39 BOLI ORDERS

Table of Contents

In the Matter of	**Page**
The Water Hole LLC, Case Nos. 32-22, 37-22	2
Sunstone Organics, LLC, Case No. 15-20	23
Reynolds Consultation, Inc., Case No. 05-21	55
Dev's Burgers, Case No. 53-21	88
Knockers Strip Club, Case No. 61-18	108
Your House, Case No. 57-22	134
Henkels & McCoy, Inc., Case No. 17-21	148
The Royal Clothiers, Case No. 02-20	183
Frehoo, Inc. dba Stars Cabaret & Steak House (Amended), Case No. 37-16	197

In the Matter of
The Water Hole LLC, Respondent,
Case Nos. 32-22, 37-22
(Consolidated)

Final Order of Commissioner Christina Stephenson
Issued February 2, 2023

SYNOPSIS

The forum concluded that Respondent unlawfully discriminated and retaliated against Complainant due to her 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 reduced Complainant's work schedule due to her protected whistleblower activities. The forum also concluded that Respondent violated ORS 653.641(1), and OAR 839-007-0000 through 839-007-0120 when Respondent reduced Complainant's work schedule due to her use of sick time,. The forum awarded complainant $4,025 in lost wages and tips and $25,000 in emotional and mental suffering damages.

The above-entitled case came on regularly for hearing before Caroline Holien, designated as Administrative Law Judge ("ALJ") by Val Hoyle, former Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 18, 2022, via Zoom video conference 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 approximately 10:00 a.m.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chief Administrative Prosecutor Adam Jeffries, an employee of the Agency[1]. Complainant Jody Applegate ("Applegate") was present throughout the hearing.

The hearing was delayed for approximately 30 minutes after Respondent did not appear at the date and time set for hearing. Respondent The Water Hole, LLC, ("Respondent") did not appear nor did any other person appear on its behalf at hearing. Respondent provided no notice to the form explaining its failure to appear. Nonetheless, the Agency presented its prima facie case, as required by OAR 839-050-0330(3).

[1] On December 8, 2022, the Agency filed Notice of Change of Administrative Prosecutor identifying Anita Smith as the Administrative Prosecutor assigned to the case.

The Agency called Jessica Hollis ("Hollis"), f/k/a Jessica Smith, Senior Investigator, Civil Rights Division, and Applegate as witnesses. The forum received into evidence Administrative Exhibits X1-X10, and Agency Exhibits A1-A4, A6-A13 and A15-A18 for both Case ## 32-22 and 37-22.[2]

Having fully considered the entire record in this matter, I, Christina Stephenson, Commissioner of the Bureau of Labor and Industries, hereby makes the following Findings of Fact (Procedural and on the Merits), Ultimate[3] Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On September 11, 2020, Applegate filed two complaints with the Agency's Civil Rights Division. Applegate's complaint in Case No. STEMDP200911-61727 alleged "unlawful employment practices based on [her] disability, whistleblowing activities, invocation of Oregon Sick Time Leave (OSTL), and for reporting/opposing unlawful employment practices." Applegate alleged Respondent retaliated against her by reducing her work hours and refusing to promote her after she requested a reasonable accommodation for her disabilities. (Ex. A1, Case # 32-22)

2) Applegate's complaint in Case No. OSEMOS200911-61728 alleged "unlawful employment practices based on [her] whistleblowing activities and opposition to health and safety hazards." Applegate alleged Respondent retaliated against her by reducing her work hours and refusing to promote her after she expressed concerns about Respondent's failure to comply with COVID-19 social distancing and mask requirements. (Ex. A1, Case # 37-22)

3) On August 30, 2021, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") for Case No. STEMDP200911-61727 in which it found "substantial evidence of an unlawful employment practice based on whistleblowing and reporting/opposing unlawful employment practices, in that Respondent retaliated against [Applegate] and reduced her shift hours in violation of ORS 659A.030(1)(f) and ORS 659A.199." (Ex. A15, Case # 32-22)

4) On June 23, 2021, the Agency's Civil Rights Division issued an SED for Case No. OSEMOS200911-61728 in which it found "substantial evidence of an unlawful practice based on whistleblowing and opposition to health and safety hazards in that Respondent retaliated against her, reduced her shift hours, and refused to promote her in violation of ORS 654.062." (Ex. A15, Case # 37-22)

5) On July 21, 2022, the forum issued a Notice of Hearing to the Agency, the Complainant, and the Respondent in Case ## 32-22 and 37-22 that included notice that

[2] The forum will cite to the exhibits in Case # 32-22 unless the exhibit is specific to Case # 37-22.
[3] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

the hearing for each case would begin at 9:30 a.m. on October 18, 2022, and the hearings would be held via video conference. 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)

6) The Contested Case Coordinator sent the Notice of Hearing and Formal charges to the Respondent at the following addresses via Regular and Certified Mail:[4]

