone, however, does not subject the guideline to Article I, section 8, scrutiny under the second category of *Robertson*. The guideline is not simply a mirror of a prohibition on words. The guideline also bars skateboarding, sitting, sleeping, walking, storing equipment, and all other possible uses of the capitol steps during certain hours. Thus, because the guideline does not expressly refer to expression as a means of causing some harm, and it does not “obviously” prohibit expression within the meaning of *Moyle*, it is not subject to an overbreadth challenge under the second category of *Robertson*.’

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Babson at 403-04. This case, like *Babson* and *Illig-Renn*, does not involve a statute that ‘obviously’ prohibits expression. Rather, it is a ‘speech-neutral’ statute as described in *Illig-Renn*.⁵¹ Furthermore, the legislature’s use of the challenged word ‘deny’ in ORS 659A.403 is contextually similar to the challenged word ‘refuse’ in *Illig-Renn*, as both terms prohibit specific actions that may involve expression without specifying a particular form of expression. In conclusion, the forum finds that ORS 659A.403 is not subject to Article I, section 8 overbreadth scrutiny as set out in *Robertson*, category two.

“Robertson Category Three Does Not Apply to Respondents’ claim of ‘compelled speech.’

“Respondents contend that their Article I, section 8, rights were violated by the Agency’s application of ORS 659A.403 because that application, in requiring them to provide a wedding cake to Complainants, ‘unlawfully compel[s] Respondents to engage in expression of a message they did not want to express.’ The *Robertson* framework was developed in a series of cases involving prohibited speech, and there are no Oregon cases that have come to the forum’s attention in which compelled speech was the issue. However, the U.S. Supreme Court has addressed that issue in a line of cases involving the First Amendment and compelled speech. In the absence of Oregon case law, the forum turns to those decisions for guidance.

“As a preliminary matter, the forum addresses Respondents’ argument, made in their response to the Agency’s cross-motions for summary judgment, that the ‘forbidden effect’ involved in a *Robertson* category three analysis of the constitutionality of ORS 659A.403 is ‘Respondents’ choice not to be involved in Complainants’ same-sex ceremony, which is alleged to be a denial of services based on sexual orientation.’ Respondents argue that their ‘choice not to be involved’ cannot be a ‘forbidden effect’ because Article XV, section 5a of the Oregon Constitution expressly prohibited legal recognition of same-sex marriages in January 2013,⁵² making it ‘clear [that] opposition to same-sex marriage is not a ‘forbidden effect.’” Respondents misread *Babson*, *Robertson*, and the statute. The ‘forbidden effect’ under ORS 659A.403 is not its impact on Respondents, but Respondents’ denial of services to Complainants based on their sexual orientation. Respondents were not asked to issue a marriage license, perform a wedding ceremony, or in any way legally recognize Complainants’ planned same-sex wedding in contravention of Article XV, Section

⁵¹ Cf. *State v. Babson*, 355 Or 383, 405, 326 P3d 559, 566 (2014), quoting *Miller* at 489-90 (*Robertson* category two analysis did not apply because contested ordinance “was directed at a harm – street and sidewalk congestion – that the city legitimately could seek to prevent, and did not, ‘by [its] terms, purport to proscribe speech or writing as a means to avoid a forbidden effect.’”)

⁵² In January 2013, Article XV, section 5a, of the Oregon Constitution provided: “It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage.”

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5a. Furthermore, there is no evidence in the record, as submitted for summary judgment, that they communicated to Respondents where they intended to be married, that they intended to be married in the state of Oregon, or, for that matter, that Complainants were ever married.⁵³

“The right to refrain from speaking was established in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), in which the U. S. Supreme Court held that the State of West Virginia could not constitutionally require students to salute the American flag and recite the Pledge of Allegiance. The Court held that a state could not require ‘affirmation of a belief and an attitude of mind,’ noting that ‘the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.’ *Id.* at 633-34.

“In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Court considered whether a Florida statute that required newspapers that ‘assailed’ the ‘personal character or official record’ of any political candidate to give that candidate the ‘right to demand that the newspaper print, free of cost to the candidate, any reply the candidate may make to the newspaper’s charges,’ and to print the reply ‘in as conspicuous a place and in the same kind of type as the charges which prompted the reply.’ *Id.* at 243. The Court found the statute was unconstitutional because it deprived the newspaper and its editors of the fundamental right to decide what to print or omit. *Id.* at 258.

“In 1977, the Court was asked to decide whether the State of New Hampshire could constitutionally enforce criminal sanctions against persons who covered the motto ‘Live Free or Die’ on their passenger vehicle license plates because that motto was repugnant to their moral and religious beliefs. *Wooley v. Maynard*, 430 U.S. 705 (1977). In its discussion of the nature of compelled speech, the Court noted that New Hampshire’s statute ‘in effect requires that appellees used their private property as a “mobile billboard” for the State’s ideological message or suffer a penalty’ and that driving an automobile was a ‘virtual necessity for most Americans.’ *Id.* at 715. The Court found New Hampshire’s statute unconstitutional, holding as follows:

‘We are thus faced with the question of whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. We hold that the State may not do so.’

⁵³ The forum takes judicial notice that a law granting full marriage rights for same-sex couples in the state of Washington, which is immediately adjacent to the State of Oregon and only separated from the City of Portland by the Columbia River, took effect on December 6, 2012. See Revised Code of Washington 26.04.010. A. Klein was aware of that on January 17, 2013, as shown by his statement during the Perkins interview, quoted in Finding of Fact #14.

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Id. at 713.

“In 1986, the Court was asked to decide whether a regulated public utility company that had traditionally distributed a company newsletter in its quarterly billing statements was required to enclose newsletters published by TURN, a group expressing views opposite to the utility, in the same billing statements. *Pacific Gas & Electric Co. v. Public Utilities Commission of California* (“PUC”), 475 U.S. 1 (1986). The Court held that the PUC’s requirement unconstitutionally compelled Pacific Gas to accommodate TURN’s speech by requiring it to disseminate messages hostile to Pacific’s own interests. *Id.* at 20-21.

“*Hurley v. Irish-American GLIB*, 515 U.S. 557 (1995), presented the question of whether private citizens in Massachusetts who organized a St. Patrick’s Day parade were required to include GLIB, a group ‘celebrat[ing] its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants,’ thereby imparting a message that the organizers did not wish to convey among the marchers. *Id.* at 570. The requirement was based on a provision of Massachusetts’ public accommodation law that included a prohibition on discrimination on the basis of sexual orientation. The Court found that a parade is a form of expression, stating that a ‘parade’ indicates ‘marchers who are making some sort of collective point, not just to each other but to bystanders along the way. Indeed, a parade’s dependence on watchers is so extreme that nowadays, as with Bishop Berkeley’s celebrated tree, “if a parade or demonstration receives no media coverage, it may as well not have happened.”’ *Id.* at 568. The Court also determined that:

‘[GLIB]’s participation as a unit in the parade was equally expressive. GLIB was formed for the very purpose of marching in it, as the trial court found, in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade. The organization distributed a fact sheet describing the members’ intentions, and the record otherwise corroborates the expressive nature of GLIB’s participation. In 1993, members of GLIB marched behind a shamrock-strewn banner with the simple inscription “Irish American Gay, Lesbian and Bisexual Group of Boston.” GLIB understandably seeks to communicate its ideas as part of the existing parade, rather than staging one of its own.’ (internal citations omitted)

Id. at 570. The Court further determined that ‘[s]ince every participating unit affects the message conveyed by the private organizers, the state courts’ application of the statute produced an order essentially requiring petitioners to

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alter the expressive content of their parade'⁵⁴ and held the state's application of the statute unconstitutional because 'this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.' *Id.* at 573.

"In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* ('FAIR'), 547 U.S. 47 (2006), a group of law school associations objected to the application of the Solomon Amendment, which required campuses receiving federal funds to provide equal access to military recruiters. The Court held that there was no First Amendment violation, distinguishing *Hurley*, *Tornillo*, and *Pacific Gas* because in those cases 'the complaining speaker's own message was affected by the speech it was forced to accommodate' or 'interfere[d] with a speaker's desired message.' *Id.* at 63-64. The Court noted that '[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.' *Id.* at 62. Of additional significance to this case, the Court stated:

'Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy.'

Id. at 65.

"*Wooley* and *Barnette* do not support Respondents because Respondents are under no compulsion to publicly 'speak the government's message'⁵⁵ in an affirmative manner that demonstrates their support for same-sex marriage. Unlike the laws at issue in *Wooley* and *Barnette*, ORS 659A.403 does not require Respondents to recite or display any message. It only mandates that if Respondents operate a business as a place of public accommodation, they cannot discriminate against potential clients based on their sexual orientation. *Elane Photography* at 64.

"*Tornillo* and *Pacific Gas* are distinctly different from this case. In both cases, the government commandeered a speaker's means of reaching its audience and required the speaker to disseminate an opposing point of view. Here, the state has not compelled Respondents to publish or distribute anything expressing a view.

⁵⁴ *Hurley v. Irish-American GLIB*, 515 U.S. 557, 572-73 (1995).

⁵⁵ *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006).

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“Hurley is distinguishable because Respondents’ provision of a wedding cake for Complainants was not for a public event, but for a private event. Whatever message the cake conveyed was expressed only to Complainants and the persons they invited to their wedding ceremony, not to the public at large. In addition, the forum notes that, whether or not making a wedding cake may be expressive, the operation of Respondents’ bakery, including Respondents’ decision not to offer services to a protected class of persons, is not. Elane Photography at 68.

“Finally, Rumsfeld does not aid Respondents because it rejected the law schools’ arguments that they were forced to speak the government’s message and that they were required to host the recruiters’ speech in a way that violated compelled speech principles. Rumsfeld at 64-65.

“For the reasons stated above, the forum concludes that the application of ORS 659A.403 to Respondents so as to require them to provide a wedding cake for Complainants does not constitute compelled speech that violates Article I, section 8 of the Oregon Constitution.

“United States Constitution

“First Amendment: Unlawfully infringing on Respondents' right to free speech.

“Respondents contend that the First Amendment to the U. S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of ORS 659A.403 against Respondents because that statute unlawfully infringes on Respondents' free speech rights. In pertinent part, the First Amendment provides: ‘Congress shall make no law * * * abridging the freedom of speech * * *.’

“Based on the discussion in the previous section, the forum concludes that the requirement in ORS 659A.403 that Respondents bake a wedding cake for Complainants is not ‘compelled speech’ that violates the free speech clause of the First Amendment to the U. S. Constitution.

“CONCLUSION

“Respondents’ motion for summary judgment is **GRANTED** with respect to the Agency’s allegations in the Amended Formal Charges that Respondent M. Klein violated ORS 659A.403 by denying full and equal accommodations, advantages, facilities and privileges to Complainants Rachel Cryer and Laurel Bowman-Cryer.

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“Respondents’ motion for summary judgment is **GRANTED** with respect to the Agency’s allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.406.

“Respondents’ motion for summary judgment is **GRANTED** with respect to the Agency’s allegations in the Amended Formal Charges that Respondents violated ORS 659A.409.

“The Agency’s cross-motion for summary judgment is **GRANTED** with respect to the Agency’s allegations in the Amended Formal Charges that Respondent A. Klein violated ORS 659A.403 by denying the full and equal accommodations, advantages, facilities and privileges of a place of public accommodation to Complainants Rachel Cryer and Laurel Bowman-Cryer based on their sexual orientation.

“The Agency’s cross-motion for summary judgment is **GRANTED** with respect to the Agency’s allegations in the Formal Charges that Respondents A. Klein and M. Klein are jointly and severally liable for A. Klein’s violation of ORS 659A.403.

“The Agency’s cross-motion for summary judgment is **GRANTED** with respect to Respondents’ affirmative defenses.

“The Forum has **NO JURISDICTION** to adjudicate the counterclaims raised by Respondents in paragraphs ##31-42 in Respondents’ Amended Answers.

“Case Status

“The hearing will convene as currently scheduled. The scope of the evidentiary portion of the hearing will be limited to the damages, if any, suffered by Complainants as a result of A. Klein’s ORS 659A.403 violation.

IT IS SO ORDERED”

The ALJ’s rulings on Respondents’ motion for summary judgment and the Agency’s cross-motion for summary judgment are **AFFIRMED**, except for the ruling on Respondents’ violation of ORS 659A.409, which is **REVERSED** for reasons set out in the Opinion section of this Final Order and as noted in the Conclusions of Law in this Final Order. (Ex. X65)

29) On February 4, 2015, the ALJ granted the Agency’s second motion for a protective order. (Ex. X65)

30) On February 5, 2015, the ALJ granted Respondents’ renewed motion to depose Complainants. The ALJ’s interim order read as follows:

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“Introduction

“On January 15, 2015, Respondents filed a renewed motion to depose Complainants. On January 22, 2015, the Agency timely filed objections. Respondents’ motion is based on part on their assertion that (1) the 25 additional interrogatories they were allowed to serve on the Agency pursuant to my September 29, 2014, interim order that allowed Respondents to serve additional interrogatories as a potential means of eliminating the need for a deposition, (2) coupled with the Agency’s responses to Respondents’ prior interrogatories and the Agency’s answers to the 25 additional interrogatories, (3) are inadequate to address Complainants’ damages, leaving Respondents substantially prejudiced as a result.

“On January 22, 2015, the Agency filed objections, arguing that Respondents’ have not clearly articulated how they will be substantially prejudiced in the absence of depositions, that Complainants should not be subjected to depositions ‘due to Respondents’ inability to adequately craft their interrogatories,’ and that Respondents’ ‘discovery tactics are an abuse of process.’

“Discussion

“On October 14, 2014, the Agency complied with the forum’s September 25, 2014, discovery order requiring the Agency to answer Respondents’ August 5, 2014, interrogatory seeking a detailed explanation of Complainants’ emotional, physical and mental suffering caused by Respondents’ actions. The Agency’s interrogatory response listed a total of 88 discrete types of harm suffered by Complainant Cryer and 90 discrete types of harm suffered by Complainant Bowman-Cryer. In support of their motion, Respondents argue that:

‘[The listed symptoms], some of which are inconsistent with each other, raise more questions than they answer. Respondents attempted to address some of these nearly 200 symptoms in their 25 interrogatories, but were unable to even begin to address the questions raised by this exhaustive list of symptoms, much less get clear answers from Complainants.’

Among its objections to Respondents’ motion for depositions, the Agency asserts that ‘many of the listed symptoms are interrelated to one another and would hardly require Respondents to explore them individually.’ The Agency further notes that Respondents will have an adequate opportunity to ‘cross-examine Complainants on all symptoms at hearing.’

“To more clearly illustrate the points raised by Respondents and the Agency, the types of harm alleged by each Complainant are reprinted below in their entirety. As will be seen, they permeate all aspects of Complainants’ lives.

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Complainant Rachel Cryer

'[88 symptoms listed]

Complainant Laurel Bowman-Cryer

'[90 symptoms listed]

OAR 839-050-0200(3) governs depositions in this forum. It provides:

'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'

"Since OAR 839-050-0200(3) was adopted, the forum has been extremely reluctant to grant depositions, and has uniformly denied respondents' requests for depositions when respondents have not first sought informal discovery through interrogatories. See, e.g., *In the Matter of Oak Harbor Freight Lines, Inc.*, 33 BOLI 1 (2014), *In the Matter of Columbia Components, Inc.*, 32 BOLI 257 (2013), *In the Matter of Blachana, LLC*, 32 BOLI 220 (2013), *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227 (2009). The only occasion when the forum has allowed a deposition to take place was in the *Columbia Components* case, under the following circumstances:

'During the hearing it became clear that Complainant possessed documents either requested by Respondent and/or set out in the [ALJ's] discovery order that Complainant did not provide until Respondent was able to ascertain existence of those documents during Complainant's testimony * * * [and] that Complainant had been less than forthcoming with regard to the existence of those documents.'

"In this case, Respondents have satisfied the forum's requirement of seeking discovery by means of informal request before requesting a deposition. Before initially requesting a deposition, Respondents made informal document discovery requests, requested admissions, and served 25 interrogatories on the Agency, all before Respondents received the Agency's interrogatory answer setting out the alleged 178 types of harm suffered by Complainants as a result of Respondents' actions.

"On September 25, 2014, the forum granted Respondents' motion to depose Complainants, with the scope of the depositions limited to 'Complainants' claim for damages.' That ruling was predicated on my conclusion that

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Respondents '[had] sought informal discovery on the issue of damages through other methods and do not have adequate information on damages.'

"At a prehearing conference held on September 29, 2014, discovery was discussed at length. As noted earlier, it was agreed that Respondents would be allowed to serve 25 additional interrogatories on the Agency as a potential means of eliminating the need for a deposition. On October 14, 2014, the Agency sent Respondents its interrogatory response listing the 178 types of alleged harm. In the absence of depositions, that left 25 interrogatories for Respondents to explore those 178 listed harms. On December 31, 2014, Respondents served the interrogatories that were allowed in my September 29, 2014, ruling. The Agency timely responded on January 13, 2015.

"Since Respondents filed their motion on January 15, 2015, the Agency was granted summary judgment as to Respondents' alleged ORS 659A.403 violation. In the interim order granting summary judgment, I ruled that the only evidentiary issue at hearing will be the amount of damages, if any, to which Complainants are entitled. The amount of damages sought on Complainants' behalf is 'at least \$75,000' for each Complainant. In addition, it appears from the Agency's February 3, 2015, filing in response to the forum's inquiry regarding a Protective Order sought by the Agency that the Agency may intend to present evidence at hearing that Complainants are entitled to damages for mental and emotional suffering up to the present day, more than two years after the date of discrimination.

"I have reviewed prior BOLI Final Orders in which damages were awarded for emotional and mental suffering and find that this case stands well apart from all its predecessors in the exhaustive list of harms alleged by Complainants for which the Agency seeks damages. No other case comes even remotely close. In defending themselves, Respondents have a right to inquire into each type of harm alleged by Complainants to determine the extent of the harm and whether Complainants' physical, mental, and emotional suffering was caused, at least in part, if not in whole, by events and circumstances that were unrelated to Aaron Klein's ORS 659A.403 violation. Based on the sheer number and variety of types of alleged harm, there is no practical way Respondents can accomplish an effective inquiry using interrogatories. I find that Respondents will be substantially prejudiced if they are not allowed to depose Complainants.

"Based on the above, Respondents' motion to depose Complainants is **GRANTED**, with the following limitations:

- '1. Respondents are allowed a maximum of three hours, not counting breaks, to question each Complainant.
- '2. The Agency may choose where the depositions are to be conducted and is instructed to cooperate in making Complainants

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available for deposition as soon as practical, given that the hearing is scheduled to begin next month. If the Agency and Respondents cannot agree on a date, they are instructed to contact me and I will choose a date. I do not intend to postpone this hearing again because of a discovery issue.

'3. Respondents are responsible for any costs associated with conducting the deposition. Respondents and Agency must each pay for their own copy of the transcript if a transcript is prepared.

'4. Respondents and the Agency are ordered to notify me at least seven days in advance of the date and time for the depositions so that I can be available if necessary. As of today, the only dates I will be unavailable between now and March 1 are the afternoon of February 11 and all day February 16.

5. The scope of Respondents' questioning is limited to damages. Respondents may not engage in a fishing expedition by inquiring into matters totally irrelevant to the issue of physical, emotional, and mental suffering.'"