The Water Hole, LLC POS BOX 1003 Merrill, OR 976633	The Water Hole, LLC Cynthia Lesh, Registered Agent 216 E. Front St. Merrill, OR 97633

(Ex. A2a)

7) The Formal Charges in Case # 32-22 included the following allegations:

a. Respondent discriminated against Applegate because she opposed an unlawful practice or what she reasonably believed was an unlawful practice in violation of ORS 659A.030(1)(f) and/or OAR 839-005-125(2)(a)(A), (b) and/or (c).

b. Respondent retaliated against Applegate because she inquired about the provisions of ORS 653.601 to ORS 653.651, submitted a request for sick time, took sick time, and or invoked any provision of ORS 653.601 to ORS 653.651 in violation of ORS 653.641(2) and OAR 839-007-0065(2)(a),(b),(c) and/or (e).

c. Respondent discriminated against and/or retaliated against Applegate with regard to promotion, compensation or other terms, conditions or privileges of employment because she reported what she believed in good faith was a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1) and OAR 839-010-0100(1).

(Ex. X2b, Case # 32-22)

8) The Formal Charges in Case # 37-22 included the following allegations:

a. Respondent discriminated against Applegate because she opposed a practice prohibited by OSEA, ORS 654.001 to ORS 654.295, which she, in

[4] After the Agency was unsuccessful in attempting to serve Respondent and Respondent's registered agent at her listed address, the Agency accomplished service by serving the Oregon Secretary of State by certified mail on September 27, 2022, as provided in ORS 60.121. (Exs. X7, A18)

good faith, believed was prohibited by OSEA in violation of ORS 654.062(5)(a) and OAR 839-004-0016(1)(e).

b. Respondent discriminated and/or retaliated against Applegate because she made a complaint under or related to OSEA in violation of ORS 654.062(5)(b) and OAR 839-004-0016(1)(a).

c. Respondent discriminated against and/or retaliated against Applegate because she exercised a right on behalf of herself and/or others afforded by the OSEA in violation of ORS 654.062(5)(c) and OAR 839-004-0016(1)(c). Current and former ORS 654.062(6)(a) and ORS 654.062(7)(a),(b).

(Ex. X2b, Case # 37-22)

9) On July 26, 2022, the forum issued an Interim Order Requiring Case Summaries to be Filed and Setting Case Deadlines in which the forum mistakenly noted the parties had agreed to receive filings by email. The interim order set October 4, 2022, as the deadline for filing Case Summaries. The forum sent the interim order to the parties at their email addresses of record, including Cynthia Lesh ("Lesh"), the Registered Agent for The Water Hole, LLC. (Ex. X3)

10) On August 2, 2022, the forum sent an email to the parties inquiring whether the parties consented to receive filings by email. The email was sent to the parties at their email addresses of record, including Lesh's email address. The Agency responded to the forum's email. Lesh did not respond to the email or have any other contact with the forum. (Ex. X4)

11) On August 2, 2022, the forum issued an Interim Order Requiring Case Summaries to be Filed and Setting Case Deadline in which the forum noted that the parties had not agreed to receiving filings by email. The interim order noted October 4, 2022, remained the deadline for filing Case Summaries. The forum sent the interim order to the parties by email. The forum's email to Lesh was not returned as undeliverable. (Ex. X5)

12) Respondent did not file an Answer to the Formal Charges within 20 days from service of the Notice of Hearing. (Forum File)

13) On October 4, 2022, the Agency filed its Case Summary. Respondent did not file its Case Summary. (Ex. X8, Forum File)

14) On October 11, 2022, the Agency filed a Motion for Consolidation arguing that Case ## 32-22 and 37-22 qualified for consolidation pursuant to OAR 839-050-0190, because the cases involved the same Respondent and common questions of law and/or fact. (Ex. X9)

15) On October 12, 2022, the forum sent an email to the parties directing Respondent to file its response to the Agency's motion no later than noon, Friday, October 14, 2022, due to the hearing being set to begin on October 18, 2022. The forum sent the email to Lesh at her email address of record. The forum's email to Lesh was not returned as undeliverable. (Forum File)

16) Respondent did not respond to the Agency's motion. (Forum File)

17) On October 14, 2022, the forum issued an Interim Order Granting Agency's Motion to Consolidate cases. (Ex. X10)

FINDINGS OF FACT – THE MERITS

1) At all times material, the Water Hole was an active Domestic Limited Liability Company ("DLLC") with its principal place of business being located in Merrill, Oregon. The Water Hole is located in Klamath County, which is a primarily rural county located on the southern border of Oregon. (Testimony of Applegate; Ex. A4)

2) The Oregon Secretary of State's Business Registry lists Lesh as the Registered Agent for The Water Hole, LLC. (Ex. A4)[5]

3) The Water Hole employed Applegate as a bartender and cook beginning in September 2013. (Testimony of Applegate)