(Ex. X72)

31) On February 11, 2015, "in view of the national attention and attendant publicity these cases have already received and the likelihood that Complainants will be questioned about the protected health information in the records produced under the protective order," the ALJ issued a protective order regarding Complainants' depositions. The order prohibited the deposition transcripts or notes made of the deposition testimony from being made available to "non-qualified" persons or from being used "for any other purpose than the preparation for litigation of [the] proceeding." (Ex. X74)

32) On February 17, 2015, Respondents filed a motion for reconsideration of the ALJ's ruling on summary judgment. The ALJ denied Respondents' motion. (Exs. X73, X75, X79)

33) On February 23, 2015, the Agency issued Second Amended Formal Charges in both cases. Respondents filed answers on February 27, 2015. (Exs. X78, X82)

34) Respondents and Agency timely submitted case summaries. (Exs. X76, 77)

35) On February 26, 2015, Respondents filed a motion for discovery sanctions that was opposed by the Agency. On March 5, 2015, the ALJ ruled on Respondents' motion as follows:

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“On February 26, 2015, Respondents filed a motion requesting discovery sanctions related to the Agency’s failure to provide discovery subject to my Discovery Order dated September 25, 2014, until February 24, 2015. The Agency filed a response on February 27, 2015, and Respondents supplemented their motion on March 3, 2015.

“The discovery in question relates to my September 25, 2014, Order requiring that the Agency provide Respondents with:

‘all posting by Complainants to any social media website, including but not limited to Facebook, Twitter, LinkedIn, MySpace, Instagram, and SnapChat from January 2013 to the present that contain comments about the facts of this case, comments about Respondents, or comments that relate to their alleged damages.’

“Specifically, Respondents allege that on February 24, 2015, less than three hours before the Agency filed its case summary, the Agency turned over 109 pages of documents (‘subject documents’) to Respondents that were subject to my discovery order. Respondents further allege that the 109 pages were included in the Agency’s case summary. The Agency does not dispute these allegations, acknowledges it received the subject documents from Complainants in August 2014, and attempts to explain the reason for its late disclosure in its response. After reviewing the subject documents, I conclude that they contain Complainants’ social media conversations that fall within the scope of my September 25, 2014, Discovery Order.

“Respondents allege that the Agency’s untimely disclosure of these documents establishes bad faith on the part of the Agency and/or Complainants, particularly since the disclosure occurred after Respondents completed their depositions of Complainants, and that Respondents are irreparably prejudiced as a result. Respondents ask that the forum sanction the Agency in a number of different ways.

“In my September 25, 2014, Discovery Order, I ruled as follows:

‘After the scheduled September 29, 2014, prehearing conference in this matter, the forum will issue a subsequent order stating the Agency’s deadline for complying with the terms of this order. The Agency has a continuing obligation, through the close of the hearing, to provide Respondents’ counsel with any newly discovered material that responds to the responses and production ordered in this interim order. The Agency’s failure to comply with this order may result in the sanction described in OAR 839-050-0200(11).’

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In the interim order I issued on September 30, 2014, that summarized the September 29, 2014, prehearing conference, I ordered that “[t]he Discovery ordered in my rulings on * * * Respondents’ motions for Discovery Orders must be mailed or hand-delivered no later than October 14, 2014.” That was not done.

“As a prelude to my ruling, I note that the forum has no authority to impose the vast majority of sanctions sought by Respondents. The forum’s authority in this matter is not derived from the ORCP, but from provisions in the Oregon APA, the Oregon Attorney General’s Administrative Rules (OAR 137-003-0000 to -0092), and the forum’s own rules, OAR 839-050-000 *et seq.* The ALJ’s authority to impose sanctions for violations of discovery orders is set out in OAR 839-050-0020(11):[^]

‘The administrative law judge may refuse to admit evidence that has not been disclosed in response to a discovery order or subpoena, unless the participant that failed to provide discovery shows good cause for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)⁵⁶. If the administrative law judge admits evidence that was not disclosed as ordered or subpoenaed, the administrative law judge may grant a continuance to allow an opportunity for the other participant(s) to respond.’

In brief, the Agency frankly admits that it ‘cannot determine why the [subject records] were not produced [earlier] in discovery, but they were in a location unlikely to be accessed’ and characterizes its ‘oversight’ as an ‘inadvertent error.’ The Agency also notes, in a supporting declaration by * * * the Agency’s Chief Prosecutor, that ‘[i]t appears that on or about October 3, 2014, in anticipation of discovery, the subject documents were partially redacted. I have no other recollection as to why they were not provided in discovery.’

“OAR 839-050-0020(16) provides:

“‘Good cause’ means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. ‘Good cause’ does not include a lack of knowledge of the law, including these rules.’

For the reasons stated below, the forum concludes that the Agency’s failure to provide the subject records by October 14, 2014, as ordered by the forum, does not meet the ‘good cause’ standard. Participants in all cases are responsible for keeping track of documents that constitute potential evidence, particularly documents subject to an existing discovery order. In this case, the subject

⁵⁶ This statutory reference in the current rule is in error. The APA was amended in 2007 and the “full and fair inquiry” requirement was moved to ORS 183.417(8).

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records were accessed by BOLI's Administrative Prosecutions Unit on October 3, 2014, eight days after a discovery order was issued requiring the production of those records, and only 11 days before their production was due pursuant to the forum's September 30, 2014, order. The Agency's 'oversight' or storage of the documents in a place where they were 'unlikely to be accessed' does not constitute 'an excusable mistake or a circumstance over which the [Agency] had no control.'

"Ordinarily, the forum's sanction for failing to provide documents pursuant to a discovery order would be to prohibit the introduction of the documents as evidence.[^] However, Respondents assert that some of the subject records will potentially assist Respondents' defense and explain why in their motion. Based on Respondents' assertion, it appears that a blanket prohibition on the introduction of the subject records may prejudice Respondents and prevent a 'full and fair inquiry' by the forum. The forum's order is crafted with this in mind.

"ORDER

"1. Sanctions: (a) The Agency may not offer or otherwise utilize any of the subject documents as evidence until such time as Respondents have offered the subject documents into evidence or otherwise utilized them during the hearing while eliciting testimony in support of their case; (b) Respondents, should they elect to do so, may offer or utilize the subject documents in support of their case.

"2. Discovery Order

"To the extent these records have not already been provided, the forum hereby issues a discovery order requiring the Agency to provide responsive documents to items ##1, 5-6, 8, 13-15, and 21 listed on pages 9 and 10 of Respondents' Motion for Discovery Sanctions, with the caveat that the Agency is not required to produce statements made to Ms. Gaddis or Ms. Casey, the Agency's administrative prosecutors in this case, in any response to item #5. The Agency's responsibility to produce any such records begins as soon as this order is issued and continues until the hearing is concluded. The forum will apply OAR 839-050-0020(11) if an issue arises regarding an alleged failure by the Agency to produce such records in a timely manner.

"3. Respondents' request that the forum dismiss the Agency's Second Amended Formal Charges is **DENIED**.

"4. Respondents may amend their Case Summary witness list and exhibit list. * * *

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“5. Respondents’ request to ‘reopen discovery to allow for depositions of Complainants and other BOLI witnesses with knowledge of these matters’ is **DENIED**.

“6. Respondents’ request that the cases be dismissed or that the Agency’s claim for damages of Complainants’ behalf be dismissed is **DENIED**.

“7. Respondents’ request for costs is **DENIED**.

“8. Respondents’ request for any other sanctions not specifically discussed in this interim order is **DENIED**.”

(Exs. X81, X83, X86, X87)

36) The general public was allowed to attend the hearing. Because of this and potential security issues, the ALJ issued guidelines prior to the hearing that, among other things: prohibited the public from bringing backpacks, briefcases, satchels, carrying cases any type, or handbags into the building in which the hearing was held; prohibited the use of audio recorders and cameras, including cell phone cameras and recorders; and required cell phones to be turned off during the hearing. (Ex. X85; Statement of ALJ)

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

38) During the hearing, the Agency offered Exhibits A24 and A26. Respondents objected to their admission and the ALJ reserved ruling on their admissibility for the Proposed Order. Respondents objected on the basis of relevancy. Exhibits A24 and A26 are received because they are relevant to show the impact that the media exposure spawned by this case had on Complainants. (Exs. A24, A26)

39) During the hearing, the ALJ stated he would consider LBC’s testimony about the “handfasting cord” used in LBC’s and RBC’s commitment⁵⁷ ceremony as an offer of proof and rule on its admissibility in the Proposed Order. That testimony is admitted because it is not evidence that was required to be disclosed by the ALJ’s discovery orders and it is relevant to show the extent of Complainants’ commitment to their relationship. (Testimony of LBC; Statement of ALJ)

40) On March 16, after the Agency had concluded its case-in-chief, Respondents filed a motion for an order to Dismiss or Reopen Discovery and Keep Record Open. Respondents argued that this was necessary in order:

⁵⁷ The forum uses the term “commitment” because the handfasting cord was used in Complainants’ June 27, 2013, ceremony at the West End Ballroom, when same-sex marriage was not yet permitted in the state of Oregon.

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“to allow Respondents a full and fair opportunity to reopen discovery concerning possible undisclosed collusion among Complainants, Basic Rights Oregon and/or the Agency in light of the testimony of Agency witness Aaron Cryer elicited at the hearing on Friday, March 13, 2015.”

The ALJ allowed Respondents and the Agency to present oral argument on Respondents’ motion when the hearing re-convened on March 17, 2015, then denied Respondents’ motion. (Ex. X94; Statement of ALJ)

41) Respondents called AK, MK, and RBC as witnesses in support of their case in chief. At the conclusion of RBC’s testimony on March 17, 2015, Respondents’ counsel Grey made the following statement:

“That’s all of the witnesses that we have to present at this time. However, for purposes of the record I’d like to make it clear that Respondents did not intend to rest their case in chief for the reasons we discussed in connection with the motion that we presented this morning, which the forum denied. So simply for purposes of the record, we are not planning on closing our case in chief.”

(Statement of Grey)

42) On May 28, 2015, Respondents filed a motion to Reopen the Contested Case Record. The Agency filed a response on June 2, then supplemented its response on June 5, 2015. On June 22, 2015, the ALJ issued an interim order that denied Respondents’ motion. The ALJ’s ruling is reprinted in its entirety below:

“Pursuant to OAR 839-050-0410, Respondents filed a motion to reopen the contested case record on May 29, 2015.

“OAR 839-050-0410 provides:

‘On the administrative law judge’s own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.’

“Good cause” means:

‘[U]nless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. “Good cause” does not include a lack of knowledge of the law, including these rules.’ OAR 839-050-0020(16).

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Respondents' motion, like their earlier motion to Disqualify BOLI Commissioner Brad Avakian, is predicated on their argument that Commissioner Avakian's alleged bias 'has effectively precluded Respondents from receiving due process in this case.'

"In support of their motion, Respondents attached documentation of the following: (1) emails beginning April 11, 2014, and ending January 31, 2015, primarily containing conversations between Charlie Burr, BOLI's Communications Director and Strategy Works NW, LLC, Basic Rights of Oregon ('BRO'), and Senator Jeff Merkley's office, that were forwarded to Respondents' counsel by email by on May 20, 2015, by Kelsey Harkness, a reporter for the Daily Signal, pursuant to a public records request made by Harkness (the 'Harkness records'); (2) testimony of both Rachel and Laurel Bowman-Cryer from their February 17, 2015, depositions; and (3) selected hearing testimony of Aaron Cryer, brother of Complainant Rachel Bowman-Cryer. Respondents contend that the above shows 'hitherto undisclosed collusion between complainants, BOLI and Basic Rights Oregon * * * sufficient to taint the integrity of the proceedings and deny Respondents fundamental due process or a fair hearing" and 'unfairly prejudice Respondents['] rights herein.

"Specifically, Respondents ask that the record be reopened so that they can:

"(1) Depose Aaron Cryer;

"(2) Request, obtain and review additional documents from BOLI, BRO, and others and to issue interrogatories through *subpoena duces tecum* upon non-participants including but not limited to Commissioner Brad Avakian, the Commissioner's assistant Jesse Bontecou, Charlie Burr, Jeanna Frazzini, Amy Ruiz, Diane Goodwin, Emily McLain, Joe LeBlanc and Maura Roche, all of whom are identified in the emails provided to Respondents by Harkness;

"(3) Depose Avakian, Bontecou, Burr, Frazzini, Ruiz, Goodwin, McLain, LeBlanc and Roche; and

"(4) Depending on the information obtained, renew their motion to disqualify the Commissioner "and other BOLI personnel shown to have been involved in this political agenda from any role in deciding the case."

On June 2, 2015, the Agency timely filed a response to Respondents' motion, then supplemented it with an amended response on June 5, 2015.

"Discussion

"Under OAR 839-050-0410, Respondents have the burden of showing 'good

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cause' within the meaning of OAR 839-050-0020(16) for reopening the contested case record. To show good cause, Respondents must demonstrate an excusable mistake or a circumstance over which Respondents had no control. The excusable mistake or circumstances over 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 821 P2d 1134 (1991). The mistaken act or failure to act is excusable if a party mistakenly acts or fails to act due to being misled by facts or circumstances that would mislead a reasonable person under similar circumstances. *Ashlanders, citing In the Matter of 60 Minute Tune*, 9 BOLI 191 (1991), *affirmed without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 174, 822 P2d 974 (1993). The forum examines the three different types of supporting documentation provided by Respondents against these standards.

A. The Harkness Records

"The emails provided to Respondents by Harkness are dated April 11, 2014, to January 31, 2015, well before the hearing began. Respondents do not assert that BOLI did not cooperate promptly in providing these documents to Harkness when she made her public records request. Respondents' June 18, 2014, motion to disqualify Commissioner Avakian due to bias makes it apparent that Respondents considered the Commissioner's alleged bias to be a relevant issue at least nine months before the hearing began. Despite this, there is no evidence in the record that Respondents made a discovery request or public records request for the records that were provided to Harkness. This is a circumstance that was under Respondents' control, and Respondents provide no explanation for their own failure to make a pre-hearing request for these records that they now claim are relevant and probative of the Commissioner's bias. In addition, Respondents have failed to show a superseding or intervening event that prevented them obtaining the Harkness Records before the hearing or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, the forum concludes that Respondents have not shown good cause for their failure to pursue the Harkness records before the hearing and offer them as evidence at hearing.⁵⁸

⁵⁸ There are no Commissioner's Final Orders interpreting "good cause" in the context of a motion to reopen a contested case proceeding. Besides *Ashlanders*, *City of Umatilla*, and *60 Minute Tune*, there have been numerous Final Orders interpreting the definition of "good cause" in OAR 839-050-0020(16) in other contexts. None of them support Respondents' claim that their supporting documentation shows "good cause." **Cf.** *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 240 (2009)(when respondents sought a postponement so they could complete discovery and respondents' previous motion for a postponement had been granted to give respondents' newly retained attorney time to prepare for the hearing, respondents delayed three months after the forum granted the first postponement before seeking discovery, the agency was not responsible for respondent's delay, and respondents' need for an another postponement could have been obviated if respondents had timely sought discovery, the forum denied respondents' motion, finding that respondents had not shown "good cause"); *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005)(the ALJ denied respondent's motion to reset the hearing based on the agency's alleged failure to provide complete discovery, stating that respondent had not established "good cause"

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B. Complainants' Deposition Testimony

“Respondents allege that Aaron Cryer’s testimony and the Harkness records show that Complainants’ deposition testimony is not credible regarding their

because it had not shown that the agency had withheld discoverable information nor that respondent was entitled to a deposition of the complainant); *In the Matter of Orion Driftboat and Watercraft Company, LLC*, 26 BOLI 137, 139 (2005)(when respondents moved for a postponement 12 days before the hearing date based on respondents’ need to be represented by an attorney and current inability to afford an attorney, because the agency had refused to accept respondents’ settlement offers, and because respondents needed more time to file a discovery order, the agency objected on the basis that it had lined up its witnesses and was prepared to proceed, and because respondents had agreed three months earlier to the date set for hearing and the forum denied respondents’ motion because respondents had not shown good cause); *In the Matter of Adesina Adeniji*, 25 BOLI 162, 164-65 (2004)(respondent’s failure to comply with discovery order because he believed the case would settle and because he had provided some of the documents subject to discovery order exhibits with his answer was not “good cause” and the ALJ sustained the agency’s objection to respondent’s attempted reliance at hearing on exhibits subject to discovery order that were not provided before hearing); *In the Matter of Barbara Coleman*, 19 BOLI 230, 238-39 (2000)(respondent’s attorney’s assertion that respondent’s medical condition of depression made it difficult for her to gather information did not present good cause for postponement of the hearing when “nothing filed with this forum * * * comes close to establishing that respondent is legally incompetent, and respondent has made no such claim. As the forum stated in [an earlier] order, respondent spoke lucidly and logically during the * * * teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago”); *In the Matter of Sabas Gonzalez*, 19 BOLI 1, 5-6 (1999)(respondent’s motion for postponement, based in part on a scheduling conflict of respondent’s counsel, was denied based on respondent’s failure to show good cause when there was no evidence that the matter on respondent’s counsel’s schedule that conflicted with the hearing had been set before the notice of hearing issued in this case and respondent’s counsel knew of the possible conflict for weeks before filing the motion and did not respond to the attempts the agency made at that time to resolve the conflict); *In the Matter of Troy R. Johnson*, 17 BOLI 285, 287-88 (1999)(respondent’s motion to postpone the hearing was denied based on respondent’s failure to show good cause when respondent based his motion on assertions that he had not received the notice of hearing until one week before a scheduled hearing date and did not have time to prepare for the hearing, but his delay in receiving the notice of hearing was due to his failure to notify the forum of his change of address; he was out of town on a hunting trip; and he was amazed the case had been set for hearing); *In the Matter of Jewel Schmidt*, 15 BOLI 236, 237 (1997)(when respondent requested a postponement of the hearing because she had an adult care home and could not find a relief person for the date of hearing or successive days, and the agency opposed the request because it was ready to proceed and had subpoenaed witnesses, the ALJ denied the request because respondent had not shown good cause for a postponement, noting that there were over 30 days between the date the notice of hearing was issued and the date of the scheduled hearing, and this should have been ample time to find a relief person for the expected one-day hearing). **Compare** *In the Matter of Computer Products Unlimited, Inc.*, 31 BOLI 209, 212-13 (2011) (respondent’s motion for postponement granted based on emergency medical treatment required by the wife of respondent’s authorized representative that could not be put off); *In the Matter of Spud Cellar Deli, Inc.*, 31 BOLI 106, 111 (2010)(forum granted the agency’s motion for a hearing postponement based on the fact that respondent’s counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing); *In the Matter of Northwestern Title Loans LLC*, 30 BOLI 1, 3, (2008)(forum granted respondent’s motion for postponement based on unavailability of respondent’s key witness on the date set for hearing); *In the Matter of Captain Hooks, LLP*, 27 BOLI 211, 213 (2006)(respondent’s motion for postponement granted based on respondent’s documented emergency medical condition); *In the Matter of SQDL Co.*, 22 BOLI 223, 227-28 (2001)(when respondent retained substitute counsel after its original counsel was suspended from the practice of law and substitute counsel filed a motion for postponement five days before the hearing based on the complexity of the case and his corresponding need for more time to prepare for the hearing, the ALJ concluded that respondent had shown good cause and granted the motion); *In the Matter of Ann L. Swanger*, 19 BOLI 42, 44 (1999)(respondent’s motion for postponement, based on the fact that respondent would be having major dental surgery the day before the hearing was set to commence, making it extremely difficult for her to attend or communicate at the hearing, was granted).

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alleged 'collusion' with BOLI 'in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants.' This is merely a repeat of Respondents' March 16, 2015, argument made in their *Motion to Dismiss or Reopen Discovery and Keep Record Open* that the ALJ denied at hearing. The deposition testimony given by Complainants that Respondents now argue justifies reopening the case was given on February 17, 2015, almost a month before the hearing commenced. In their depositions, Complainants were asked questions and gave answers regarding Jeanna Frazzini, Amy Ruiz, BRO, and their involvement with Frazzini, Ruiz, and BRO, as reflected in the attachments to Exhibit X94. Despite that deposition testimony, there is no evidence that Respondents attempted to follow up on the collusion that Respondents now alleges existed between these individuals, Complainants, BRO, and BOLI. Further, Respondents could have questioned Complainants about Cryer's testimony in their case-in-chief, but did not do so. These opportunities were both circumstances that were under Respondents' control. Likewise, Respondents have not shown a superseding or intervening event that prevented them from pursuing further discovery before the hearing based on Complainants' deposition testimony or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, Respondents have not established good cause to support their argument that Complainants' deposition testimony, coupled with Aaron Cryer's hearing testimony and the Harkness records, constitute grounds for reopening the contested case record to pursue the additional discovery that Respondents seek in this motion.