4) Applegate typically worked six-hour shifts, four days per week, with three of those shifts being 6:00 p.m. to close. Applegate averaged $100 per week in tips prior to the COVID-19 pandemic. (Testimony of Applegate)

5) Applegate and Lesh had a good working relationship through much of Applegate's employment. Lesh treated Applegate as one of her "favorites." (Testimony of Applegate)

6) On March 17, 2020, Executive Order 20-07 was issued prohibiting the on-premises consumption of food and drink due to the public health threat posed by COVID-19. As a result, the Water Hole was required to close for business. (Testimony of Applegate; Ex. A17, pp. 1-4)

7) On May 14, 2020, Executive Order 20-25 was issued, which set forth a phased reopening process that allowed food and drink establishments in certain counties, including Klamath County, to begin the reopening process. The phased reopening included various restrictions such as limiting the number of patrons allowed in the business; prohibiting patrons from sitting at the bar unless certain requirements were met; placing tables six feet apart; and requiring patrons and employees to wear a

[5] At the time of hearing, the Business Registry listed The Water Hole, LLC as inactive. (Ex. A18, pp. 30-31 (Business Entity Data produced 09/26/2022))

face mask when inside the building. Other requirements included disinfecting customer areas and common work areas and prohibiting pool table use. (Testimony of Applegate; Ex. A17, pp. 15-30)

8) Just prior to the issuance of Executive Order 20-25, Applegate sent a text message to Lesh inquiring about whether Lesh had secured enough face masks and gloves for employees. Applegate suggested in a subsequent text message that an employee meeting be held prior to the reopening of the bar so that the employees were all on the same page as to the COVID-19 related reopening requirements. Lesh informed Applegate that there would be no meeting because she was busy dealing with the bar's roof. Applegate responded by sending Lesh a text message that included links to the reopening requirements. (Testimony of Applegate; Ex. A9, pp. 6-10)

9) On May 14, 2020, Applegate sent Lesh a text message informing her that she had woken up with a sore throat and a cough and that she was going to self-isolate. Lesh suggested she get tested, and Applegate confirmed that she had already been tested and was awaiting results. Lesh responded, "Okay take care of yourself." (Testimony of Applegate; Ex. A9, pp. 11-12)

10) Applegate missed her next regularly scheduled shift due to illness. Applegate and Lesh had the following text message exchange:

Applegate: "Hi. Just letting you know am still waiting to hear from doc. Still feeling crappy and have been running a fever."

Lesh: "K will ask Elaine to cover!"

(Testimony of Applegate; Ex. A9, p.13)

11) On May 19, 2020, Applegate sent a text message to Lesh that she still did not feel well, but she had tested negative for COVID-19 and planned to return to work the next day. Lesh responded, "Okay see you then…sorry couldn't find mask!" Applegate responded by telling Lesh she only had a few and she had used them all. (Testimony of Applegate; Ex. A9, pp. 13-14)

12) On May 20, 2020, Applegate sent the following text message to Lesh:

"Hi. Just have a few concerns…I am just as desperate to get back to normal as anybody else, however, we are nowhere near there. So I am wondering, how come nobody besides me is wearing a mask? The cook said she wasn't told, and you were here with her today. Just cuz u couldn't find any masks doesn't' mean it's not still a requirement for us all to wear a face covering. A bandana will suffice, but u have to enforce it. Also, why r there barstools at the bar? "No bar or counter service unless it faces a window or a wall." This bar faces me in my workstation.

> "I have serious concerns Cyndi. You know that I am high risk for contracting coronavirus. I don't feel like you are taking this seriously enough. I really don't feel like u care about the safety of your employees or your customers. You are not in compliance with the requirements for re-opening, but you still re-opened. I have serious concerns."

(Testimony of Applegate; Ex. A9, pp. 14-16)

13) Lesh responded with the following text message:

> "Lottery states they will only turn on machines to approved facilities. And they have been here twice. We couldn't find masks but there are wipes that can be substituted just like bandanas. I'm sorry you feel I'm not doing this up to your standards."

(Testimony of Applegate; Ex. A9, p. 15)

14) Applegate responded with the following text message:

> "These are state and local requirements. Has nothing to do with my standards. Please enforce the…mask requirement. In the workplace. I'm the only one wearing a face covering. Shay, apparently is refusing, even though she has one right here. That blatant disregard, is in my opinion, bordering on…"[6]

(Testimony of Applegate; Ex. A9, p. 16)

15) On or about May 22, 2020, and May 28, 2020, Applegate filed a complaint with Klamath County Environmental Health ("Klamath County") regarding sanitation and food safety issues at the Water Hole. Applegate also reported the Water Hole's failure to comply with the COVID-19 related reopening requirements, including employees not wearing face masks; patron areas not being properly sanitized; tables not being six feet apart; patrons being allowed to use the pool tables; the maximum capacity requirement being exceeded; and patrons sitting at the bar. (Ex. A10, pp. 17-20)

16) Applegate filed similar complaints with OSHA. (Testimony of Applegate; Ex. A10, p. 20 ("Ms. Lesh also informed Jazzalyn that she received a letter from Occupational Safety and Health Administration (OSHA).")