C. Aaron Cryer's Testimony

"Respondents' proffered characterization of Cryer's quoted testimony as 'directly' implicat[ing] BOLI and Complainants in using this case against Respondents for a political agenda rather than a good faith claim for recovery of damages to Complainants' is simply inaccurate. As noted above, Respondents were aware of communications between Complainants, BRO, BOLI, Frazzini, and Ruiz before the hearing, but elected not to pursue the defense they now assert by requesting additional discovery or by calling Complainants as witnesses in their case in chief to explore the alleged political agenda. This was a choice made by Respondents' legal team, not a circumstance beyond Respondents' control, and Respondents have not shown any superseding or intervening event that prevented them seeking additional discovery or that they were misled by facts or circumstances that would mislead a reasonable person under similar circumstances. Accordingly, Cryer's testimony that Respondents rely on is not good cause within the meaning of OAR 839-050-0410 and OAR 839-050-0020(16).

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D. The Additional Evidence Sought by Respondents is Unnecessary to Fully and Fairly Adjudicate This Case

"Notwithstanding the lack of 'good cause,' the forum also concludes that additional evidence on the issues raised in Respondent's motion is unnecessary to fully and fairly adjudicate this case, as the forum has fully and carefully considered and ruled on these matters, which are incorporated herein and made a part hereof by this reference. See Ex. X12 (ALJ's July 2, 2014, Interim Order entitled *Ruling on Respondents' Election to Remove Cases to Circuit Court and Alternative Motion to Disqualify BOLI Commissioner Brad Avakian*).⁵⁹

"Furthermore, since these prior rulings the Oregon Court of Appeals issued an opinion in *Columbia Riverkeeper v. Clatsop County*, 267 Or App 578, 341 P3d 790 (2014) that supports those rulings. Respondents' earlier motions sought to disqualify Commissioner Avakian due to 'actual bias.' In *Columbia*, Huhtala, a Clatsop County Commissioner, ran for election on the platform of not allowing a LNG business to be established in Astoria, then voted to deny in a land use decision that denied a pipeline company's application to build an LNG pipeline originating in Astoria. Prior to his election, Huhtala had made many public statements opposing construction of an LNG pipeline. In reversing the Land Use Board of Appeals' (LUBA) decision that Huhtala's bias had deprived the pipeline company of an impartial tribunal, the court stated:

'All told, no single case in Oregon establishes what is necessary for a party to prove actual bias by an elected official in quasi-judicial land-use proceedings such as this one. Generally, we can glean the following. The bar for disqualification is high; no published case has concluded that disqualification was required in quasi-judicial land-use proceedings. An elected local official's 'intense involvement in the affairs of the community' or 'political predisposition' is not grounds for disqualification. Involvement with other governmental organizations that may have an interest in the decision does not require disqualification. An elected local official is not expected to have no appearance of having views on matters of community interest when a decision on the matter is to be made by an adjudicatory procedure.

⁵⁹ Cf. *In the Matter of Mountain Forestry, Inc.*, 29 BOLI 11, 48-50 (2007), *affirmed without opinion*, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009)(when respondents moved to reopen the record to admit a federal audit that purportedly showed the prevalence of records discrepancies throughout the firefighting industry and that the Oregon Department of Forestry did not have specific training requirements prior to 2003, and that purportedly negated certain inferences drawn from witness testimony, the forum found that, notwithstanding respondents' failure to submit an affidavit showing they had no knowledge of the audit prior to its release in March 2006, the audit did not contain any information relevant to the issues in the case or that mitigated respondents' violations and therefore the additional evidence was not necessary to fully and fairly adjudicate the case).

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'In addition to those general observations, there are three salient principles from the case law that define and drive our analysis in this case. *First*, the scope of the "matter" and "question at issue" is narrowly limited to the specific decision that is before the tribunal. *Second*, because of the nature of elected local officials making decisions in quasi-judicial proceedings, the bias must be actual, not merely apparent. And *third*, the substantive standard for actual bias is that the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented.'

Columbia Riverkeeper at 602-03.

"Under this standard, none of the "evidence" that Respondents have proffered previously or in support of their Motion to Reopen the Contested Case Record is probative to show "actual bias" on Commissioner Avakian's part. Therefore, notwithstanding the lack of "good cause" shown for not providing the proffered "evidence" before the record closed, the Motion is denied on the merits.

E. Conclusion

"Respondents' motion to Reopen the Contested Case Record is **DENIED**."

43) On April 24, 2015, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency and Respondents both timely filed exceptions.

44) Respondents' exceptions are **DENIED** in their entirety as lacking merit. The Agency's exceptions as to the alleged violations of ORS 659A.409 are **GRANTED**. Otherwise, the Agency's exceptions are **DENIED**.

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In the Matter of
Sunlan Lighting, Inc., Respondent, Case
No. 12-21
Final Order of Commissioner Val Hoyle
Issued July 14, 2022

SYNOPSIS

Respondent violated ORS 659A.142(4) when it refused to allow Complainant, an individual with a disability, to shop in its store in April 2019 while accompanied by her assistance animal. The allergies of the Respondent's owner to animal dander was not a valid reason to exclude Complainant from the Respondent's retail store, a place of public accommodation, because the Complainant was accompanied by an assistance animal. The forum awarded Complainant \$8,000 in damages for physical, emotional, and mental suffering.

The above-entitled case came on regularly for hearing before Caroline A. Holien, designated as Administrative Law Judge ("ALJ") by, Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 5, 2022, via Zoom.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chief Administrative Prosecutor Adam Jeffries, an employee of the Agency. Respondent Sunlan Lighting, Inc. ("Sunlan") was represented by Steven Parker, attorney at law. Complainant Molly Neher ("Neher") was present throughout the hearing, as was Sunlan owner Kay Newell ("K. Newell").

The Agency called Zachary Zerzan ("Zerzan"), Senior Investigator, BOLI's Civil Rights Division; Kevin Cardoza ("Cardoza"); and Neher as witnesses. Sunlan called K. Newell and Sunlan employee and K. Newell's son, Dennis Newell ("D. Newell") as witnesses. The forum received into evidence Administrative Exhibits X1-X14 and Agency Exhibits A1-A12¹, A14 (pages 4-5 only), A15 and A22-A24. Respondent offered no exhibits at hearing.

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

¹ Exs. A11 and A15 are subject to the provisions of the Protective Order issued on February 9, 2022. See Findings of Fact – Procedural # 12.

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

FINDINGS OF FACT – PROCEDURAL

1) On May 20, 2019, Neher filed a complaint with the Agency's Civil Rights Division ("CRD") alleging "unlawful discrimination in a place of public accommodation in that [Sunlan] made a distinction, discrimination, or restriction because of [her] disability." (Ex. A1)

2) On May 20, 2020, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence of the unlawful practice of discrimination in a place of public accommodation on the basis of disability in violation of ORS 659A.142. (Ex. A9)

3) On September 10, 2021, the Agency submitted a request for hearing. (Ex. X1)

4) On September 10, 2021, the forum issued a Notice of Hearing to Respondents, the Agency, and Complainant stating the time and place of the hearing as April 5, 2022, beginning at 9:30 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)

5) The Formal Charges alleged Sunlan engaged in unlawful practices, as defined under ORS 659A.001(14), in violation of ORS 659A.142(4), ORS 659A.142(6)(a), ORS 659A.142(7), and OAR 839-006-0345(8)(a),(9). The Formal Charges sought damages for physical, mental, and emotional distress of at least \$8,000. The Formal Charges also asked that Sunlan be required to be trained, at its expense, "on accommodating individuals with disabilities including accommodating individuals with disabilities who utilize service animals" and that Respondents be enjoined from violating laws. 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. 2b)

6) On September 30, 2021, Sunlan filed Respondent Sunlan Lighting, Inc.'s Answer and Affirmative Defenses to Formal Charges, in which it denied the allegations set forth in the Formal Charges. (Ex. 3)

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

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7) On September 30, 2021, the forum issued an Interim Order Re Temporary Procedures and Requiring Case Summaries that included notice to the parties that documents were to be filed by email only and set March 22, 2022, as the deadline for filing Case Summaries. (Ex. X4)

8) On December 29, 2021, the Agency filed its Agency Motion to Compel seeking an order compelling the production of documents and responses to interrogatories pursuant to OAR 839-050-0150 and OAR 839-050-0200(5). (Ex. X5)

9) On January 5, 2022, Sunlan filed the Declaration of Steven Parker in Opposition to the Agency's Motion to Compel Discovery arguing that Agency's motion was premature as the Respondent had failed to timely respond to the Agency's discovery request due to an oversight and it intended to respond to the discovery requests. (Ex. X6)

10) On January 14, 2022, the forum issued an Interim Order Re Agency's Motion to Compel:

"The Agency filed a Motion to Compel Discovery on December 29, 2021. In the motion, the Agency represented that it served discovery requests on Respondent, but had not received a response at the time the motion was filed. The motion asked that the forum require Respondent to respond to the discovery requests by January 19, 2022.

"Respondent's counsel filed a declaration in response to the motion on January 5, 2022. In the declaration, Respondent's counsel 'acknowledge[d] that the Agency is entitled to responses to discovery it previously served on Respondent,' but stated that Respondent needed additional time to respond. In subsequent email communication, Respondent's counsel informed the ALJ that Respondent would be able to respond to the requests by January 12, 2022.

"The Administrative Law Judge has the sole discretion to order discovery by a participant in appropriate cases.' OAR 839-050-0200(1). 'Any discovery request must be reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7).

"In its motion, the Agency sought to compel answers and responses to the Agency's discovery requests, a copy of which is attached to this interim order. The forum determines that the requests for production and interrogatories appear to seek information that is "reasonably likely to produce information that is generally relevant to the case," and Respondent acknowledge that the Agency was entitled to a response. Accordingly, the Agency's motion is GRANTED. If Respondent has not already done so, it must respond to all of the discovery requests **on or before January 19, 2022.**

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“Failure to comply with this interim order may result in sanctions as described in OAR 839-050-0200(11), including the refusal to admit evidence that was not disclosed in response to this order. Pursuant to OAR 839-050-0200(8), Respondent has a continuing obligation, through the close of the hearing, to provide the Agency with any newly discovered material that is within the scope of this order.

“IT IS SO ORDERED.”

(Ex. X7)

11) On February 9, 2022, the Agency filed an Unopposed Agency Motion for Protective Order seeking a protective order permitting the parties to designate documents as being subject to its terms. (Ex. X8)

12) On February 9, 2022, the forum issued an Interim Protective Order granting the parties’ request and ordering that “[m]edical records contain[ing] information that is of a personal nature” were exempt from disclosure under the Public Records law pursuant to ORS 192.355(2)(a). (Ex. X9)

13) On March 18, 2022, the Agency issued Amended Formal Charges that identified additional statutory grounds for the Agency’s jurisdiction. The allegations remained the same but were amended as follows, in pertinent part:

“UNLAWFUL DISCRIMINATION AGAINST CUSTOMER OR PATRON WITH DISABILITY

“18. The Agency re-alleges Sections I through V, paragraphs 1 through 18 and further alleges: Respondent made a distinction, discrimination, and/or restriction because Complainant is an individual with a disability in violation of ORS 659A.142(4).

“DENIAL OF A PERSON WITH A DISABILITY THE RIGHT TO BE ACCOMPANIED BY AN ASSISTANCE ANIMAL

VI.

“19. The Agency re-alleges Sections I through V, paragraphs 1 through 18 and further alleges: Respondent denied Complainant the right to be accompanied by an assistance animal in a place of public accommodation that is open to the public in violation of ORS 659A.142(6)(a) and OAR 839-006-0345(8)(a). ORS 659A.142(4); **ORS 659A.400(1)**; **ORS 659.805(1)(a)**; ORS 659A.139(1). This is an unlawful practice.

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“FAILURE TO MAKE REASONABLE MODIFICATIONS TO ALLOW AN
OPPORTUNITY FOR A PERSON WITH A DISABILITY WHO IS BENEFITTED
BY THE USE OF AN ASSISTANCE ANIMAL TO OBTAIN GOODS, SERVICES,
AND/OR THE USE OF A PLACE OF PUBLIC ACCOMMODATION

VII.

- “20. The Agency re-alleges Sections I through VI, paragraphs 1 through 19 and further alleges: Respondent failed to make reasonable modifications as necessary to allow an opportunity for Complainant, a person with a disability who benefits from the use of an assistance animal, to obtain goods, services, and/or the use of the advantages, facilities, and privileges of a place of public accommodation in violation of ORS 659A.142(7) and OAR 839-006-0345(9). ORS 659A.142(4); **ORS 659A.400(1)**; **ORS 659.805(1)(a)**; ORS 659A.139(1). This is an unlawful practice.

(Ex. X10)(Amendments are bolded))

14) On March 16, 2022, the Agency filed the Agency’s Second Motion to Compel Discovery seeking an order compelling a complete answer to several Interrogatories and Requests for Production. (Ex. X11)

15) On March 21, 2022, Respondent filed a Declaration of Steven Parker in Opposition to Agency’s Second Motion to Compel Discovery arguing that it had provided the responses sought in the Agency’s First Motion to Compel Discovery and it had provided all nonprivileged documents in its possession or control. (Ex. X12)

16) On March 23, 2022, the forum issued an Interim Order Re Agency’s Motion to Compel:

“On March 16, 2021, the Agency filed its Second Motion to Compel Discovery seeking the production of any remaining non-privileged documents responsive to the Agency’s Requests for Production (RFP’s) Nos. 1 through 22; as well as a complete answer to Agency Interrogatory No. 1 and any supplemental responses to the Agency’s Interrogatories Nos. 2, 3, 4, 5, and 6 that may be necessary in the manner prescribed by OAR 839-050-0200(6). The Agency represented in its motion that Respondent had not fully complied with the Interim Order issued on January 14, 2022, which ordered Respondent to respond to all of the Agency’s discovery requests by January 19, 2022, and included notice that failure to do so could result in sanctions as described in OAR 839-050-0200(11).

“Respondent’s counsel filed a declaration in response to the Agency’s motion on March 22, 2022. Respondent’s counsel represented that all

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nonprivileged documents in its possession or control had been produced in response to the Agency's discovery requests, with the exception of RFP No. 15. Respondent argues that RFP No. 15 seeks information that is personal to individuals who are not parties to the matter nor are potential witnesses. Respondent further argues that production of such documents is oppressive given that there has been no allegation of improper wage and practices. Respondent also argues that the Agency's motion is unnecessary as to Interrogatory No. 1 because it has identified all employees having any relation to the incident at issue in this matter and provided the contact information of those employees.

"The Administrative Law Judge has the sole discretion to order discovery by a participant in appropriate cases.' OAR 839-050-0200(1). 'Any discovery request must be reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7).

"Requests for Production Nos. 1 through 22

"In its motion, the Agency sought to compel the Respondent to 'produce all remaining non-privileged documents responsive to Agency's RFPS [1 through 22] in its possession, custody, or control.' Specifically, the Agency sought to compel Respondent to provide a copy of its "payroll records from April 1, 2019, to the present showing each employee's occupation, each employee's hours worked by workday, each employee's hours worked by work week, and each employee's rate of pay" in response to its RFP No. 15. The Agency argues the information sought in RFP No. 15 will provide information relevant to the requirements set forth in ORS 659A.112 to 659A.139. The Agency contends the information sought is relevant to whether the significant risk of harm Respondent alleges Complainant and/or her assistance animal posed could be eliminated or reduced by a modification of staffing policies, practices, or procedures. See OAR 839-006-0335(1). The Agency further contends that such information is relevant as to whether Respondent was required to accommodate the disabilities of its employee(s) under ORS 659A.118.

"The forum finds that the information sought in the Agency's RFP Nos. 1 through 22, and, in particular, RFP No. 15, appear to seek information that is 'reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7). Further, the production of such information is not oppressive as argued by Respondent, because it is information that it is generally required to maintain and to make available to the Oregon Bureau of Labor and Industries. OAR 839-020-0080(1)(a), (d), (f), (g), (h); OAR 839-020-0083(3). It is therefore ordered that the Respondent must produce all remaining non-privileged documents responsive to the Agency's Requests for Production Nos. 1 through 22 no later than March 28, 2022. The forum is confident counsel can mutually agree as to how to best address the privacy concerns noted in the Respondent's declaration.

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“Interrogatories

“In its motion, the Agency sought to compel the Respondent to provide the contact information sought in the Agency’s Interrogatory No. 1 for each employee employed between April 1, 2019, and the present, including the start and end dates of employment for each employee. The Agency argues such information is relevant as to whether the significant risk of harm Respondent alleges Complainant and/or her assistance animal posed could be eliminated or reduced by a modification of staffing policies, practices, or procedures pursuant to OAR 839-006-0335(1). The Agency also argues such information is relevant to determine whether the requirements of ORS 659A.112 to 659A.139 applied to Respondent and whether it had an obligation to accommodate the disabilities of its employee(s) under ORS 659A.118.

“The Agency argues Interrogatories Nos. 2 through 6 are reasonably likely to produce relevant information to this matter, noting that the interrogatories seek information as to how individuals who have entered the store with an assistance animal have been treated and information pertaining Respondent’s third affirmative defense concerning OAR 839-006-0335(1).

“The forum determines that the Agency’s Interrogatories Nos. 1 through 6 seek information that is reasonably likely to produce information generally relevant to the case. OAR 839-050-0200(7). It is therefore ordered that Respondent must provide a complete response to the Agency’s Interrogatory No. 1 in the manner prescribed by OAR 839-050-0200(6) no later than March 28, 2022. It is therefore further ordered that Respondent must provide any supplemental responses to the Agency’s Interrogatories Nos. 2, 3, 4, 5, or 6 that may be necessary in the manner prescribed by OAR 839-050-0200(6) no later than March 28, 2022.

“Failure to comply with this interim order may result in sanctions as described in OAR 839-050-0200(11), including the refusal to admit evidence that was not disclosed in response to this order. Pursuant to OAR 839-050-0200(8), Respondent has a continuing obligation, through the close of the hearing, to provide the Agency with any newly discovered material that is within the scope of this order.

“IT IS SO ORDERED.”

(Ex. X13)

17) On March 29, 2022, the Agency filed an Addendum to Agency Case Summary adding documents A23-A26 to the Agency’s Case Summary. (Ex. X14)

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18) On May 19, 2022, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent and the Agency both filed exceptions on May 31, 2022³. The exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Sunlan was an active business domestic corporation registered with the Oregon Secretary of State Business Registry. (Ex. A4)

2) Sunlan is a retail establishment open to the general public that specializes in selling lightbulbs. Sunlan is located on Mississippi Avenue in Portland, Oregon, and has been in operation since 1989. K. Newell owns both the business and the building in which the business is located. K. Newell operates Sunlan with her son, D. Newell. (Testimony of K. Newell)

3) Sunlan has an employee handbook that is focused primarily on rest and meal periods and includes information regarding Portland's Sick Time Ordinance. The employee handbook does not include any reference to assistance animals. (Ex. A13)

4) K. Newell suffers from severe allergies to animal dander, which causes her to lose her voice and her eyes to swell, which she believes has led to permanent damage to her vision. It can take K. Newell several days to recover after being exposed to animal dander. At times, she has been required to use a portable speaker in order to be heard due to the swelling in her throat. K. Newell has determined over the years that she is especially sensitive to dog dander. As a result, K. Newell avoids dogs and does not allow them in her store. (Exs. A6, p. 11; A14; A15; Testimony of K. Newell)

5) Each Sunlan employee has an air purifier at his or her desk. There is also an air purifier in the store's heating and cooling system. Despite these modifications, K. Newell continues to suffer an allergic reaction if she is exposed to animal dander. (Testimony of K. Newell)

6) A sign with an image of a dog in a red circle with a red line across the dog image is posted on the front door of the store. Under the image, the sign reads, "NO DOGS ALLOWED * * * Scent Free Building." (Ex. A24)(capital letters used in original)

7) There is a second sign on the door that reads, "No Dogs allowed due to server [sic] Allergies. Thank you!" There is also a note on the door that reads:

"I am sure your dog is cute, but to me it is a health hazard. If I were to pet your dog, I would break out in a rash.

³ As the 10th day following the issuance of the Proposed Order fell on a holiday, the parties timely filed their exceptions on the next business day.

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"If you bring your dog in to [sic] the building, he will leave dander behind. That dander will float into my lungs causing my throat to swell and my voice to become a whisper. As I breathe in the dander my lungs will begin to burn and I will hurt. Just a few minutes exposure to your dog will cause me to lose the ability to talk on the phone. The problems will start to occur shortly after your dog leaves and will get worse until I can breathe clean fresh air that has no dog dander.

"You are welcome to explore the store, but please leave your dog outside."

(Ex. A6, pp. 17-21)

8) Sunlan's procedure has traditionally been to inform customers who bring a dog inside of the store that exposure to dogs can cause K. Newell to lose her voice and to ask the customer to take the dog outside. Sunlan employees have assisted customers with assistance animals in picking out their items and completing the sale while the customer or another person waits outside of the store with the animal. There is an attached breezeway in which customers with dogs have been asked to wait while a Sunlan employee retrieves their items. (Ex. A6, p. 4; Testimony of K. Newell)

9) K. Newell typically sits at a desk where she can observe the front door and greet customers. K. Newell has limited mobility and requires the use of two canes to walk safely so she usually stays at her desk while other employees work the floor and assist customers. (Testimony of K. Newell and D. Newell)

10) On April 20, 2019, Neher and Cardoza entered Sunlan accompanied by Neher's assistance animal Reid. (Testimony of Neher and Cardoza)

11) Neher suffered a traumatic brain injury ("TBI") in 2014, which resulted in Neher having a seizure disorder that causes her to have grand mal seizures once or twice a week. Reid is trained to alert Neher prior to a seizure so she can protect herself and others during a seizure by moving to a safe area. (Ex. A11; Testimony of Neher)

12) Neher's condition causes her sensory difficulties; affects her concentration; and causes her to suffer from fatigue and migraines. Neher is limited in her ability to stand for extended periods, interact with people, or run simple errands. Neher's condition has impacted her ability to work. (Exs. A3; A11; Testimony of Neher)

13) Reid is a Labradoodle and weighs approximately 70 pounds. Reid is hypoallergenic and housebroken. At all times material to this case, Reid was certified to serve as an assistance animal having passed the annual Public Access Test. (Ex. 8; Testimony of Neher)

14) K. Newell did not observe Neher and Cardoza enter the store as she was busy working with customers. Sunlan employee Robert Plumb ("Plumb") approached Neher while she was inside of the store and told her that dogs were not allowed in the

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store. Neher told Plumb that she had a right to be in the store with her assistance animal. The situation quickly escalated with both Plumb and Neher raising their voices while addressing one another. Plumb told Neher several times that dogs were not allowed in the store. At one point, Plumb pointed at K. Newell, who was still at her desk, and told Neher that K. Newell was allergic and she could not have dogs in the store. Plumb then yelled at K. Newell that there was a dog in the store. K. Newell responded by telling Plumb to get the dog out of the store. As Plumb continued to direct Neher to leave the store, K. Newell announced that she would leave the store. Neher and Cardoza then left the store. (Testimony of Neher and K. Newell)

15) Reid did not act in an aggressive or disruptive manner at any time he was in the store and was under Neher's control throughout her interaction with Plumb. There is no evidence showing Reid was not in an appropriate harness or leash while in the store or that he caused any damage to Sunlan property or that of Sunlan's customers. (Testimony of Neher and K. Newell)

16) K. Newell lost her voice shortly after Neher and Reid left the store and did not regain her voice again until later that night. (Testimony of K. Newell)

17) Plumb was suffering from cancer at the time of his interaction with Neher and passed away on May 27, 2019. (Ex. A6, p. 16; Testimony of K. Newell)

18) Neher was upset during the confrontation with Plumb and felt distressed and anxious after leaving the store. Neher found the entire situation upsetting. (Testimony of Neher)

19) A similar situation occurred in September or October 2020, when a customer was told she could not have her assistance animal with her in the store due to K. Newell's allergies. (Testimony of K. Newell; Ex. A14, pp. 4-12)

20) Neher, Cardoza, and K. Newell were considered credible witnesses as each person's testimony regarding the events of April 20, 2019, was substantially similar. (Testimony of Neher, Cardoza, and K. Newell)

21) D. Newell initially informed the Civil Rights Division that he had "heard the conversation going on in the front of the store, Sunlan Lighting, Inc." At hearing, D. Newell conceded he had not heard the specifics of the conversation but had heard loud voices. D. Newell's testimony is considered credible to the extent it is consistent with the substantial and credible evidence of record. (Ex. A6, p. 12; Testimony of D. Newell)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an active domestic business corporation. Respondent is a "person" within the meaning of ORS 659A.001(9)(a), OAR 839-003-0005(12) and OAR 839-005-0003(12).

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2) Respondent Sunlan is a retail establishment open to the public that is a “place of public accommodation,” as defined in ORS 659A.400(1).

3) At all times material herein, Complainant’s condition substantially limited one or more of her major life activities. Complainant was an individual with a disability under ORS 659A.104(1)(a).

4) Complainant has an assistance animal that has been individually trained to assist Complainant with seizure response. Complainant’s assistance animal is an “assistance animal” as defined by ORS 659A.143(1)(a) and OAR 839-006-0345(1).

5) On April 20, 2019, Respondent Sunlan engaged in an unlawful practice, as defined by ORS 659A.001(14), by refusing to allow Complainant to remain in the store while accompanied by her assistance animal thereby making a distinction, discrimination, and/or restriction against Complainant because of her disability in violation of ORS 659A.142(4).

6) Respondent denied Complainant the right to be accompanied by an assistance animal in a place of public accommodation that is open to the public in violation of ORS 659A.143(6)(a) and OAR 839-006-0345(8)(a). ORS 659A.142(4); ORS 659A.400(1); ORS 659.805(1)(a); ORS 659A.139(1).

7) Respondent failed to make reasonable modifications as necessary to allow Complainant, a person with a disability who benefits from the use of an assistance animal, an opportunity to obtain goods, services, and/or the use of the advantages, facilities, and privileges of a place of public accommodation in violation of ORS 659A.143(7) and OAR 839-006-0345(9). ORS 659A.142(4); ORS 659A.400(1); ORS 659.805(1)(a); ORS 659A.139(1).

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

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

OPINION

The Agency alleges that Sunlan unlawfully discriminated against Neher in violation of ORS 659A.142(4) by denying Neher, a person with a disability, the right to be accompanied by an assistance animal in a place of public accommodation that is open to the public in violation of ORS 659A.143(6)(a) and OAR 839-006-0345(8)(a) and

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by failing to make reasonable accommodations as necessary to allow Neher, a person with a disability who benefits from the use of an assistance animal, to obtain goods, services, and/or the use of the advantages, facilities, and privileges of a place of public accommodation in violation of ORS 659A.143(7) and OAR 839-006-0345(9). ORS 659A.142(4); ORS 659A.400(1); ORS 659A.805(1)(a); ORS 659A.139(1).

To prevail in this matter, the Agency must prove the following by a preponderance of the evidence: (1) Sunlan is a place of public accommodation as defined in ORS 659A.400; (2) Neher is an individual with a disability; (3) Sunlan made a distinction, discrimination or restriction against Neher because she is an individual with a disability; and (4) Neher was harmed by Sunlan's conduct. *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 30 (2014).

1. Sunlan is a "Place of Public Accommodation"

ORS 659A.142(4) provides that "It is an unlawful practice for any place of public accommodation, resort or amusement as defined in ORS 659A.400, or any person acting on behalf of such place, to make any distinction, discrimination or restriction because a customer or patron is an individual with a disability." ORS 659A.400(1)(a) defines "place of public accommodation" as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise."

Sunlan is a retail establishment that is open to the general public. As such, Sunlan constitutes a "place of public accommodation" pursuant to ORS 659A.400(1)(a).

2. Neher is an Individual with a Disability

ORS 659A.104(1)(a) defines "an individual with a disability" as an individual who "has a physical or mental impairment that substantially limits one or more major life activities." Neher suffered a TBI that causes her to experience grand mal seizures once or twice a week. Neher's condition causes her sensory difficulties; affects her concentration; and causes her to suffer from fatigue and migraines. Neher is limited in her ability to stand for extended periods, interact with people, or run simple errands. Neher's condition has impacted her ability to work. (Findings of Fact ## 11-12) Neher's condition substantially limits one or more of her major life activities. ORS 659A.104(2) Neher is, therefore, an individual with a disability under ORS 659A.104(1)(a).

3. Sunlan Made a Distinction, Discrimination or Restriction Against Neher Because she is an Individual with a Disability

The Agency alleges that Sunlan denied Neher the right to be accompanied by her assistance animal by ordering her out of the store on April 20, 2019, in violation ORS 659A.143(6)(a) and OAR 839-006-0345(8)(a). ORS 659A.143(6)(a) provides:

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“(a) Except as provided in this subsection, a place of public accommodation or of access to state government services, programs or activities may not deny a person with a disability or an assistance animal trainer the right to be accompanied by an assistance animal or assistance animal trainee in any area of the place that is open to the public or to business invitees. A place of public accommodation or of access to state government services, programs or activities may require a person with a disability or an assistance animal trainer to remove an assistance animal or assistance animal trainee if:

“(A) The animal is not housebroken; or

“(B) The animal is out of control and effective action is not taken to control the animal.”

Neher was accompanied by Reid, an “assistance animal” as defined under OAR 839-006-0345(1), when she tried to access the goods and services offered by Sunlan as a customer and/or patron on April 20, 2019. ORS 659A.142(4) There is no evidence showing that Reid was not wearing a harness or was otherwise not under Neher’s control while they were in the business. Further, there is no evidence showing Reid was not housebroken. ORS 659A.143(6)(a) and OAR 839-006-0345(7) and (8)(b)

There is no dispute that a Sunlan employee ordered Neher out of the store on April 20, 2019, simply because she was accompanied by Reid, a service animal. Therefore, the forum concludes that Sunlan denied Neher “the right to be accompanied by an assistance animal or assistance animal trainee in any area of the place that is open to the public” in violation of ORS 659A.143(6)(a) OAR 839-006-0345(8)(a).

The Agency further alleges that Sunlan unlawfully discriminated against Neher by failing to make reasonable modifications as necessary to allow Neher “the opportunity to obtain goods, services, and/or the use of the advantages, facilities, and privileges of a place of public accommodation” in violation of ORS 659A.143(7) and OAR 839-006-0345(9). “[A]llowing the presence of the assistance animal is a reasonable modification.” *Id.*

K. Newell testified in detail as to the modifications made at Sunlan to allow her to safely remain in the store, including air purifiers at each employee’s desk and an air purifier in the store’s HVAC system, should an animal enter the store. K. Newell outlined various measures store employees have taken when customers have attempted to enter the store while accompanied by an animal, including asking the customer to wait outside while an employee assisted the customer in purchasing the items sought and having the dog wait outside or in a breezeway connected to the store while the customer shopped in the store without the animal. K. Newell also described one occasion when a Sunlan employee helped a customer accompanied by an assistance animal in gathering the items the customer wished to purchase while the customer and the assistance animal remained outside of the store.

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While Sunlan has made efforts in the past to accommodate customers accompanied by assistance animals in the past, it is clear that it did not do so in this particular case. While sympathetic to Plumb's circumstances, as well as K. Newell's, it is clear that, rather than attempting to make a modification when Neher and Reid were observed in the store, Plumb, as a Sunlan employee, immediately ordered Neher to leave the store. K. Newell offered to leave the store and to allow Neher to remain, but only when Neher began leaving the store after having been repeatedly ordered to do so by Plumb, thereby rendering K. Newell's gesture futile. It is therefore determined that Sunlan failed to make reasonable modifications as necessary to allow Neher "the opportunity to obtain goods, services, and/or the use of the advantages, facilities, and privileges of a place of public accommodation" in violation of ORS 659A.143(7) and OAR 839-006-0345(9).

a. Allergies to Animal Dander are not a Proper Reason for Excluding a Customer or Patron Accompanied by an Assistance Animal

Sunlan argued that Reid's presence posed a direct threat of harm to K. Newell. K. Newell testified in great detail as to the detrimental effects she experiences after exposure to dog dander, including swelling of her eyes and throat, which affects her vision and ability to be heard when speaking. K. Newell has no doubt that such effects are directly caused by the exposure to dog dander.

OAR 839-006-0335 provides:

"(1) Notwithstanding other provisions of these rules, places of public accommodation may refuse to permit an individual with a disability to participate in or benefit from the goods, services, facilities, privileges, advantages and accommodations of the public accommodation if the individual with a disability poses a direct threat to the health or safety of others. Direct threat means significant risk of substantial harm that cannot be eliminated or reduced below the level of significant risk of substantial harm by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

"(2) In determining whether an individual with a disability poses a direct threat to the health or safety of others, places of public accommodation must make an individualized assessment, based on reasonable judgment that relies on the most current medical knowledge, or on the best available objective evidence, to ascertain:

- "(a) The duration of risk;
- "(b) The nature and severity of potential harm;
- "(c) The likelihood that potential harm will occur;
- "(d) The imminence of potential harm; and

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“(e) Whether reasonable modifications of policies, practices or procedures will mitigate the risk.”

A respondent asserting a “direct threat” as a basis for excluding an individual bears a heavy burden of demonstrating that the individual poses a significant risk to the health and safety of others. *Lockett v. Catalina Channel Express*, 496 F3d 1061, 1066 (9th Cir 2007). In *Lockett*, the defendants operated a public ferry boat service. The defendant had a policy that prohibited all animals from a small, semi-private lounge area called the Commodore Lounge, which offered more comfortable seats and complimentary beverages, upon the request of a frequent passenger who required an area free of animal dander due to allergies. Defendant refused to sell a ticket to the lounge area to the plaintiff because she was accompanied by an assistance animal. Defendant changed its policy two weeks later to allow access to the lounge.

The court in *Lockett* noted that defendant’s policy was adopted in response to a frequent passenger’s allergies. *Id.* at 1065. “Accordingly, [defendant’s] employees had to decide on the spot whether to potentially expose passengers in the Commodore Lounge to dander or to ask [the plaintiff] to ride in the general passenger area.” *Id.* The court held that the defendant made a reasonable decision based upon the objective evidence before them that it would pose a direct threat to the safety of others to allow the plaintiff to enter the Commodore Lounge with her assistance animal. The court noted that the “single decision” to exclude an individual accompanied by an assistance animal from the lounge area was not a violation of the ADA. *Id.* at 1067. However, the court cautioned that an ongoing policy of exclusion may well violate the ADA even when a one-time exclusion does not.⁴ *Id.* at 1066.

It has been the practice of Sunlan to treat those individuals who benefit from the services of an assistance animal differently than those individuals who do not. Those individuals are made to wait outside or to separate themselves from their assistance animal in order to access the goods and services that Sunlan makes available to the general public. The forum has no doubt that such actions are taken out of a real and sincere concern about the health and welfare of K. Newell. However, the forum does not believe that K. Newell and her employees acted with any ill intent. Rather, the evidence suggests that the events of April 20, 2019, were a perfect storm of circumstances that resulted in a circumstance not wanted or sought by anyone involved. However, that result included the exclusion of Neher, an individual with a disability, solely because of her disability.

In determining whether Neher and her assistance animal posed a direct threat to the health and safety of others, namely K. Newell, an individualized assessment was required pursuant to OAR 839-006-0335. There is no evidence that an individualized assessment was performed before Plumb ordered Neher to leave the store. Plumb and

⁴ ORS 659A.139(1) provides that ORS 659A.103 to 659A.144 “shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended by the federal ADA Amendments Act of 2008 and as otherwise amended.

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other Sunlan employees clearly know that K. Newell will experience significant issues if exposed to animal dander, particularly dog dander. However, the evidence in this case shows a pattern and practice of Sunlan employees treating individuals with disabilities differently by subjecting them to different treatment than other individuals not similarly situated which is not consistent with the stated policy of the laws at issue in this case. This is contrary to the prohibition against any place of public accommodation or any person acting on behalf of such a place making any distinction, discrimination or restriction because a customer or patron is an individual with a disability.⁵ ORS 659A.142(4)

ORS 659A.103, the Oregon Legislature's statement of policy with regard to individuals with a disability and access to places of public accommodation provides, in pertinent part:

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

"(2) The guarantees expressed in subsection (1) of this section are hereby declared to be the policy of the State of Oregon to protect, and ORS 659A.103 to 659A.145 shall be construed to effectuate such policy."

This policy statement clearly establishes that the State of Oregon considers access by individuals with a disability to places of public accommodation to be a fundamental human right. *Kara Johnson*, 34 BOLI at 39. The forum concludes that Respondent's denial of that right was an affront to Neher's fundamental human dignity, which Neher experienced when she was ordered to leave Sunlan on April 20, 2019, strictly for the reason she was accompanied by her assistance animal. Respondent Sunlan has not shown that Neher represented a direct threat or her presence while accompanied by an assistance animal fundamentally or that it properly conducted an individualized assessment to determine whether an accommodation was possible to allow Neher the opportunity to access the goods and services offered by Sunlan before she was ordered to leave the store.

It is therefore determined that Respondent Sunlan violated ORS 659A.142(4) by denying Neher, a person with a disability, the right to be accompanied by an assistance animal in a place of public accommodation in violation of ORS 659A.143(6)(a) and OAR 839-006-0345(8)(a) and by failing to make reasonable accommodations as necessary to allow Neher and her assistance animal to obtain goods, services, and/or the use of the advantages, facilities, and privileges of a place of public accommodation in violation

⁵ "Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals," U.S. Dept. of Justice, Civil Rights Div., Service Animals (July 12, 2011)(last updated February 24, 2020), https://www.ada.gov/service_animals_2010.htm.

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of ORS 659A.143(7) and OAR 839-006-0345(9). ORS 659A.142(4); ORS 659A.400(1); ORS 659A.805(1)(a); ORS 659A.139(1).

4. *Neher was Harmed as a Result of the Conduct of Respondent Sunlan and is Entitled to Physical, Mental and Emotional Distress Damages*

Neher was distressed and anxious following the incident on April 20, 2019.. The Agency established that Neher experienced the physical, mental and emotional distress as a result of Respondent's unlawful discrimination. The Formal Charges and Amended Formal Charges seek damages for "physical, mental and emotional distress in an amount to be proven at hearing, estimated to be at least \$8,000.00."

In determining an award for emotional and mental suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the Complainant. The actual amount depends on the facts presented by each complainant. A complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 100, 152 (2012). Additionally, this forum has long held that Respondents must take Complainants "as they find them."⁶

Given the confrontational nature of the events leading to Neher's ouster from Sunlan, as well as the distress Neher experienced thereafter, the forum concludes that \$8,000 is an appropriate award to compensate Neher for her physical, emotional, and mental suffering.