17) Both Klamath County Complaint Forms indicate Applegate requested to remain anonymous, because she "was very worried about retaliation. Has already brought the complaint up with her employer, and they have dismissed her concerns." (Ex. A10, pp. 17-20)

[6] Applegate's text message appears to have been cut off in the exhibit admitted at hearing.

18) Applegate suffers from significant health issues that increased her risk for severe COVID-19 illness. Applegate worried about dying alone in the Intensive Care Unit if she were to contract COVID-19. Applegate's concerns were real and were ignored by Respondent. Applegate's complaints to Klamath County and OSHA during the early months of the pandemic were based on a good faith concern about her health and safety. (Testimony of Applegate)

19) On or about May 29, 2020, Applegate sent Lesh a text message indicating that another employee wanted to work the Tuesday day shift that Applegate was scheduled to work. Lesh told Applegate that she would not switch the shift to the other employee, because she wanted to avoid paying overtime wages. (Testimony of Applegate; Ex. A9, pp. 18-19)

20) On June 5, 2020, Klamath County Health Inspector Jazzalyn Smith conducted a semi-annual inspection of the Water Hole. Smith found the Water Hole had "Failed to Comply" with several requirements and noted issues with food storage and handling, as well as sanitation issues and issues regarding the tables not being six feet apart and patrons being allowed to drink at the bar. Smith's report also included:

> "No masks are worn – PIC [Person in Charge] uninterested that all employees must have on a mask or a face shield when in the facility"

(Ex. A10, pp. 2-3, 7-10)

21) On June 9, 2020, Smith conducted a follow-up inspection. Smith's report indicated continuing issues with food storage, sanitation, and a lack of staff knowledge regarding safe food handling. Smith's report also included: "Tables are not 6ft apart. Employees are not wearing masks or face shields. Customers are being allowed to sit at the bar even though the space between the bar and the wall prohibit bar seating." (Ex. A10, pp. 4-6)

22) On June 23, 2020, Applegate sent Lesh a text message informing her that she was feeling ill and would not be reporting for her shift. The following text message exchange occurred thereafter:

Lesh: "Want a note from…our doctor"

Applegate: "What?"

Lesh: "Want a note from your doctor!"

Applegate: "Sure. That's required if I'm out 3 days."
"Just saw doc. I have been referred for another covid test for tomorrow."

(Testimony of Applegate; Ex. A9, pp. 20-22)

23) On June 23, 2020, Smith performed a follow-up inspection at the Water Hole. Smith's report noted that several issues identified in her previous reports had been corrected. Smith's report included: "COVID – Employees are wearing masks. Tables are 6ft apart. Customers are not allowed to stand at bar." (Ex. A10, pp. 13)

24) When Applegate returned to work, she discovered a new work schedule that had been posted on June 25, 2020. The work schedule showed that Applegate was no longer scheduled to work during the day on Tuesdays and was only scheduled to work two night shifts. Applegate's work scheduled was cut in half without any prior warning or explanation. (Testimony of Applegate; Exs A11, p. 3; A13, A14)

25) Applegate averaged $100 in tips on a weekly basis based upon working four shifts. After the reduction of her work hours, Applegate's weekly tips were reduced to approximately $50. (Testimony of Applegate; Exs. A13, A14)

26) On or about July 16, 2020, Applegate sent the following text message to Lesh:

> "Hi. So, when I went to see my doc the other week, she found something concerning. She just called and wants me to go to the hospital Wednesday morning for surgery. If I don't do it Wednesday, she can't do it till September and she wants it done ASAP.
>
> Elaine is willing to trade me shifts next week, Friday for Wednesday, if that is okay with you."

(Testimony of Applegate; Ex. A9, pp. 21-22)

27) Lesh sent the following text message to Applegate after a brief text message exchange:

> "Sorry just reread your text and in the future you need to take this up with Shay as she will be my new manager."

(Testimony of Applegate; Ex. A9, pp. 21-22)

28) Applegate was surprised to learn that Shay was going to be the new manager. Lesh had offered the position to Applegate several times in the past. Lesh did not offer the position to Applegate before it was offered to Shay. Shay became manager as part of an agreement between her and Lesh that she would be purchasing the bar from Lesh. (Testimony of Applegate)

29) Applegate's working relationships with Lesh and her co-workers became more strained at or near the time she filed her complaints with Klamath County and she took her sick leave. Applegate felt isolated from her co-workers, who ignored her and did not speak to Applegate. Customers were allowed to treat Applegate in a hostile and

aggressive manner without any comment by her supervisor or Water Hole management. (Testimony of Applegate)

30) Breanna Archer ("Archer"), a former Water Hole employee, described the treatment of Applegate by her co-workers, during an investigative interview conducted by Hollis on June 3, 2021:

> "When I first started, there were hi's and goodbyes. But the last few months, no one spoke a word to her. No updates on the bar like they were supposed to. They didn't tell her anything. They would just leave and tell me they were leaving. That's the biggest thing I noticed. Behind closed doors when CP [Applegate] wasn't there, they would talk about her, say she was being a bitch, that she was complaining about this or that again. Every day I worked, there was something about her."