EXCEPTIONS TO PROPOSED ORDER

AGENCY'S EXCEPTIONS

The Agency filed 12 exceptions to the Proposed Final Order. Exceptions 1, 2, 4, and 5 seek corrections to statutory citations. Those exceptions are well taken and GRANTED as reflected above. The Agency's Exceptions 6-9 seek corrections to scrivener's errors. The Agency's Exceptions 6-9 are GRANTED, as reflected above.

Agency's Exception 3 requests the forum remove language pertaining to whether Reid was wearing a vest or anything identifying him as a service animal. Given that such identification is not required under the law, the Agency's Exception 3 is GRANTED. Findings of Fact – the Merits, # 10 is modified as reflected above.

Agency's Exception 10 argues that language referring to a "single incident" should be removed as neither ORS 659A.142(4) or ORS 659A.103(1) includes any

⁶ See, e.g., *In the Matter of Charles Edward Minor*, 31 BOLI 88, 104 (2010) (with regard to the particular sensitivity of a complainant who was sexually harassed by respondent).

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reference to an exception for a “single incident.” The Agency’s Exception 10 is GRANTED, and the Final Order has been modified as reflected above.

Agency’s Exceptions 11 and 12 seek the inclusion of a timeframe in which the Respondent is required to complete the ordered training and to develop the applicable policy. The Agency’s Exceptions 11 and 12 are well taken. The Order is modified to require the ordered training to be completed within 150 days of the date of issuance of the Final Order. Similarly, the Order is modified to require the applicable policy to be implemented within 180 days of the date of issuance of the Final Order.

RESPONDENT’S EXCEPTIONS

The Respondent filed three exceptions. The issues in Respondent’s Exception 1 were addressed by the removal of the language in Findings of Fact – the Merits #10 as requested by the Agency in its Exception 3. Similarly, the removal of that language resolves the issue raised in Respondent’s Exception 2. Respondent’s Exception 3 is addressed by the corrections requested in Agency’s Exceptions 6 through 8. Therefore, each of the Respondent’s Exceptions are hereby GRANTED.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of violations of ORS 659A.142(4) by **Respondent Sunlan Lighting, Inc.**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Sunlan Lighting, Inc.** 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 **Molly Neher** in the amount of:

- 1) EIGHT THOUSAND DOLLARS (\$8,000), representing compensatory damages for emotional, mental, and physical suffering experienced by Molly Neher as a result of Respondent’s unlawful practices found herein,
plus,
- 2) Interest at the legal rate on the sum of \$8,000 from the date of issuance of the Final Order until Respondent complies with the requirements of the Order herein.

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

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- 1) At Respondent's expense, undergo training, along with her employees, on the correct interpretation and application of Oregon laws pertaining to disability and service animals in places of public accommodation, with the training to be conducted by the Technical Assistance Unit of the Bureau of Labor and Industries or another trainer agreeable to the Agency. Such training shall be completed within 150 days from the issuance of the Final Order.
- 2) Create and implement a public accommodation policy that accurately reflects Oregon law, to be approved by the Bureau of Labor and Industries, Civil Rights Division, within 180 days from the issuance of the Final Order
- 3) Cease and desist from violating laws pertaining to unlawful discrimination against persons with disabilities in the scope of the operation of Sunlan Lighting.

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In the Matter of

**Southwest Airlines Co.,
Case Nos. 102-18, 11-19**

**Final Order of Commissioner Val Hoyle
Issued July 12, 2022
(Withdrawn)**

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In the Matter of

**Moho Enterprises LLC dba
St. Johns Grocery Outlet,
Respondent, Case No. 32-21**

**Final Order of Commissioner Val Hoyle
Issued September 26, 2022**

SYNOPSIS

The forum concluded that Respondent Moho Enterprises LLC (“Moho”) made a distinction, discrimination or restriction in a place of public accommodation based on Complainant’s race in violation of ORS 659A.403(1) and (3). The forum awarded Complainant \$20,000 in damages for mental and emotional suffering.

The above-entitled case was assigned to Caroline A. Holien, designated as Administrative Law Judge (“ALJ”) by, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 25, 2022, via video conference.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by administrative prosecutor, Rachel Diamond-Cuneo, an employee of the Agency. Respondent Moho Enterprises, LLC (“Moho”), was represented by Chris Morgan, Attorney at Law. Owner Robert Mode (“Mode”) was present throughout the hearing.

The Agency called Complainant AiKeda Boyd (“Boyd”), Britney Boggs (“Boggs”), Senior Civil Rights Investigator, and Shirley Baker (“Baker”), store patron, as witnesses. Charles Warren, the Agency’s witness, was not available when contacted to testify. Moho called Mode as its only witness.

The forum received into evidence: (a) Administrative exhibits X1 through X11; (b) Agency exhibits A1 through A12; and (c) Moho exhibits R1 through R10.

Having fully considered the entire record in this matter, I, Val Hoyle, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order.¹

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

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FINDINGS OF FACT – PROCEDURAL

1) On November 6, 2019, Boyd filed a complaint with the Agency's Civil Rights Division alleging Moho unlawfully made a distinction, discrimination or restriction in a place of public accommodation based on her race. (Ex. A1)

2) On June 30, 2021, the Agency issued a Notice of Substantial Evidence Determination in which the Agency found substantial evidence of an unlawful practice based on race in that Moho made a distinction, discrimination, or restriction based on Boyd's race. (Ex. A12)

3) On April 9, 2021, a timely Request for Hearing was filed. (Ex. X1)

4) On April 13, 2021, the forum issued a Notice of Hearing to Respondent, the Agency and the Complainant stating the time and place for hearing as August 17, 2021, beginning at 9:30 a.m., at the Offices of the Bureau of Labor & Industries, W.W. Gregg Hearings Room (10th Floor), 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232. 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)

5) The Formal Charges alleged Moho denied Boyd full and equal accommodations, advantages, facilities, and privileges based on her race in violation of ORS 659A.403(1) and (3). The Formal Charges sought "[d]amages for physical, mental and emotional distress in an amount estimated to be at least \$60,000, to be determined at hearing." (Ex. X2b)

6) On May 3, 2021, Moho, by and through its attorney, filed Respondent's Answer to Notice of Hearing and Formal Charges in which it denied the allegation set forth in the Formal Charges and identified its affirmative defenses. (Ex. X3)

7) On May 5, 2021, the forum issued an Interim Order Re Temporary Procedures and Requiring Case Summaries setting August 3, 2021, as the deadline for filing Case Summaries. The interim order also noted that the parties had "indicated by email that they consent[ed] to accept filings by email." (Ex. X4)

8) On July 27, 2021, the forum issued an Interim Order Re New Hearing Date and Case Deadlines setting October 12, 2021, as the deadline for filing Case Summaries and setting the hearing to begin October 26, 2021. (Ex. X5)

9) On September 30, 2021, the forum issued an Interim Order Setting Video Hearing that included the instructions for attending the hearing via Zoom. (Ex. X6)

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10) On October 12, 2021, the parties filed their respective Case Summaries. (Exs. X7, X8)

11) On October 19, 2021, the Agency filed its Unopposed Motion for Postponement of Hearing due to the unavailability of Boyd. The Agency's motion was granted in the forum's Interim Order Postponing Hearing issued on October 19, 2021. (Exs. X9, X10)

12) On October 26, 2021, the forum issued an Interim Order Re New Hearing Date setting the matter for hearing on January 25, 2022. (Ex. X11)

13) At the start of hearing, pursuant to ORS 183.417(5), 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)

14) On March 24, 2022, 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.

15) On March 24, 2022, the forum issued an Interim Order Re Motion for Extension of Time to File Exceptions to Proposed Order granting the Agency's unopposed motion to extend the deadline for filing exceptions to April 18, 2022.

16) The parties timely filed their exceptions on April 18, 2022. The parties' exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Moho was a domestic limited liability company that owned and operated St. Johns Grocery Outlet ("SJGO") located in Portland, Oregon. (Ex. A2)

2) SJGO "specializes in the purchase and resale of surplus and discontinued product * * * that is guaranteed to be fresh and wholesome by the owners and quality standards are the same as those found in other grocery stores." A large percentage of its customers are on a fixed income and food stamps. (Ex. R2)

3) Boyd was a frequent SJGO customer based, in part, on her transportation needs. Boyd took the bus to SJGO, which required a walk of approximately 30 minutes to get to the bus stop. Boyd often used her hoverboard to shorten the trip if the weather was nice. Boyd rode her hoverboard to SJGO four or five times prior to June 18, 2019. (Testimony of Boyd)

4) A hoverboard allows the rider to stand on the hoverboard as it levitates and propels forward. It is a handsfree vehicle used for personal transportation that is

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quite heavy to carry. A hoverboard without a rider can propel itself forward causing a risk of harm to others in the area. (Testimony of Boyd)

5) The store has nothing posted advising customers that the use of hoverboards, skateboards or similar items is prohibited. (Testimony of Baker)

Boyd's Interaction with SJGO's Employees

6) On or about June 18, 2019, Boyd went to SJGO riding on her hoverboard. Before entering the store, Boyd spent several minutes on her hoverboard outside of the front door looking at gardening supplies. Boyd entered the store while still on her hoverboard and remained on her hoverboard while inside of the store. (Testimony of Boyd)

7) Boyd intended to purchase both dog and cat food, which is kept by the front checkouts near the exit. Boyd grabbed the dog and cat food and put the food on her shoulder before moving to another aisle to look at something. As Boyd turned around to head to the checkouts, Supervisor Courtney Madoche ("Madoche") approached her and directed her to get off the hoverboard or leave the store. (Testimony of Boyd; Ex. R2, p. 8 (Affidavit of Madoche))

8) Boyd resisted getting off the hoverboard out of concern that it could potentially move forward rapidly once she stepped off thereby endangering the safety of herself and others. (Testimony of Boyd)

9) Boyd continued moving toward a checkout lane after being confronted by Madoche. Boyd was intending to lay her items down on the checkout lane when Madoche told her again to get off her hoverboard or leave the store. Madoche repeated her directive a third time after Boyd put her items down at the checkout. (Testimony of Boyd; Ex. R2, p. 8 (Affidavit of Madoche))

10) Boyd was struggling to maintain her balance on the hoverboard when Manager Michelle Robbins ("Robbins") approached and asked Supervisor Jennifer Runyan ("Runyan") to open a checkout lane to wait on Boyd. Robbins told Boyd that riding a hoverboard inside the store was not allowed due to the potential liability for the store if someone got hurt. The situation escalated to the point that Robbins directed Runyan to close the checkout lane and told Boyd that she was "86'd," or banned from the store. (Testimony of Boyd; Ex. R2, p. 8 (Affidavit of Madoche))

11) Boyd felt threatened and was embarrassed by the employees' conduct toward her in front of other customers. Madoche spoke loudly enough for others in the area to hear her telling Boyd to get off the hoverboard or leave the store. Boyd also felt threatened and embarrassed by having three employees surround her at the store. (Testimony of Boyd)

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12) Boyd asked to call the police, and was told that she was on private property and the store would not call the police. Boyd then attempted to record the confrontation on her phone before saying, “Fuck it. I won’t spend my money here,” and leaving the store. (Testimony of Boyd)

13) Boyd walked out of the store carrying her hoverboard. Boyd walked to a sidewalk near the store’s entrance where she stopped to look at the bus schedule on her phone. Madoche stood at the door of the store while Robbins approached Boyd outside of the store and told her to leave the area. Robbins repeatedly told Boyd to “get out of here” and told her “to do better with her life.” (Testimony of Boyd)

14) Boyd told Robbins that she should not be discriminating against her. Robbins responded by telling Boyd that she could not be racist because her husband is Black. Boyd responded by asking Robbins, “Did you know slave owners had sex with their slaves?” Boyd told Robbins the slave owners were still racists. (Testimony of Boyd)

15) Boyd used expletives both inside the store and outside of the store due to her frustration with the situation. Boyd’s voice was loud enough for others to hear what she was saying. (Testimony of Baker)

16) Boyd ultimately left the area in front of the store and went to the bus stop that was located behind the store. Boyd was devastated and frustrated at the events that had occurred. Boyd was particularly upset given that she was a frequent customer at the store, which was easier for her to access than other stores in the area because it was close to a bus route. Boyd was also upset because she felt she was being unfairly punished for something that she did not do. (Testimony of Boyd)

17) Baker has been a longtime customer of SJGO and observed the confrontation between Boyd and the SJGO employees inside the store. Baker was with her husband, her daughter and her daughter’s friend when she observed two SJGO’s employees “flank” Boyd and tell her to get off the board. (Testimony of Baker)

18) Baker asked her husband to take her daughter, who is biracial, and her friend out of the store so they did not have to observe the situation which she felt was escalating quickly. (Testimony of Baker)

19) Baker found the employees’ behavior to be “kind of aggressive” and thought their “response was weird” since nothing offensive appeared to be happening. Baker found Boyd’s behavior normal and casual and observed she was “slowly rolling to the checkouts” when she was flanked by the store employees. (Testimony of Baker)

20) Baker observed that Boyd was made to leave the store without completing her purchase. Baker never heard Boyd refuse to get off of the hoverboard. (Testimony of Baker)

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21) Baker asked the cashier who was checking her out why the employees were not helping Boyd after Boyd told the employees that she could not get off the board with her hands full. Baker thought the employees were “badgering her” as they forced Boyd to leave the store. Baker observed Boyd became more frustrated as the situation continued to escalate, which Baker thought was as a result of the unnecessarily aggressive behavior of the store employees. (Testimony of Baker)

22) As Baker left the store, she observed the employees had “kept at [Boyd]” while she was outside of the store. Baker wondered why the employees kept aggravating the situation and felt they were treating Boyd unfairly. Baker moved between Boyd and the employees and gave Boyd her telephone number and told her to call her if she needed to. (Testimony of Baker)

23) Baker called Mode that day or the next. Mode told Baker that he had reviewed the situation and the employees had handled the situation according to policy. Baker asked if he had viewed the video, because the employees were antagonistic and failed to help Boyd. (Testimony of Baker)

24) Baker, who is white, has a 15-year-old son who had entered SJGO on rollerblades in the past without comment by the employees. Baker’s son is also white. Baker’s son had knocked over merchandise while on his rollerblades without the employees reacting in the manner they did with Boyd. (Testimony of Baker)

25) The SJGO employees reported the situation to Mode, who believed they had handled the situation appropriately. Mode understood the situation escalated as a result of Boyd refusing to get off the hoverboard and calling the employees “racist bitches” and later making the slave owner comment. (Testimony of Mode)

26) SJGO’s employees are trained not to engage with disruptive customers. SJGO frequently has customers that are inebriated or under the influence of drugs come into the store and cause a disturbance. Employees are free to “86” a customer if they believe the customer has acted in an offensive or disruptive manner. (Testimony of Mode)

27) Boyd called Mode a day or two after the incident. Boyd denied calling the employees “racist bitches” or using expletives during the exchange. Mode ended the conversation after Boyd threatened a lawsuit and indicated he would be calling his lawyer. (Testimony of Mode)

28) SJGO has security video that is kept on a “rolling loop.” As a result, the video of the confrontation between Boyd and the three store employees was not preserved. Even if the video had been preserved, the video has no audio. (Testimony of Mode)

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Credibility of Witnesses

29) The testimony of Boggs is considered credible in its entirety. (Testimony of Boggs)

30) Respondent attempted to impeach Boyd's testimony by introducing evidence of criminal convictions for crimes involving a false statement or dishonesty as allowed for under ORS 40.355 (OEC 609). No documentary evidence was offered in support of its effort, and Respondent relied entirely upon Boyd's admission of the convictions. Boyd testified as to the circumstances surrounding the convictions and indicated that the convictions had been expunged from her record and/or were more than 15 years old. Given that no evidence was offered to disprove Boyd's testimony that the convictions were expunged and/or were older than 15 years, Respondent failed to impeach the credibility of Boyd's testimony. (ORS 40.355 (OEC 609(3) and (4)); Testimony of Boyd)

31) Boyd and Baker were the only witnesses who had firsthand knowledge of the events that occurred at SJGO on or about June 18, 2019. Boyd and Baker have no personal relationship and were unknown to one another at the time of the incident. (Testimony of Boyd and Baker)

32) Baker's testimony was clear and direct. Baker showed no animus toward the Respondent during her testimony, and no evidence was offered showing why the forum should not rely upon her testimony. Baker's testimony is considered credible in its entirety. (Testimony of Baker)

33) Boyd's testimony was often meandering and appeared exaggerated at times. However, Boyd's testimony regarding the events leading to her being banned from SJGO was consistent with Baker's testimony. Therefore, Boyd's testimony is considered credible to the extent it is consistent with the substantial and credible evidence on the record. (Testimony of Boyd and Baker)

34) Mode's testimony regarding the events that occurred on or about June 18, 2019, was based almost entirely upon information provided to him by individuals who did not testify at hearing. (Ex. R2)

35) Mode's testimony regarding store procedures and what steps he took after receiving notice of the incident is considered credible to the extent it is consistent with the substantial and credible evidence on the record. (Testimony of Mode)

36) As to the events that occurred on or about June 18, 2019, the testimony of Boyd and Baker is considered more credible than Mode's testimony for the reasons described above. (Testimony of Boyd, Baker and Mode)

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CONCLUSIONS OF LAW

- 1) At all times material herein, Respondent Moho owned and operated SJGO, a grocery outlet in Portland, Oregon.
- 2) At all times material herein, SJGO was a “place of public accommodation” as defined in ORS 659A.400(1)
- 3) Boyd is a Black woman who resides in Portland, Oregon.
- 4) Moho denied the full and equal accommodations, advantages, facilities and privileges of SJGO to Boyd based on her race, thereby violating ORS 659A.403(1) and (3).
- 5) Boyd suffered emotional and mental suffering as a result of Moho’s violation of ORS 659A.403(1) and (3).
- 6) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.
- 7) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded to Complainant and order to cease and desist violating ORS 659A.403 is an appropriate exercise of that authority.

OPINION

The Agency alleges in its Formal Charges that Moho violated ORS 659A.403(1) and (3) by denying Boyd “full and equal accommodations, advantages, facilities and privileges” in a place of public accommodation on the basis of race. The Agency seeks damages “for physical, mental and emotional distress in an amount estimated to be at least \$60,000, to be proven at hearing.” (Ex. X2b). Moho denies the allegations and contends its employees applied Moho’s policies without consideration of Boyd’s race.

To prevail in this matter, the Agency must prove the following by a preponderance of the evidence: (1) Respondent is a place of public accommodation as defined in ORS 659A.400; (2) Complainant is a member of a protected class; (3) Respondent made a distinction, discrimination or restriction against Complainant because she is a member of a protected class; and (4) Complainant was harmed by Respondent’s conduct. *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 30 (2014).

The parties stipulated that SJGO is a “place of public accommodation” as defined under ORS 659A.400(1). The only remaining issue is whether Moho denied Boyd full

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and equal accommodations, advantages, facilities, and privileges in a place of public accommodation on account of her race.

Boyd and Baker were the only witnesses who had firsthand information regarding the events that occurred at SJGO on or about June 18, 2019. Moho offered written statements from the employees involved in the situation. (Ex. R2) However, those individuals were not subject to cross examination, and the forum was denied the opportunity to assess the credibility of each individual. As such, the sworn testimony of Boyd and Baker carries greater evidentiary weight than the written statements submitted by Moho.

There is no dispute that Boyd rode her hoverboard while inside the store and remained on the hoverboard despite being told to get off or to leave the store by SJGO employees. (Findings of Fact ## 5, 6, and 11) Boyd remained on the hoverboard out of concern for the safety of others given the potential of the hoverboard propelling forward without her being to control it. (Findings of Fact # 7) Boyd's frustration with the situation was apparent as the SJGO employees flanked her and eventually forced her out of the store without her being allowed to complete her purchase. Boyd used expletives during the confrontation, but her behavior was as a result of the antagonistic behavior of at least one of the SJGO employees. (Finding of Fact # 20)

The forum acknowledges that Moho has a right to enforce its policies, particularly those that pertain to the health and safety of its employees and customers. The forum further acknowledges that the initial contact by Madoche was most likely limited to communicating the store's policy to Boyd. However, Baker's description of the antagonistic nature of the confrontation between the SJGO employees and Boyd suggests an animus that goes beyond that which was described in Mode's testimony and the affidavits of those employees involved in the confrontation. (Findings of Fact # # 20 and 21)

The forum finds it particularly troubling that at least one employee chose to follow Boyd out of the store and into the parking lot, where she no longer posed a risk of disturbing customers inside the store, and felt it necessary to inform Boyd that she needed to go and she needed to do better with her life. (Finding of Fact # 12) Given Baker's testimony that she, as a white woman, did not experience anything approaching that level of aggression when her own son, who is also white, entered the store on roller blades and knocked over merchandise shows that Boyd was treated differently than an individual who was not in her protected class. Further, the confrontation was concerning enough to Baker that she continued to monitor the situation even after Boyd left the store. The Agency has showed by a preponderance of the evidence that Moho denied Boyd "full and equal accommodations, advantages, facilities and privileges * * * on account of race" in violation of ORS 659A.403(1) and (3).

DAMAGES

The Agency seeks damages on behalf of Boyd in the amount of at least \$60,000

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for emotional, mental and physical 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 Oregon Truck Painting, LLC*, 37 BOLI 87, 114-15 (2018). The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful practices. *Id.*

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*, 34 BOLI at 37. A complainant’s testimony, if believed, is sufficient to support a claim for mental suffering damages². *In the Matter of Oregon Truck Painting*, 37 BOLI at 114-15.

A review of past emotional distress damage awards is instructive when determining an appropriate emotional distress damages award. The forum has made the following emotional distress damages awards in past public accommodation discrimination cases.

The forum determined that \$60,000 was an appropriate award for the complainant’s physical, emotional, and mental suffering that resulted from the complainant being denied access to a convenience store because she was accompanied by a service dog. *In the Matter of Kara Johnson*, 34 BOLI at 37. Thereafter, “Respondent, or someone driving Respondent’s vehicle, followed” Complainant home to her apartment complex and complainant “received an eviction notice” because “Respondent, or someone working in conjunction with Respondent, drove to her apartment complex and took photographs of her neighbor’s car and Complainant’s apartment).” *Id.* These incidents caused the complainant to feel invaded upon and unsafe in her home.

In another public accommodation discrimination case, the forum examined the damages that should be awarded to a bar patron with Parkinson’s disease who was accused of being drunk because of the way he walked and was told to leave the respondent’s club on two occasions. *In the Matter of C. C. Slaughter’s, Ltd.*, 26 BOLI 186, 196-97 (2005). The respondent’s refusal to let complainant remain in its club made complainant very apprehensive about shopping in new places, and particularly about visiting new bars, in that he was afraid he would be stopped again and accused of being drunk because of his disability. *Id.* In that matter, the commissioner awarded the complainant \$25,000 in damages for emotional distress. *Id.*

Another public accommodation discrimination case involved a respondent who denied access to a bar to 11 members of a social group for transgendered persons based on the sexual orientation of the group’s members *See In the Matter of Blachana*,

² Respondent argues the Agency sought \$60,000 in damages rather than \$15,000 as it had represented during the course of its discussions with Respondent’s counsel. Given the forum was not privy to those conversations, and the Agency sought \$60,000 in damages for mental and emotional suffering in the Formal Charges, the forum finds it sufficient to look to Complainant’s testimony to determine the appropriate amount of damages.

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LLC, 32 BOLI at 220. The forum awarded damages to each of the 11 complainants in varying amounts ranging from \$20,000 to \$50,000 based on the evidence in the record of the emotional harm each complainant suffered as a result of the denial of access. *Id.* at 249-53. For example, one complainant was awarded \$20,000 when she had feelings lasting for about a month that included “some upset and disappointment,” and feeling “unwelcome” and “mildly dismayed and discouraged.” *Id.* at 251. By contrast, the forum awarded \$50,000 to a complainant who had emotional distress lasting for around three months. *Id.* at 251.

The forum also notes that following the issuance of the Proposed Order in this matter, the Oregon Court of Appeals issued its decision in *Klein v. Oregon Bureau of Labor and Industries*, 317 Or App, 138, 140-41, 506 P3d 1108 (2022) (*Klein III*), *rev. denied* 369 Or 705, 509 P.3d 119 (2022), and the Commissioner issued an Amended Final Order in *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, amended final order on remand*, 38 BOLI _ (2022) (awarding two complainants \$20,000 and \$10,000, respectively, when respondents refused to make their wedding cake because of their sexual orientation)(*Klein Amended Final Order*).

Boyd felt hurt and offended that she was treated as though she was a stereotype by the store employees. Boyd was traumatized by the incident and continues to feel hurt and frustrated as a result of the incident. (Findings of Fact ## 10, 14, and 15) Boyd can no longer shop at the store closest to her home and is frequently reminded of the incident, which causes her anger and upset. (Findings of Fact ## 10, 14, and 15) The altercation has had a lasting impact on Boyd and has affected her daily life in that she is no longer able to shop at a store that is close to a bus route. *Id.* Accordingly, based on the record in this case, the forum finds that \$20,000 is an appropriate award of emotional distress damages.

OTHER REQUESTED RELIEF

In its Formal Charges, the Agency asked that Respondents and Respondents’ managers and supervisors be trained, at Respondents’ expense, “on discrimination in places of public accommodation” by “the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to and approved by the Agency.” (Ex. X2b)

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

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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.

EXCEPTIONS TO THE PROPOSED ORDER

The Agency filed 19 exceptions that sought corrections to scrivener’s errors. The Agency’s exceptions are well taken and GRANTED as reflected above. The Respondent filed six exceptions, each of which are addressed below.

Respondent’s Exceptions

Respondent’s Exception 1

Respondent argues in its first exception that the ALJ erred in her statement of the applicable legal standard in a claim involving discrimination in the provision of a public accommodation. While the legal standard set forth in the Proposed Order referred to discrimination on the basis of disability, the legal standard itself is correct. The legal standard has been modified in this order to refer to “protected class.” Therefore, the Respondent’s exception is DENIED.

Respondent’s Exception 2

Respondent argues in its second exception that the forum improperly considered Baker’s testimony regarding her son as a comparator when considering Boyd’s testimony. Respondent argues that there was no evidence showing that anyone in the store observed Baker’s son or that the employees involved in the situation with Boyd were involved in Baker’s son’s situation. Respondent argues that Baker’s testimony is not sufficient evidence to show Boyd was treated differently because of her race.

Contrary to Respondent’s argument, Baker offered sufficient evidence in her sworn testimony showing that her son, who is not African American, was in the store on his rollerblades and knocked over a store display without any comment by store personnel. In contrast, Boyd, who, by all accounts, was not disruptive before being approached by store personnel or riding her hoverboard in a manner that caused damage to store property, was subject to a lengthy confrontation by store personnel that continued into the parking lot after she was ordered to leave the store. While the two events may not have occurred on the same day, the measure of the reaction to the two events raises an inference that the response to Boyd was motivated by her race. The

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Agency rightly notes that the forum has long held that evidence includes inferences. *In the Matter of Income Property Management*, 31 BOLI 18, 39 (2010)(evidence includes inferences and it is up to the form to decide which inference to draw). Therefore, Respondent's Exception 2 is hereby DENIED.

Respondent's Exceptions 3a-3f

In Exceptions 3a and 3b, Respondent argues that the forum failed to properly weigh Boyd's credibility and improperly excused her behavior at the store. Respondent argues that there were inconsistencies in Boyd's version of events, including the initial August 20, 2019, CRD Questionnaire; her October 14, 2019, intake interview; her interviews on January 8, 2020, and May 18, 2020, and her testimony at hearing. Respondent offers, as an example, Boyd's initial denial that she used profanity or accused the store employees of being racist.

Boyd's testimony was credited to the extent that it was consistent with the substantial and credible evidence of record. The forum found Baker's testimony particularly credible given that she had no apparent interest in the outcome of the proceeding and found the situation concerning enough that she took note of it at the time she was in the store and testified as to the events she observed under oath. While the forum concedes that Boyd's testimony was inconsistent and exaggerated at times, her testimony was sufficiently consistent with the testimony offered by Baker to be deemed credible. However, Boyd's testimony, when inconsistent with Baker's was not given great evidentiary weight.

The evidence of record does not show that Boyd came into the store using expletives or acting in an obnoxious or offensive manner. Rather, the evidence shows that Boyd's behavior changed once she was flanked by store personnel in a store aisle and followed to the front of the store as the matter continued escalating. The evidence further shows that Boyd's use of expletives continued as she was followed out of the store and into the parking lot with a store employee continuing to make comments to Boyd that hurt and offended her. While Boyd could have taken a different approach, the evidence shows that her behavior was in response to the behavior of store personnel. Therefore, Respondent's Exceptions 3a and 3b are DENIED.

Respondent argues in its Exceptions 3c that the forum failed to properly credit witness statements submitted by Respondent. OAR 839-050-0260(9) provides:

"Any declaration, affidavit, certificate, or document included with a case summary or that a participant serves on the other participants at least ten days before hearing may be offered and received into evidence unless cross-examination is requested of the declarant, affiant, certificate preparer, or other document preparer or custodian no later than five days prior to hearing or, for good cause shown, by such other date as the Administrative Law Judge may set. A declaration, affidavit, or certificate may be offered and received with the same effect as oral testimony."

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The forum considered the statements submitted by Mode, Runyan, and Madoche. See Ex. R2, pp. 5-8. However, Mode's statement addressed events that were reported to him by store personnel and what occurred following Boyd's expulsion from the store. The statements of Runyan and Madoche addressed generally the sequence of events that led to Boyd being "trespassed" from the store. Neither statements was as specific as the testimony offered by Boyd and Baker, both of whom appeared personally and testified under oath at hearing. To the extent that the statements offered were consistent with the substantial and credible evidence of record, they were credited. However, as noted above, Baker's testimony was credited in its entirety. Therefore, to the extent the statements were inconsistent or lacking in specifics, they were given less evidentiary weight.

Respondent argues the forum failed to give proper consideration to the testimony of Mode and Respondent's interest in enforcing its policies in its Exceptions 3d and 3d. The forum acknowledges that Mode testified Moho's policies are applicable to each customer and multiple customers have been "trespassed" from the store for various reasons. The forum is not indifferent to Mode's testimony as to Respondent's policies or Respondent's interest in enforcing its policies. However, the forum is left with only the witness statements submitted by Respondent and the sworn testimony of Boyd and baker when considering what occurred on the day in question. Mode was not present and learned of the events after the fact. Therefore, Respondent's Exception 3d is DENIED.

In Respondent's Exception 3f, Respondent takes exception to the forum's finding that the investigator's testimony was credible. The investigator's testimony was unchallenged during cross-examination and there is no objective reason in the record for the forum to find part or all of the testimony of the witness unbelievable. Therefore, Respondent's Exception 3f is DENIED.

Respondent's Exception 4

Respondent argues the forum's conclusions as to why Boyd refused to get off the hoverboard are unreasonable and not supported by logic. Boyd testified she initially refused to get off the hoverboard because her hands were full and she was concerned that it would propel forward without her being able to control it. Boyd testified she was attempting to move to a location to put the things in her arms so she could safely get off the hoverboard. The forum has no reason to disbelieve Boyd's testimony as to why she delayed getting off the hoverboard. While store personnel may have had legitimate reasons for direct Boyd to get off the hoverboard, the evidence shows that it continued to escalate to the point that a store employee followed her out into the parking lot and told her to "do better with her life." The situation inside and outside of the store was sufficient to get Baker's attention, who testified the store employees "kept at" Boyd even after she had left the store. While the act of asking a customer to remove themselves from a hoverboard inside the store is not in and of itself a discriminatory act, the surrounding circumstances suggest that the interaction between Boyd and the store

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employees was motivated by discrimination and not by a commitment to enforcing Moho's policies. Therefore, Respondent's Exception 4 is DENIED.

Respondent's Exception 5

Respondent argues in its Exception 5 that the forum failed to consider the entire record. To the contrary, the forum reviewed and considered the entire record. Therefore, Respondent's Exception 5 is DENIED.

Respondent's Exception 6

Respondent argues in its Exception 6 that the damages awarded in the Proposed Order are inappropriate based upon issues arising prior to the case going to hearing and actions by Boyd that Respondent contend derailed attempts to informally settle the matter. Neither argument offered by Respondent is persuasive as to Boyd's entitlement to emotional distress damages based upon the unlawful practices addressed above.

The forum is, however, persuaded that the award of \$60,000 is inappropriate based upon the facts of this case and in light of the *Klein Amended Final Order*. The evidence shows Boyd was embarrassed upset as a result of the confrontation with SJGO staff and her being banned from the store. As a result of the banning, Boyd is not able to shop at her preferred store, which has caused her some frustration based, in part, on her transportation needs. While the Agency has sought and the forum previously awarded \$60,000 in emotional distress damages, the forum finds that the nature of Boyd's damages are similar to those experienced by the complainants in *Blachana* and *Sweetcakes by Melissa*. Therefore, the previous award of \$60,000 in emotional distress damages as set forth in the Proposed Order is hereby reduced to \$20,000. Respondent's Exception 6 is GRANTED.

ORDER

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.403 by Respondent Moho Enterprises LLC dba St. Johns Grocery Outlet, and as payment of damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Moho Enterprises LLC dba St. Johns Grocery Outlet** 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 AiKeda Boyd in the amount of:

- 1) TWENTY THOUSAND DOLLARS (\$20,000.00), representing damages for emotional and mental suffering AiKeda Boyd experienced as a result of Respondent's violation of ORS 659A.403; 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.

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B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to further eliminate the effect of the violations of ORS 659A.403, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Moho Enterprises LLC dba St. Johns Grocery Outlet** to cease and desist from denying the full and equal accommodations, advantages, facilities and privileges of SJGO to any person based on that person's race.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to further eliminate the effects of Respondent's unlawful discrimination found herein, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Moho Enterprises LLC dba St. Johns Grocery Outlet** to train its management personnel on discrimination in places of public accommodation, either through a training offered by the Bureau of Labor and Industries Technical Assistance for Employers Unit or another trainer agreeable to the Agency.

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**In the Matter of
Romantic River Gardens, LLC and
Sandra L. Hester, individually, Respondents,
Case Nos. 109-18, 110-18 (Consolidated)**

**Final Order of Commissioner Val Hoyle
Issued September 29, 2022**

SYNOPSIS

Respondents Romantic River Gardens, LLC and Sandra Hester refused to book a wedding for two Complainants based on their sexual orientation, in violation of ORS 659A.403(1), (3). However, the Agency did not sustain its burden to prove that Respondents also violated ORS 659A.409 by issuing a discriminatory “notice” or communication.” In addition, Sandra Hester did not violate ORS 659A.406 by aiding and abetting the commission of the discriminatory acts. The Commissioner awards each Complainant \$20,000 and \$10,000, respectively, in damages for emotional and mental suffering resulting from the denial of service.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge (“ALJ”) by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 11-12, 2019, at BOLI’s Eugene office, located at 1400 Executive Parkway, Eugene, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Chief Prosecutor Cristin Casey, an employee of the Agency. Complainants, William Romo (“Romo”) and Dane Zahner (“Zahner”), were present throughout the hearing. Respondents Romantic River Gardens, LLC (“RRG”) and Sandra L. Hester (“S. Hester”)¹ were represented throughout the proceeding by Attorney Micah Fargey. S. Hester and her husband, Charles Hester (“C. Hester”), were also present for the entire hearing.

The Agency called Senior Civil Rights Investigator Michael Mohr, Romo and Zahner as its witnesses.

RRG called S. Hester and C. Hester as witnesses (in person). RRG called the following individuals as telephone witnesses: Garrett Mattox, Roy Elias, Jennifer Mattox and Tamara Gross.

¹ When a statement applies to both RRG and S. Hester, they will be referred to collectively as “Respondents” in this Final Order.

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The forum received into evidence: (a) Administrative exhibits X1 through X16; (b) Agency's exhibits A1-A11 and A13-A15; (c) Respondents' exhibits R3-R5; and (d) ALJ exhibit ALJ1 (DVD S. Hester sent to Romo).

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

FINDINGS OF FACT – PROCEDURAL

1) Romo filed a complaint with the Agency's Civil Rights Division on June 7, 2017, citing ORS 659A.403, 659A.406 and 659A.406, and alleging that RRG discriminated in a place of public accommodation based on his sexual orientation. The complaint identified S. Hester as an aider/abettor. (Ex. A1)

2) Zahner filed a complaint with the Agency's Civil Rights Division on June 7, 2017, citing ORS 659A.403, 659A.406 and 659A.406, and alleging that RRG discriminated in a place of public accommodation based on his sexual orientation. The complaint identified S. Hester as an aider/abettor. (Ex. A3)

3) On June 7, 2018, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") for Case Nos. STPASO170607-5062 and STPASO170607-5063 in which it found substantial evidence of unlawful discrimination in a place of public accommodation as follows:

- RRG refused to book its venue for the wedding of Romo and Zahner because of their sexual orientation, in violation of ORS 659A.403.
- RRG provided Romo and Zahner with written notice that it would refuse to rent its venue to same-sex couples because of their sexual orientation, in violation of ORS 659A.409.
- S. Hester aided and abetted RRG's violations of ORS 659A.403 and 659A.409, in violation of ORS 659A.406.

(Ex. A15)

4) On October 15, 2018, the forum issued Notices of Hearing in Case Nos. 109-18 and 110-18 to Respondents, the Agency, Romo and Zahner, stating the time and place of the hearing as February 26, 2019, beginning at 9:00 a.m., at BOLI's Eugene office, located at 1400 Executive Pkwy, Suite 200, Eugene, 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

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

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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, X6)

5) The Formal Charges in Case Nos. 109-18 and 110-18 alleged the following:

- a) At all times material, RRG was a limited liability company doing business in Oregon. RRG was an outdoor event venue and was a place of public accommodation as defined in ORS 659A.400(1).
- b) At all times material, S. Hester was a member of RRG.
- c) On or about February 3, Romo contacted RRG and spoke to S. Hester about reserving RRG for his wedding and informed S. Hester that he was marrying a man.
- d) S. Hester told Romo that RRG was not hosting weddings because they did not want the venue to be used for non-heterosexual weddings.
- e) In April of 2017, Romo received a letter at work from S. Hester explaining the decision “to only do heterosexual weddings” at RRG and discussing her religious beliefs.
- f) RRG booked three weddings in March and April of 2017 which took place in July, August and September of 2017, and received payment for hosting those weddings.
- g) Respondents discriminated against Romo and Zahner based on their sexual orientation, in violation of ORS 659A.403(1),(3) and ORS 659.409.
- h) Respondents published or issued a communication, notice that its accommodation, advantages would be refused, withheld from or denied to, or that discrimination would be made against, Romo and Zahner on account of their sexual orientation, in violation of ORS 659A.409.
- i) S. Hester aided and abetted RRG’s violation of ORS 659A.403(1), (3) and ORS 659.409; thereby violating ORS 659A.406.
- j) Romo and Zahner were injured by the refusal to host their wedding.
- k) Romo and Zahner are each entitled to damages for physical, mental, and emotional distress in the amount of “at least \$50,000 to be proven at hearing.”