(Ex. A8)

31) Archer also reported to Hollis that Lesh participated in the negative conversations about Applegate and confirmed that Lesh and other employees believed Applegate was the individual who complained to Klamath County and OSHA. Archer also confirmed that Applegate's work hours were significantly reduced at or near the time Respondent became aware of the complaints filed with Klamath County and OSHA while her work schedule and other employee work schedules were not similarly reduced. (Ex. A8)

32) Applegate was anxious and dreaded going to work after Lesh and other employees began ignoring her and excluding her from conversations. Applegate was upset that customers gave her a hard time about wearing a mask and treated her badly just because she tried to enforce the reopening requirements. Applegate was heartbroken and destroyed by the changes in her relationship with Lesh and in the work environment after she reported her concerns to Klamath County and OSHA. Applegate suffered financial distress as a result of the reduction in her working hours and tips she averaged each week. (Testimony of Applegate)

33) The forum found the testimony of both Hollis and Applegate to be credible. The forum also found the information provided by Archer during her investigative interview to be credible. (Testimony of Hollis, Applegate; Ex. A8)

CONCLUSIONS OF LAW

1) At all times material herein, The Water Hole, LLC was a corporation subject to the provisions of ORS 654.062 and was an employer as defined in ORS 659A.001(4). Applegate was an employee as defined in ORS 654.005(4).

2) The Water Hole, LLC failed to provide Applegate and other employees with a safe and healthful workplace as required under the Oregon Safety in Employment

Action ("OSEA"), ORS 654.001 to 654.295, in violation of ORS 654.010 and ORS 654.022.

3) Applegate, acting in good faith and while employed by The Water Hole, LLC, reported information that she reasonably believed was evidence of a violation of a statute or rule to Klamath County, OSHA and Lesh. ORS 654.062(5)(a) and OAR 839-004-0016(1)(e)

4) The Water Hole, LLC unlawfully discriminated against Applegate because she opposed an unlawful practice or because she filed a complaint, testified, or assisted in any proceeding under this chapter or had attempted to do so in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A), (b) and (c).

5) The Water Hole, LLC discriminated and retaliated against Applegate because it believed Applegate opposed a practice that was prohibited by the OSEA, made a complaint under or related to the OSEA and/or or exercised a right afforded by the OSEA on behalf of themselves or others in violation of ORS 654.062(5)(a), (b), (c) and OAR 839-004-0016(1)(a), (c), (e).

6) The Water Hole, LLC retaliated against Applegate, because she inquired about the provisions of sick time, submitted a request for sick time, took sick time, and/or invoked any provision of ORS 653.601 to 653.661 in violation of ORS 653.641(2) and OAR 839-007-0065(2)(a),(b),(c), and/or (e).

7) The Water Hole, LLC retaliated against Applegate, because she, in good faith, reported information that she 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).

8) 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.

9) 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 The Water Hole, LLC, in the Order below are an appropriate exercise of that authority.

OPINION

The Formal Charges in each case alleged the following:

- Respondent discriminated against Applegate because it reasonably believed Applegate opposed a practice that was prohibited by the Oregon Safe Employment Act ("OSEA"), made a complaint under or related to the OSEA

and/or or exercised a right afforded by the OSEA on behalf of themselves or others in violation of ORS 654.062(5)(a), (b), (c) and OAR 839-004-0016(1)(a), (c), (e).

- Respondent The Water Hole LLC retaliated against or in any way discriminated against Complainant with respect to any term or condition of employment because the employee inquired about the provisions of ORS 653.601 to ORS 653.661, submitted a request for sick time, took sick time, and/or invoked any provision of ORS 653.601 to 653.661 in violation of ORS 653.641(2) and OAR 839-007-0065(2)(a),(b),(c), and/or (e).

- Respondent unlawfully discriminated against Applegate because she opposed an unlawful practice or because she filed a complaint, testified, or assisted in any proceeding under this chapter or had attempted to do so in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A), (b) and/or (c).

- Respondent retaliated against Applegate, because she, in good faith, reported information that she 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).

(Findings of Facts – Procedural ## 7,8)

DISCRIMINATION FOR ENGAGING IN A PRACTICE PROVIDED FOR BY OSEA

The Agency asserts that Respondent reduced Applegate's work schedule by 50% and did not offer her the manager position, because she complained about or opposed unsafe practices under the OSEA, which 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 employment." ORS 654.022.