(Exs. X2b, X6b)

6) On November 8, 2018, Respondents timely filed answers to both sets of Formal Charges. They admitted that RRG had declined Romo’s request to book the couple’s wedding at RRG, but denied that any unlawful discrimination occurred. The answers raised the following affirmative defenses:

- a) The Formal Charges fail to state a claim or claims on which relief can be granted.
- b) The statutes at issue are unconstitutional as applied to Respondents because they do not protect the fundamental rights of RRG, S. Hester and persons similarly situated under the First and Fourteenth Amendments because the

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statutes:

- Unlawfully infringe on Respondents' right of free association;
 - Unlawfully infringe on Respondents' right of free speech;
 - Unlawfully infringe on Respondents' right to free exercise of religion;
 - Unlawfully denying Respondents' rights to due process.
- c) The claims for damages are barred, in whole or in part, because Romo and Zahner failed to mitigate their damages, if any.
- d) The damages are barred because of the doctrine of avoidable consequences.
- e) Romo's claims failed because he lacks standing.³
- f) Romo's claims fail because he failed to file a claim until more than one year after the alleged violations occurred.

(Exs. X3, X7)

7) On November 14, 2018, ALJ Jennifer Gaddis issued an interim order stating that she reviewed the Formal Charges in Case Nos. 109-18 and 110-18. The interim order stated that both matters contained common questions of law or fact, and that consolidation would avoid additional costs or delay. The interim order stated that the Agency and Respondents had ten days in which to file any objections to consolidation. If an objection was not received by November 26, 2018, the cases would remain consolidated, as of the date of the order. No parties filed objections to consolidating the cases. (Ex. X8)

8) On November 11, 2018, the ALJ issued an interim order requiring case summaries to be filed no later than February 12, 2019, and set out the requirements for what each participant must include in their case summary. The interim order also set a date for a prehearing telephone conference. (Ex. X9)

9) A brief prehearing conference ("PHC") was originally scheduled for December 10, 2018. On December 3, 2018, Chief Administrative Prosecutor Casey contacted the forum, copying Respondent, and indicated she was unavailable on that date. The PHC was postponed, by mutual agreement of the case participants, to December 20, 2018, at 10:30 a.m. During the PHC, Chief Administrative Prosecutor Casey appeared telephonically, on behalf of the Agency; Respondent did not appear.⁴

³ The Fifth and Sixth Affirmative Defenses were asserted only in the Answer to the Formal Charges against Romo, not in Zahner's Answer. (Exs. X3, X7)

⁴ During the conference, Casey told the ALJ that she had emailed Mr. Fargey about the PHC. She indicated that she received a message back, stating that Mr. Fargey was out of the office due to illness.

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The forum contacted Respondent's counsel, Mr. Fargey, by telephone and left a voicemail message, indicating steps by which to reset the PHC.

The ALJ set case deadlines during the conference which were reflected in an interim order dated December 20, 2018. The interim order informed the parties that if they wished to alter the deadlines, they could file a motion to do so. (Exs. X10-X11)

10) On February 7, 2019, the forum postponed the contested case hearing due to a conflict with the docket. The case participants were directed to confer about mutually agreeable dates and email the forum with the suggested dates no later than March 1, 2019. On February 25, 2019, the Agency emailed the forum, as directed, and suggested the mutually agreeable date of June 11, 2019, to begin the hearing. Based on the mutual agreement of the case participants, the hearing was rescheduled to begin on June 11, 2019, and the case summary deadline was extended to May 28, 2019. The Agency and Respondents timely filed their case summaries on May 28, 2019. (Exs. X12-X13)

11) On April 9, 2019, ALJ Gaddis issued an interim order transferring the case to ALJ Kari Furnanz. (Ex. X14)

12) The Agency and Respondents timely filed their case summaries on May 28, 2019. (Exs. X15-X16)

13) At the start of hearing, 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)

14) After the presentation of evidence, the ALJ requested a copy of the DVD with the video S. Hester provided to Romo with her letter on or about April 12, 2017. The ALJ marked the DVD as Ex. ALJ1. (Hearing Record: Ex. ALJ1)

15) In emails sent December 23 and 28, 2020, the Agency and RRG's counsel informed the forum that the Agency and RRG agreed to receive filings (including the Proposed Order, exceptions to the Proposed Order and the Final Order) from the parties, the Contested Case Coordinator and the ALJ by email, because of challenges associated with the COVID-19 virus. (Forum File)

16) On December 14, 2021, 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.

17) On December 22, 2021, Attorney Ray D. Hacke informed the forum that Respondent's previous counsel, Micah Fargey, was suspended from the practice of law and Hacke now represented Respondents. (Forum File)

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18) After obtaining an extension of time from the forum, Respondents timely filed exceptions to the Proposed Order on January 21, 2022. (Forum File)

FINDINGS OF FACT – THE MERITS

1) At all times material herein, RRG was an active limited liability company doing business in Oregon. RRG registered as a business with Oregon's Secretary of State in 1999. Its annual renewal payment was submitted to the Oregon Secretary of State on March 14, 2017, and it was an active business as of May 19, 2017. S. Hester is a member of RRG. Respondents operate an outdoor event venue on the Umpqua River in Umpqua, Oregon. (Exs. X2b, X3, X6b, X7, A5)

2) A man who attended church with S. Hester contacted her in late December of 2016 or early January of 2017, and inquired about booking RRG for his daughter's wedding on March 11, 2017. S. Hester told him that RRG was no longer hosting weddings and March was too early weatherwise. (Testimony of Elias; Ex. A7)

3) Romo and Zahner are men who became engaged to be married on February 14, 2016. Romo took on the primary responsibility for planning the wedding and was excited to start the process. The couple envisioned having their wedding take place on the Umpqua River, which was a special place for them. In particular, Zahner spent a lot of time on the river camping and playing with his dogs; he felt "spiritually" connected to it. It was important to Romo that he find a location on the river due to his fiancé's connection with it. During their search for wedding venues, the couple viewed RRG's website. The website advertised that RRG hosted weddings and displayed photographs of weddings that had taken place there. Romo and Zahner noted that RRG had the facilities they needed. They thought the setting of the property was beautiful and found the location on the river to be ideal. (Testimony of Romo, Zahner; Exs. X2b, X3, X6b, X7)

4) On or about February 3, 2017, Romo contacted RRG by telephone and spoke to S. Hester about hosting a wedding at RRG. S. Hester told Romo that Respondents were no longer taking wedding bookings because of a change in the law and that her religious beliefs conflicted with same-sex marriages. S. Hester began to explain her justification to Romo. He told her not to go any further because "we are the people you want to keep off" of the property. (Testimony of Mohr, Romo, S. Hester; Exs. X2b, X3, X6b, X7, A7)

5) S. Hester's statements during the telephone call made Romo feel angry, hurt, disgusted and disappointed. Romo considers himself to be a compassionate and loving person. It bothered him when he felt hurt and disdain towards S. Hester, and he considered these feelings to be unhealthy. He spoke to a close friend to try to get help and to not be so upset. During his testimony, Romo became emotional and appeared to be on the verge of crying. (Testimony of Romo)

6) Romo told Zahner about his conversation with S. Hester. Zahner felt that

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RRG's denial was wrong. He felt like he was not treated as a human, and was angry, "pissed" and upset. It "rocked" him to his "core." Zahner believed that S. Hester had lied to Romo because Zahner knew that RRG's website contained advertisements for weddings. (Testimony of Zahner)

7) Around March of 2017, S. Hester and her husband decided to book three weddings to help pay for their taxes and upkeep of the property. They booked the first three couples who contacted RRG after they made their decision. S. Hester did not consider contacting Romo and did not consider hosting a wedding for Romo and Zahner at RRG. (Testimony of S. Hester)

8) On or about March 25, 2017, Respondents booked a wedding for a heterosexual couple that took place at RRG on or about July 22, 2017. Respondents were paid for hosting the wedding. (Testimony of S. Hester; Exs. X2b, X3, X6b, X7)

9) On or about April 11, 2017, Respondents booked a wedding for a heterosexual couple that took place at RRG on or about August 26, 2017. Respondents were paid to host the wedding. (Testimony of S. Hester; Exs. X2b, X3, X6b, X7)

10) On or about April 11, 2017, Respondents booked a wedding for a heterosexual couple that took place at RRG on or about September 2, 2017. Respondents were paid for hosting the wedding. RRG received a total of \$9,927 for the weddings booked in March and April of 2017. (Testimony of S. Hester; Exs. X2b, X3, X6b, X7, A11)

11) On April 12, 2017, C. Hester dropped off a letter addressed to Romo at Romo's place of employment. The letter stated:

"Dear Bill,

"After talking with you on the phone, I feel compelled to explain more fully why we made the decision to do only heterosexual weddings at [RRG]. (Though at this time we are not doing weddings at all).

"I know what is going on in our world right now in regard to same-sex marriage is accepted by many. But we feel that based on Genesis chapter 2 and Romans chapter 1 in the Bible, this is not God's plan for marriage. Therefore to host these weddings was not based on prejudice as this decision would only apply to weddings, not other types of events.

"I am truly sorry if I came across in our conversation as self-righteous or judgmental as this was not my intent. God only knows the many sins I have committed in my life that He has forgiven me for! I am so glad that the Bible teaches that God's love extends to all mankind equally! (John 3:16) But He does ask us to repent of any disobedience and receive His Son, Jesus, whose sacrifice on the cross covers all our sin. This is what he asks of all of us in order

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to receive His gift of salvation and eternal life with Him. (See enclosed dvd).

"Please accept my feeble attempt to explain more fully our decision and please forgive any offense I may have caused you in explaining our policy in an incomplete or insensitive way.

"Sincerely,
Sandy Hester
Romantic River Gardens, LLC
Owner/operator"

(Exs. X2b, X3, X6b, X7, A2)

12) S. Hester's letter included a DVD titled "Genius." "Genius" is a religious DVD produced by Living Waters, a religious organization. S. Hester gave the DVD to Romo because she was concerned about his spiritual life. (Exs. X2b, X3, X6b, X7, A2)

13) Romo shared S. Hester's letter with Zahner. Zahner interpreted the letter as a message to both Romo and Zahner because they were a couple. He felt more "hate" after reading it. He had grown up as a Methodist and had walked away from the church because of people like S. Hester. He did not interpret the letter as an apology, but rather as S. Hester's attempt to justify her beliefs. (Testimony of Zahner)

14) Later that month, Romo's co-worker approached him and showed him a Facebook post with pictures of a wedding that took place at RRG on the previous Saturday. When Romo saw the pictures, he felt that S. Hester had lied to him when she told him that RRG was not hosting weddings and it made him angry. He felt that S. Hester manipulated her religion to make it acceptable to lie and to discriminate. (Testimony of Romo; Ex. A2)

15) The wedding in the Facebook posting took place at RRG on April 22, 2017. S. Hester and RRG hosted the wedding as a favor for friends who attended church with S. Hester and her husband, and did not receive compensation to host the event. (Testimony of S. Hester)

16) In addition to displaying wedding photographs, RRG's website also advertised that RRG hosted events such as business meetings, luncheons, anniversaries, birthday parties, bridal showers and reunions. As of the date of the hearing, Respondents had not booked any weddings since September of 2017. (Testimony of Mohr, S. Hester; Ex. R5)

17) In January of 2018, Romo and Zahner watched the DVD that S. Hester sent with the letter. Zahner became angry and upset after hearing the host of the program on the DVD talk about "sinful" behavior. He perceived the video to be sending a message that if a person did not believe what the people in the DVD believed, then they would be going to hell. Zahner felt that S. Hester intended to hurt them by sending

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Romo the video. (Testimony of Zahner)

18) At the time of the couple's wedding, Zahner was a person recovering from alcoholism; he had been sober for approximately 16 years. The setting the couple ultimately chose for their wedding (a winery) was a challenge for him due to the presence of alcohol and wine. However, he did consider the wedding to be a "joyful" occasion. The conduct of S. Hester and RRG made Zahner feel like he was not a human and was not provided with the basic human rights that everyone deserves. Zahner became emotional and cried when describing his feelings. (Testimony of Zahner)

19) The forum found all of the witnesses to be credible with the exception of the testimony of S. Hester and C. Hester in two respects.

First, their testimony on their decision to host or not host weddings on the property conflicted with other credible evidence. S. Hester communicated to Romo on February 3, 2017, and in the letter of April 12, 2017, that RRG was not hosting any weddings. However, at least three paid wedding bookings were made between those two dates.

Second, S. Hester and C. Hester testified that the website was out of date because their webmaster had been ill since 2015. While that may explain a slight delay in updating the site, the forum does not find this to be a credible explanation as to why the website continued to advertise weddings two years later in 2017, if RRG no longer intended to host them.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents owned and operated an outdoor event venue in Umpqua, Oregon called "Romantic River Gardens."

2) At all times material herein, RRG was a "place of public accommodation" as defined in ORS 659A.400.

3) At all times material herein, S. Hester was an individual and a "person[s]" under ORS 659A.001(9)(a), ORS 659A.403, ORS 659A.406, and ORS 659A.409. RRG is also a person for purposes of 659A.403 and 406.

4) At all times material herein, Complainants' sexual orientation was homosexual.

5) Respondents denied the full and equal accommodations, advantages, facilities and privileges of Romantic River Gardens to Complainants based on their sexual orientation, thereby violating ORS 659A.403.

6) Respondents did not violate ORS 659A.409.

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- 7) S. Hester did not violate ORS 659A.406.
- 8) Complainants suffered emotional and mental suffering as a result of Respondents' violations of ORS 659A.403.
- 9) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to ORS 659A.865.
- 10) Pursuant to ORS 659A.850 and ORS 659A.855, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The sum of money awarded to Complainants and the orders to cease and desist violating ORS 659A.403 and ORS 659A.409 are an appropriate exercise of that authority.

OPINION

THE AGENCY'S ALLEGED VIOLATIONS

ORS 659A.403(1),(3)

In each set of Formal Charges, the Agency alleged that RRG was a place of public accommodation, and that RRG and S. Hester "denied full and equal accommodations, advantages, facilities and privileges" to Romo and Zahner, in violation of ORS 659A.403(1), (3). ORS 659A.403 provides, in pertinent part:

"(1) Except as provided in subsection (2) of this section, all persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older.

"(2) Subsection (1) of this section does not prohibit:

"(a) The enforcement of laws governing the consumption of alcoholic beverages by minors and the frequenting by minors of places of public accommodation where alcoholic beverages are served; or

"(b) The offering of special rates or services to persons 50 years of age or older.

"(3) It is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section."

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The prima facie elements of the Agency's 659A.403 case are: 1) Complainants were a homosexual couple and were perceived as such by S. Hester; 2) RRG was a place of public accommodation; 3) S. Hester, a person acting on behalf of RRG, denied full and equal accommodations to Complainants; and 4) the denials were on account of Complainants' sexual orientation.⁵

The requirements of Element 1 are not in dispute. Romo and Zahner credibly testified about their relationship, and S. Hester understood that they were a homosexual couple as indicated by both her testimony and the letter she sent to Romo.

With respect to Element 2, Respondents assert that RRG was not a place of public accommodation on February 3, 2017, the date when Romo contacted Hester and told her he was interested in booking the couple's wedding, and contend that RRG was not booking any weddings on that date. In response, the Agency pointed to evidence of heterosexual weddings booked and held in 2017, arguing that a business cannot pick individual dates as to when it will comply with the law.

ORS 659A.400(1)(a) defines "place of public accommodation" as "[a]ny place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." The Oregon Supreme Court declared that the definition of a place of public accommodation "is intended to be a broad one and to apply to all types of businesses which offer goods and/or services to the public." *Schwenk v. Boy Scouts of Am.*, 275 Or 327, 335, 551 P2d 465 (1976) (emphasis omitted). Oregon courts define "a place of public accommodation" as "a business or commercial enterprise that offers privileges or advantages to the public." *Lahmann v. Grand Aerie of Fraternal Order of Eagles*, 180 Or App 420, 429, 43 P3d 1130 (2002).

The forum finds the following facts pertinent to whether RRG was a place of public accommodation for purposes of this case:

- RRG registered as a business with Oregon's Secretary of State in 1999. Its annual renewal payment was submitted to the Oregon Secretary of State on March 14, 2017, and it was an active business as of May 19, 2017. (Finding of Fact # 1)
- In February of 2017, the RRG's website advertised for wedding services.⁶ The website displayed wedding photos at time of the Agency's investigation in 2017.

⁵ See *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 166 (2015), *aff'd Klein v. Or. Bureau of Labor & Indus.*, 289 Or App 507, 410 P3d 1051 (2017), *rev den* 363 Or 121, 224 (2018), *cert granted, judgment vacated and remanded on other grounds* 139 S Ct 2713 (2019), *remanded on other grounds* 317 Or App 138, 140-41, 506 P3d 1108 (2022), *rev den* 369 Or 705, 509 P3d 119 (2022).

⁶ As stated above, Respondents asserted that the website was out of date because their webmaster was ill since 2015, but the forum does not find this to be a credible explanation for this information was still displayed on the website in 2017.

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(Finding of Fact # 3)

- In addition to weddings, RRG's website also advertised other events including business meetings, luncheons, anniversaries, birthday parties, bridal showers and reunions. There is no evidence that bookings for these events stopped. (Finding of Fact # 16)
- S. Hester told Roy Elias in December of 2016 or early January of 2017 that he could not help with his wedding because RRG was not doing weddings and March would be too early weatherwise. (Finding of Fact # 2)
- RRG received \$9,927 as compensation for hosting three weddings in 2017. (Finding of Fact # 10)
- S. Hester communicated with Romo by letter on April of 2017 as the owner/operator of RRG, and referenced their telephone conversation of February 3, 2017. (Finding of Fact # 11)

Taken together, all of this evidence demonstrates that RRG was a place of public accommodation at the time of the events in this case.

Element 3 (denial of full and equal accommodations) is not in dispute. S. Hester admitted that she told Romo she would not book his wedding on February 3, 2017, and in the letter delivered to him on April 12, 2017, yet RRG booked heterosexual weddings in between those two dates.

The forum also finds that the Agency established Element 4 and proved that the denial was due to Complainants' sexual orientation. S. Hester admitted that she held a sincere religious belief that weddings were limited to a man and a woman, and that homosexuality was a sin. Although she initially may have decided not to book any weddings at RRG, this decision changed at some point when RRG accepted bookings for heterosexual weddings. Indeed, at the time S. Hester sent the letter to Romo on April 12, 2017, RRG had already accepted bookings for a heterosexual wedding on March 26, 2017, and two heterosexual weddings on April 11, 2017. The evidence is clear that during the same time period S. Hester told Romo that RRG could not book his wedding, RRG was taking bookings for heterosexual weddings. Accordingly, the forum finds that the Agency established all four elements of its prima facie case and proved that Respondents discriminated against Complainants because of their sexual orientation and violated ORS 659A.403 (1),(3).

ORS 659A.409 - Discriminatory Communication, Notice, Advertisement or Sign

The Agency also alleges that Respondents violated ORS 659A.409 when C. Hester delivered S. Hester's letter to Romo on April 3, 2017. ORS 659A.409 provides, in pertinent part:

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“* * * it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issued or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of * * * sexual orientation * * *.”

S. Hester told Romo on two occasions that she would not host Complainants' wedding because RRG only hosted heterosexual weddings. First, in Romo's initial conversation with S. Hester on February 3, 2017, she told him that RRG was not hosting any weddings because of the change in the law requiring businesses to serve same sex couples.⁷ Second, on April 12, 2017, C. Hester delivered S. Hester's letter to Romo at his workplace. In the letter, S. Hester told him that RRG was hosting “only heterosexual weddings.”⁸

The forum previously adopted the definitions in *Webster's Third New International Dictionary* (unabridged ed. 2002) to interpret several terms in ORS 659A.409. See *In the Matter of Blachana, LLC*, 32 BOLI 220, 246-48 (2013), *aff'd Blachana, LLC v. Or. Bureau of Labor & Indus.*, 273 Or App 806, 808, 359 P3d 574 (2015), *opinion adhered to as modified on reconsideration*, 275 Or App 46, 362 P3d 1210 (2015). Briefly, “notice” is defined as “formal or informal warning or intimation of something” and “communication” includes “facts or information communicated” and/or “a letter, note, or other instance of written communication.” *Id.* For purposes of this case, the forum recognizes that “issue” includes “to cause or appear to become available by officially putting forth or distributing or granting or proclaiming or promulgating” and to “publish” includes “to impart or acknowledge to one or more persons.”

For purposes of this statute, the forum will analyze each communication separately. In the first statement (the telephone call), S. Hester stated that RRG was not hosting *any* weddings and, thus, her statement in the telephone call did not communicate an intent to discriminate in the future. The second communication (the April letter) is a closer call because it stated that “we made the decision to do only heterosexual weddings.” However, the letter then communicates that “at this time we are not doing weddings at all.” Looking at the language of the letter alone without the surrounding circumstances, as the forum must do under this statute, there is insufficient evidence that respondents communicated an intent to discriminate in the future. Accordingly, the Agency did not establish that Respondents violated ORS 659A.409.

⁷ As previously stated, this statement may not have been true. However, even if inaccurate, S. Hester said that *no* weddings were being booked, not that only heterosexual weddings were being booked.

⁸ In the letter of April 12, 2017, S. Hester also said, “[A]t this time we are not doing weddings at all.” (Finding of Fact # 11) However, as stated above, the forum finds this statement to be untrue in that RRG made one heterosexual wedding booking on March 26, 2017, and two bookings on April 11, 2017.

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ORS 659A.406 - Aiding and Abetting RRG's Violations

The Agency seeks to hold S. Hester liable as an aider and abettor under ORS 659A.406 for RRG's violations of ORS 659A.403(1), (3). ORS 659A.406 provides, in pertinent part:

"Except as otherwise authorized by ORS 659A.403, it is an unlawful practice for any person to aid or abet any place of public accommodation, as defined in ORS 659A.400, or any employee or person acting on behalf of the place of public accommodation to make any distinction, discrimination or restriction on account of * * * sexual orientation * * * ."

"Person" includes "[o]ne or more individuals." ORS 659A.001(9)(a). In this case, S. Hester was an individual and the person acting on behalf RRG. "Aid" commonly means: "to give help or support to." *Webster's Third New International Dictionary*, 44 (unabridged ed. 2002). And "abet" means "to incite, encourage, instigate, or countenance." *Id.* at 3. Because the forum already concluded that S. Hester individually violated ORS 659A.403(1),(3), the forum declines to also find that she aided and abetted that violation.

RESPONDENTS' COUNTERCLAIMS

Before addressing Respondents' affirmative defenses, the forum addresses Respondents' counterclaims. First, Respondents assert that they are entitled to an award of attorney fees pursuant to ORS 659A.885(9). Second, Respondents allege that a claim under 42 USC § 1983, claiming that ORS 659A.003 *et seq* deprives them of fundamental rights and protections guaranteed by the First and Fourteenth Amendments to the United States Constitution. Respondents' counterclaims include a prayer requesting that the charges against them be dismissed and that the forum award damages, attorney fees and costs to them.

The authority of state agencies is limited to that granted to them by the legislature. See *SAIF Corp. v. Shipley*, 326 Or 557, 561, 955 P2d 244 (1998) ("an agency has only those powers that the legislature grants and cannot exercise authority that it does not have"). ORS 659A.850(4) gives the Commissioner the authority to award compensatory damages to complainants as an element of a cease and desist order within a contested case proceeding. There is no corresponding statute that authorizes the Commissioner to award the damages sought by Respondents in their counterclaims. With regard to attorney fees or court costs, the legislature has only granted authority to the Commissioner to award these in contested case proceedings to intervenors in a real property case brought under ORS 659A.145 or ORS 659A.421.⁹

In conclusion, the forum lacks jurisdiction to adjudicate Respondents' counterclaims and may neither grant nor deny them. Under ORS 659A.850(3), the only

⁹ See ORS 659A.850(1)(b)(B).

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relief available to Respondents through this forum is dismissal of any charges not proven by the Agency.¹⁰

RESPONDENTS' AFFIRMATIVE DEFENSES

Respondents' affirmative defenses in both sets of Formal Charges include (1) failure to state a claim, (2) violation of U.S. Constitutional rights, (3) failure to mitigate damages and (4) avoidable consequences. The Answer to the Formal Charges against Romo include two additional affirmative defenses, asserting that Romo lacks standing and that the violations asserted on behalf of Romo are untimely based on the statute of limitations. As an initial matter, the forum notes that the Oregon Court of Appeals has held that an agency has the authority to decide the constitutionality of statutes. See *Eppler v. Board of Tax Service Examiners*, 189 Or App 216, 75 P3d 900 (2003), citing *Cooper v. Eugene Sch. Dist. No. 4J*, 301 Or 358, 362-65, 723 P2d 298 (1986) and *Nutbrown v. Munn*, 311 Or 328, 346, 811 P2d 131 (1991).

Respondents' First Affirmative Defense in each answer is for failure to state a claim. This defense is typically raised by motion pursuant to OAR 839-050-0150(1)(c) to eliminate a claim prior to hearing. Because this case proceeded to hearing, the merits of the case are addressed above and the affirmative defense is rejected.

Respondents' Second Affirmative Defense is for violation of U.S. Constitutional rights and asserts that the "statutes underlying the Complaint," are unconstitutional under the First and Fourteenth Amendments to the United States Constitution, as applied. Specifically, Respondents assert that the statutes unlawfully infringement upon Respondents' right of free association, free speech, free exercise of religion and rights to due process.

Respondents contend that the First Amendment to the U.S. Constitution, as applied to the State of Oregon under the Fourteenth Amendment, prohibits BOLI from enforcing the provisions of the applicable statutes, and unlawfully infringes on Respondents' right of conscience and right to free exercise of religion. In pertinent part, the First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

The U.S. Supreme Court recently recognized:

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At

¹⁰ See, e.g., *Wallace v. PERB*, 245 Or App 16, 30, 263 P3d 1010 (2011) (holding that, since the court had no authority under ORS 183.486(1)(b) to award compensatory damages to the plaintiff, the plaintiff was also unable to recover those damages in the contested case proceeding).

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the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression.”

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Com’n, __ U.S. __, 138 S Ct 1719, 1727, 201 L Ed 2d 35 (2018). Importantly, religious or conscientious objections do not supersede the basic obligation to comply with generally applicable civil rights laws provided those laws are applied neutrally. *Id.* at 1727. The violation is the denial of service. Any statements in the record disparaging S. Hester’s religious beliefs as she expressed them in her telephone call with Romo and February 3, 2017, and in the letter and DVD delivered to Romo on April 12, 2017, are disavowed. As well, as stated above, the Commissioner has considered this Final Order in light of the decisions in a similar case: *Klein v. Oregon Bureau of Labor and Industries*, 289 Or App 507, 410 P3d 1051 (2017) *rev. den.*, 363 Or 224, 434 P3d 25 (2018) (*Klein I*); *Klein v. Oregon Bureau of Labor and Industries*, __ US __, 139 S Ct 2713 (2019) (*Klein II*); *Klein v. Oregon Bureau of Labor and Industries*, 317 Or App, 138, 140-41, 506 P3d 1108 (*Klein III*), *rev. den.* 369 Or 705, 509 P3d 119 (2022). Moreover, S. Hester admitted to the conduct that forms the basis of the violation in that she did not dispute that on February 3, 2017, and April 12, 2017, she told Romo that RRG would not host his wedding, but RRG took bookings for three heterosexual weddings in between those two dates. Given this undisputed evidence in the record, the forum rejects this affirmative defense.

Respondents’ Third Affirmative Defense (failure to mitigate damages) is addressed in the damages discussion in the Opinion section of this Final Order. Accordingly, it is rejected.

With its Fourth Affirmative Defense, Respondents assert that the claims for damages are barred by “the doctrine of avoidable consequences.” This doctrine is generally treated the same as the allegation of a failure to mitigate damages. See, e.g. *In the Matter of Civil Service Board of the City of Portland*, 6 BOLI 203, 210 (1987). Accordingly, this defense is denied for the same reasons as discussed with respect to the Third Affirmative Defense.

In Respondents’ Answer to the Formal Charges in Case No. 109-18 (“Romo Answer”), Respondents assert a Fifth Affirmative Defense, which states that Romo lacks standing to pursue his claims against Respondents. No further explanation or argument is provided in support of this defense. Accordingly, this defense is denied.

Respondents assert a Sixth Affirmative Defense in the Romo Answer, arguing that Romo “failed to file a claim in court or any relevant agency regarding the allegations above until more than one year after the alleged violations occurred.” ORS 659A.820(2) provides “[e]xcept as provided in ORS 654.062, a complaint under this section must be filed no later than one year after the alleged unlawful practice.”¹¹ Romo’s interactions

¹¹ OAR 839-003-0025(3) further interprets ORS 659A.820(2), stating that “the right to file a complaint exists so long as the person files the complaint within one year of the most recent date the unlawful practice occurred.”

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with RRG and S. Hester first occurred on February 3, 2017, and he filed his civil rights complaint approximately four months later on June 7, 2017. Accordingly, the Sixth Affirmative Defense in the Romo Answer lacks merit and is denied.

DAMAGES

Emotional Distress Damages

The Agency's Formal Charges requested damages on behalf of Romo and Zahner in the amount of at least \$50,000 each for emotional, mental and physical 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 Oregon Truck Painting, LLC*, 37 BOLI 87, 114-15 (2018). 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.* 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. 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). An analysis of emotional distress damages is very factually intensive as demonstrated in the cases described below.

For example, in a past public accommodation discrimination case, the forum awarded damages to a complainant who was denied access to a convenience store because she was accompanied by a service dog. *Id.* Thereafter, "Respondent, or someone driving Respondent's vehicle, followed" Complainant home to her apartment complex and complainant "received an eviction notice" because "Respondent, or someone working in conjunction with Respondent, drove to her apartment complex and took photographs of her neighbor's car and Complainant's apartment)." *Id.* These incidents cause the complainant to feel invaded upon and unsafe in her home. In that case, the forum determined that \$60,000 was an appropriate award for the complainant's physical, emotional, and mental suffering.

In another public accommodation discrimination case, the forum examined the damages that should be awarded to a bar patron with Parkinson's disease who was accused of being drunk because of the way he walked and was told to leave the respondent's club on two occasions. *In the Matter of C. C. Slaughter's, Ltd.*, 26 BOLI 186, 196-97 (2005). The respondent's refusal to let complainant remain in its club

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made complainant very apprehensive about shopping in new places, and particularly about visiting new bars, in that he was afraid he would be stopped again and accused of being drunk because of his disability. *Id.* In that matter, the commissioner awarded the complainant \$25,000 in damages for emotional distress. *Id.*

Another public accommodation discrimination case involved a respondent who denied access to a bar to 11 members of a social group for transgendered persons based on the sexual orientation of the group's members *See In the Matter of Blachana, LLC*, 32 BOLI at 220. The forum awarded damages to each of the 11 complainants in varying amounts ranging from \$20,000 to \$50,000 based on the evidence in the record of the emotional harm each complainant suffered as a result of the denial of access. *Id.* at 249-53. For example, one complainant was awarded \$20,000 when she had feelings lasting for about a month that included "some upset and disappointment," and feeling "unwelcome" and "mildly dismayed and discouraged." *Id.* at 251. By contrast, the forum awarded \$50,000 to a complainant who had emotional distress lasting for around three months. *Id.* at 251.

The forum notes that following the issuance of the Proposed Order in this matter, the Oregon Court of Appeals issued its decision in *Klein III* and the Commissioner issued an Amended Final Order in *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, amended final order on remand*, 38 BOLI (2022) (awarding two complainants \$20,000 and \$10,000, respectively, when respondents refused to make their wedding cake because of their sexual orientation). The record in this matter shows two causes of complainants' emotional suffering: 1) the denial of services by RRG and S. Hester, and 2) S. Hester's explanation concerning the denial of services. As noted above, the Commissioner expressly disavows any disparaging comments in the record concerning 1) S. Hester's mention of her religious beliefs in her telephone call with Romo on February 3, 2017, and 2) S. Hester's quotes and citations to the Bible in the letter and DVD delivered to Romo on April 12, 2017. Damages are awarded based on consideration of the harm resulting from the denial of service alone, as described below, and consistent with the forum's prior damages awards in public accommodations case, as described above.

Romo

Romo had been excited when he started planning the couple's wedding. It was important to him the wedding take place on the Umpqua River because it had a "spiritual connection" with his fiancé. When he looked at the RRG website, he thought the location on the river and the property looked beautiful, and it had the facilities they needed.

After S. Hester told him that RRG was not hosting weddings for homosexual couples, Romo was angry, hurt, disgusted and disappointed. Romo considers himself to be a compassionate and loving person. He felt hurt and disdain towards S. Hester, and believed that was unhealthy. He spoke to a close friend about his feelings to try to get help and not be so upset. During his testimony, Romo was emotional and appeared

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to be on the verge of crying. Based on the record in this case and the forum's previous awards in public accommodations cases, the forum concludes that \$20,000 is an appropriate award of emotional distress damages for Romo, given that S. Hester communicated RRG's refusal to host his wedding to him directly.

Zahner

After Romo told Zahner about his conversation with S. Hester on February 3, 2017, Zahner felt that RRG's denial was wrong. He felt like he was not treated as a human, and was angry, "pissed," and upset. It "rocked" him to his "core." Zahner believed that S. Hester was lying when she said that RRG was not hosting any weddings because he knew that RRG's website contained advertisements for weddings.

After Romo shared S. Hester's letter with Zahner, Zahner interpreted the letter as a message to both Romo and Zahner because they were a couple.

At the time of the wedding, Zahner was a person recovering from alcoholism and he had been sober for approximately 16 years. The setting the couple ultimately chose for their wedding (a winery) was a challenge for him due to the presence of alcohol and wine. However, he did consider the wedding to be a "joyful" occasion.

The conduct of S. Hester and RRG made Zahner feel like he was not a human and was not provided with the basic human rights that everyone deserves. At times, during his testimony, Zahner was shaking. He became emotional and cried when describing his feelings. Based on the record in this case and the authority cited above, the forum concludes that \$10,000 is an appropriate award of emotional distress damages for Zahner because he was not present during the telephone call of February 3, 2017, and was not the recipient of the letter Romo received on April 12, 2017.

OTHER REQUESTED RELIEF

In each set of Formal Charges, the Agency sought a cease and desist order against Respondents that enjoins them from violating laws pertaining to unlawful discrimination in a place of public accommodation. 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

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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.

Exceptions to the Proposed Order

Respondents filed exceptions to the Proposed Order on January 21, 2022.

Specific Exceptions: Proposed Findings of Fact – Procedural

Respondents concurred Proposed Findings of Fact – Procedural and submitted no exceptions to them.

Specific Exceptions: Proposed Findings of Fact – The Merits

Respondents took exception to three of the credibility findings in the Proposed order.

First, Respondents took exception to the statement in Proposed Finding of Fact # 19, which stated “although S. Hester communicated to Romo that RRG was not hosting any weddings, at least three paid wedding bookings were made during the same time period.” Respondents’ three reasons for taking exception to that statement and the forum’s responses to those reasons are as follows:

1. Respondents first asserted that the Proposed Order was unclear as to “what ‘period’ the [f]orum was referring to” in this statement. To address Respondents’ concern, Finding of Fact # 19 has been revised in this Final Order to clarify that at least three paid wedding bookings were made between the two dates that S. Hester communicated RRG’s denial of service to Romo (the February 3, 2017, telephone call and the letter delivered on April 12, 2017).
2. Next, Respondents argue that the “fact that RRG started booking weddings again also does not mean Respondents discriminated against Complainants.” The forum disagrees with this statement because the evidence is undisputed that after RRG made three heterosexual wedding bookings in March and April of 2017, S. Hester sent Romo the letter on April 12, 2017, informing him that RRG would not book his wedding.
3. Finally, Respondents contend that the “fact that the three couples who requested wedding bookings” in March and April of 2017 “happened to be heterosexual is purely coincidental.” The evidence does not support the assertion that it was “coincidental” that RRG booked heterosexual weddings because S. Hester told Romo on two occasions that RRG would not book his wedding. Additionally, S. Hester testified that when she made wedding bookings on March 25 and April 11,

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2017, she did not consider contacting Romo and did not consider hosting a wedding for Romo and Zahner at RRG. (Finding of Fact # 7) The day after she made two bookings for heterosexual couples on April 11, 2017, C. Hester delivered the letter to Romo.

Second, Respondents disagreed with the finding that “S.Hester’s testimony that she wrote the letter to Romo because she ‘felt bad’ and that she did not want to harm him was not believable.” This sentence has been removed.

Third, Respondents take exception with the finding that the testimony of S. Hester and C. Hester regarding the advertising of weddings on their website lacked credibility. This pertained to testimony that RRG’s webmaster had been ill and could not update the website. As explained in Finding of Fact # 19, there was testimony that the webmaster had been ill beginning in 2015. That is not an adequate explanation as to why the website continued to advertise weddings two years later in 2017, if RRG no longer intended to host them. Accordingly, the forum disagrees with this portion of Respondents’ exceptions.

In summary, Respondents’ Exceptions to the Proposed Findings of Fact – The Merits are GRANTED IN PART AND OVERRULED IN PART, as reflected above.

Specific Exceptions: Proposed Conclusions of Law

Respondents raised Exceptions to several of the Proposed Conclusions of Law. All Exceptions were considered and, when well taken, were incorporated into this Final Order. The remainder of the Exceptions either raise new facts or issues not previously before the forum, or were not well taken.

Specific Exceptions: Proposed Opinion Re Alleged Violations

In this section, Respondents included one sentence incorporating their Exceptions to Conclusions of Law Nos. 5-7. The rulings with respect to those Conclusions of Law are, therefore, incorporated herein.

Specific Exceptions: Proposed Opinion Re Counterclaims

Respondents state that they concur with the portion of the Proposed Opinion addressing Respondents’ counterclaims. Accordingly, no further ruling is necessary on this issue.

Specific Exceptions: Proposed Opinion Re Affirmative Defenses

Respondents filed Exceptions in regard to the rulings in the Proposed Order regarding Respondents’ First and Second Affirmative Defenses.

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With respect to the First Affirmative Defense (failure to state a claim), Respondents incorporate their Exceptions to the Proposed Conclusions of Law. The rulings with respect to those Conclusions of Law are, therefore, incorporated herein.

Respondents Exceptions regarding their Second Affirmative Defense addressed alleged constitutional issues. All of these issues were discussed above when addressing the Exceptions to the Proposed Conclusions of Law and, therefore, are incorporated herein.

Specific Exceptions: Proposed Opinion Re Damages

This Exception pertains to the damages awarded in the Proposed Order. As set forth above, the Commissioner has reviewed the damages in light of the *Klein III* opinion and reduced the damages awarded consistent with the facts of this case and prior BOLI Orders in public accommodations.

Specific Exceptions: Proposed Order

These Exceptions duplicate exceptions addressing the damages award and the Cease and Desist Order. The rulings previously made with respect to those issues are, therefore, incorporated herein.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2), and to eliminate the effects of Respondent **Romantic River Gardens, LLC and Sandra L. Hester's** violations of ORS 659A.403(1),(3) and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Romantic River Gardens, LLC and Sandra L. Hester** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainants **William Romo and Dane Zahner** in the amount of:

1) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for emotional and mental suffering William Romo and Dane Zahner experienced as a result of Respondents Romantic River Gardens, LLC and Sandra L. Hester's unlawful practices to be apportioned as follows:

William Romo:	\$20,000
Dane Zahner:	\$10,000

plus,

2) Interest at the legal rate on THIRTY THOUSAND DOLLARS (\$30,000), from the date the Final Order is issued until paid.

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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 Respondents Romantic River Gardens, LLC and Sandra L. Hester to cease and desist from violating laws pertaining to unlawful discrimination in a place of public accommodation.