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 provided, 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 an ORS 654.062 claim, the Agency must prove by a preponderance of credible evidence that: (1) Applegate was an employee of Respondent who opposed, complained about or caused a complaint to be instituted about conduct forbidden under or related to the OSEA; (2) Respondent subjected Applegate to an adverse employment action; and (3) there was a causal connection between the adverse employment action and Applegate's opposition to practices forbidden under or related to OSEA. *In the Matter of Atlas Bolt & Screw Co., LLC,* 37 BOLI 57, 74 (2018).

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

To establish Element 1, the Agency must establish that Applegate was an employee who opposed, complained about or caused a complaint to be instituted about conduct forbidden under or related to the OSEA. ORS 654.062(5)(a),(b),(c).

To prove a violation, the Agency need not establish that Applegate opposed conditions that actually violated a statute or rule; rather, the Agency need only prove that Applegate was discriminated against for expressing safety concerns "under or related to" the OSEA. *In the Matter of Atlas Bolt*, 37 BOLI at 75, 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." *Id.* at 84 (quoting *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61, 82 (1992)).

The forum finds that Applegate was an employee of Respondent who opposed and/or complained about conduct under or related to the OSEA when she reported her concerns to Lesh that Respondent was not complying with the reopening requirements on or about May 20, 2020. (Findings of Facts – the Merits, ## 12-14).[7] The forum further finds that Applegate caused a complaint to be filed when she filed complaints regarding Respondent's failure to comply with the reopening requirements with Klamath County and OSHA. (Findings of Fact – the Merits ## 15-16). The forum concludes that the Agency has, therefore, satisfied the first element of its prima facie case.

Element 2: Adverse Employment Action

The Agency alleged one of the adverse employment actions in this case was the 50% reduction in Applegate's work schedule beginning on or about June 25, 2020. Applegate denied requesting the reduction in her work hours and testified that the reduction resulted in a 50% reduction in her tips, which she relied upon to support herself and her family. The Agency alleged the second adverse action was Lesh's decision to promote another employee rather than Applegate to the manager position.

The forum concludes that Respondent's reduction of Applegate's work schedule by 50% was an adverse employment action. There is no evidence supporting Respondent's assertion that other employees experienced a similar reduction in their work schedule. Rather, that is contrary to the information Archer provided during the investigative interview. (Findings of Fact – the Merits #31) However, the forum does not find that Respondent's decision to promote another employee to manager rather than Applegate constitutes an adverse employment action. It is more likely than not that the promotion decision was based upon the transfer of the business and unrelated to Applegate's complaints. The Agency has, therefore, satisfied the second element of its prima facie case.

Element 3: Causation

To show causation, the Agency must prove that a respondent's unlawful motive was a "substantial factor" in the adverse employment action, 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 *Harper v. Mt. Hood Cmty. Coll*., 283 Or App 207, 214, 388 P3d 1170 (2016)). "[T]he discrimination or discharge may still be retaliatory if the employer's knowledge of the

[7] The nature of Applegate's separation from her employment with Respondent in November 2020 is not at issue in these matters.

employee's opposition to safety hazards played a key role in the employer's decision." *In the Matter of Atlas Bolt*, 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).

The forum finds that the Respondent had "knowledge of" Applegate's concerns regarding Respondent's failure to abide by the reopening requirements and Applegate's voicing those concerns contributed to the 50% reduction of her work schedule. (Findings of Fact – The Merits ## 8, 12, and 31). Further, Lesh reduced Applegate's work schedule within twenty (20) days of the first visit by the Klamath County Health Inspector and two (2) days after the final visit. (Findings of Fact – The Merits ## 22 and 24). No other employee experienced a similar reduction in their work schedule. Given the size of the community and how few employees worked for Respondent at the time, it is more likely than not that Lesh knew Applegate was the source of the complaints. (Findings of Fact – the Merits #30-31).

The Agency has satisfied each of the three elements of its prima facie case. The forum concludes that the Respondent discriminated against Applegate because she opposed, complained about or caused a complaint to be instituted about conduct forbidden under or related to the OSEA in violation of ORS 654.062(5)(a), (b), (c), and OAR 839-004-0016(1).

RETALIATION AND/OR DISCRIMINATION BECAUSE OF USE OF SICK TIME

The Agency alleges Respondent retaliated and/or discriminated against Applegate by redoing her work schedule by 50% after she used sick time on or about June 23, 2022, in violation of ORS 653.641(2), which provides:

"It is an unlawful practice for an employer or any other person to:

> (2) Retaliate or in any way discriminate against an employee with respect to any term or condition of employment because the employee has inquired about the provisions of ORS 653.601 (Definitions for ORS 653.601 to 653.661) to 653.661 (Preemption), submitted a request for sick time, taken sick time, participated in any manner in an investigation, proceeding or hearing related to ORS 653.601 (Definitions for ORS 653.601 to 653.661) to 653.661 (Preemption), or invoked any provision of ORS 653.601 (Definitions for ORS 653.601 to 653.661) to 653.661 (Preemption)."

The Agency's prima facie case is similar to that required under for a claim under ORS 654.062(5). The Agency must show that Respondent was Applegate's employer and subjected Applegate to an adverse action because of her use of sick time. The Agency has succeeded in establishing its prima facie case regarding this allegation. The primary evidence supporting the Agency's charge of discrimination and/or retaliation is the timing of Respondent's decision to reduce Applegate's work schedule. Within two days of Applegate's use of sick time, Applegate returned to work to find her work schedule cut in half without any prior warning or explanation by Respondent. Even if the surrounding circumstances did not support a finding that Applegate's use of sick time and the reduction in her work schedule was related, the temporal proximity between Applegate's use of sick time and the reduction in her work schedule is sufficiently close so as to establish the requisite causal link. *See Boynton-Burns v. University of Oregon*, 197 Or App 373, 381, 105 P3d 893, 897-898 (2005), citing *Clark County School District v Breeden*, 532 US 268, 273 (2001).

The forum concludes that Respondent retaliated and/or discriminated against Applegate when it reduced her work schedule in half after she used sick time in violation of ORS 653.641(2) and OAR 839-007-0065(2)(a),(b),(c), and/or (e).

DISCRIMINATION AND/OR RETALIATION FOR COMPLAINTS

The Agency alleges Respondent's reduction of Applegate's work schedule was also due, in part, to Applegate's report of health violations and Respondent's failure to abide by the reopening requirements. Respondent denied having knowledge that Applegate was the source of the complaints that led to an inspection by Klamath County and subsequent notices of violations, including notice that Respondent was not in compliance with the reopening requirements.

"It is an unlawful employment practice for an employer to discharge * * * or in any manner discriminate or retaliate against 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 * * * or in any manner discriminate against or retaliate against 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) Respondent was an employer as defined by statute; (2) Respondent employed Applegate; (3) Applegate, in good faith, reported information to someone that they believed was evidence of a violation of a state rule; (4) Respondent reduced Applegate's work schedule because of her report. *In the Matter of Oregon Truck Painting, LLC*, 37 BOLI 87, 113 (2018).

There is no dispute as to Elements 1 and 2.

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. There is no dispute that Applegate reasonably believed Respondent was not in compliance with the COVID-19 reopening requirements and other health and safety rules when she filed her complaints with Klamath County and OSHA. The Agency has established the first three elements of its prima facie case.

The final element the Agency must show is that the adverse employment action was because of Applegate's complaints. As discussed above, the forum finds that Respondent reduced Applegate's work schedule due, in part, to her complaints to Klamath County and OSHA. Accordingly, the Agency has established that Respondent discriminated and/or retaliated against Applegate by reducing her work schedule because she had, in good faith, reported information to local and state health authorities that she believed was evidence of a violation of any state or federal law, rule or regulation in violation of both ORS 659A.199(1).

DISCRIMINATION BECAUSE OF OPPOSITION TO UNLAWFUL EMPLOYMENT PRACTICE

The Agency also alleges that Respondent violated ORS 659A.030(1)(f) when it reduced Applegate's work schedule because she opposed what she reasonably believed to be an unlawful practice. ORS 659A.030(1)(f) 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."

The analysis used in determining that Respondent 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 287, 199 (2019). Accordingly, the forum's conclusion that Respondent violated ORS 659A.199 necessarily leads to the conclusion that Respondent also violated ORS 659A.030(1)(f) because Respondent was more likely than not aware of Applegate's complaints to Klamath County and OSHA when it made the decision to reduce her work schedule in half on or about June 25, 2020.

DAMAGES

Lost Wages

Applegate is eligible for a back pay award because Respondent committed an unlawful employment practice when it cut her work schedule in half because of her use of sick time and her complaints regarding Respondent's failure to follow the COVID-19 related reopening requirements to not only Lesh, but also to Klamath County and OSHA, in violation of ORS 653.641(2); ORS 654.062(5); ORS 659A.030(1)(f) and ORS 659A.199(1). *In the Matter of Atlas Bolt,* 37 BOLI at 79. The purpose of a back pay award is to compensate a complainant for the lost wages they would have received but for the unlawful employment practice. *Id.* Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the unlawful employment action. *Id.*

Applegate typically worked approximately 20 hours per week, with an hourly wage of $15. Applegate averaged $100 in tips each week prior to the start of the COVID-19 pandemic and $50 per week during the pandemic. The agency seeks "Lost wages, tips, and/or other benefits in an amount estimated to be at least $3,800 to be proven at hearing." (Ex. X2b, p. 7) At hearing, the Agency argued that Applegate's lost tips should be calculated at the rate of $100 per week during the period beginning June 25, 2020, through November 30, 2020, when Applegate's employment ended. The forum finds calculating lost wages using pre-pandemic tip averages too speculative given that the operating restrictions continued during the remaining weeks and months of Applegate's employment with the Water Hole. Therefore, the forum will calculate the lost tips based upon Applegate's average of $50 per week.

There are approximately 23 weeks during the period of June 25, 2020, through November 30, 2020. Applegate worked approximately ten hours each week at an hourly wage $15 for a total of $3,450 (23 weeks x 10 hours x $15). But for Respondent's unlawful employment action, Applegate would have received twice that if she had retained her work schedule of approximately 20 hours per week. Therefore, Applegate is entitled to lost wages in the amount of $3,450. Applegate received approximately $25 less each week in tips as a result of Respondent's unlawful employment action for a total of $1,150 (23 weeks x $25 = $575). Therefore, Applegate is further entitled to lost tips in the amount of $575. Accordingly, the forum finds that the Agency has sustained its burden of showing Applegate is entitled to lost wages in the amount of $4,025, which includes both her lost wages and lost tips for the period of June 25, 2020, through November 30, 2020.

Emotional Distress Damages

The Agency seeks damages on behalf of Applegate in the amount of "at least" $25,000 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*

Grand Management Services, Inc., 38 BOLI ___ (2021) 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*.

Applegate previously enjoyed her job and began to dread going to work at or near the time Respondent reduced her work schedule. Applegate felt she properly reported her concerns to Lesh prior to going to Klamath County and OSHA with her concerns about the business not being in compliance with the COVID-19 related reopening requirements.

Applegate suffers from serious health issues that make it more likely that she could develop serious symptoms of COVID-19 that would require her hospitalization. Applegate worried about dying alone in the Intensive Care Unit if she were to contract COVID-19. Applegate's concerns were real and were ignored by Respondent, who failed to adhere to the reopening requirements in the weeks following the issuance of Executive Order No. 20-27. (Findings of Fact – the Merits ## 20, 21, and 23)

Based on the record in this case, the forum concludes that $25,000 is an appropriate award of emotional distress damages given the emotional distress Applegate experienced as a result of Respondent's failure to appropriately address Applegate's reported concerns and for reducing Applegate's hours for her complaints related to OSEA and use of OSTL. *See, e.g. In the Matter of Grand Management,* 38 BOLI at ___ (awarding $60,000 in emotional distress damages to complainant who was discharged for opposition and complaints related to OSEA); *In the Matter of Atlas Bolt*, 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).

OTHER REQUESTED RELIEF

In the Formal Charges for each case, the Agency asked that Respondent and its managers, supervisors and human resources professionals be trained, at the expense of Respondent, "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 the Agency's 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

On December 15, 2022, the Agency filed Agency Exceptions to Proposed Order noting typographical errors in Finding of Fact #3 and in the Opinion that have been corrected accordingly. Respondent did not file any exceptions to the Proposed Order.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 654.062(5)(a),(b),(c); OAR 839-004-0016(1)(a),(c),(e); ORS 653.641(2); OAR 839-007-0065(2)(a),(b),(c),(e); ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A),(b),(c); ORS 659A.199(1); and OAR 839-010-0100(1) by Respondent **The Water Hole, LLC**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **The Water Hole, LLC** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for **Jody Applegate** in the amount of:

1) TWENTY FIVE THOUSAND DOLLARS ($25,000), representing compensatory damages for emotional and physical suffering experienced by Jody Applegate as a result of Respondent's unlawful employment practices found herein; plus,

2) FOUR THOUSAND TWENTY FIVE DOLLARS ($4,025), representing lost wages suffered as a result of Respondent's unlawful employment practices; plus

3) Interest at the legal rate on the sum of TWENTY NINE THOUSAND TWENTY FIVE DOLLARS ($29,025), 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 **The Water Hole, LLC** to train all of 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, and whistleblower protections under Oregon law, either through a training offered by the Bureau of Labor and Industries Technical Assistance for Employers Unit or another trainer agreeable to the Agency, with the first training to be completed by December 31, 2023 and by December 31st of each successive year for the next five years.

In the Matter of
Sunstone Organics, LLC, and
Hugh Holiday aka Norman Luebbert,
Respondents, Case No. 15-20

Final Order of Commissioner Christina Stephenson
Issued February 10, 2023

SYNOPSIS

The Agency established by a preponderance of the evidence that the employer unlawfully discriminated against Complainant based on sexual orientation (gender identity) in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C),(b). The forum concluded that Respondent Sunstone Organics, LLC was liable for H. Holiday's harassment of Complainant as its proxy pursuant to ORS 659A.030(1)(b) and OAR 839-005-0010(4)(c) and as a supervisor pursuant to ORS 659A.030(1)(b) and OAR 839-005-0010(4)(d)(D). Respondent H. Holiday, a member of the Sunstone limited liability corporation, violated ORS 659A.030(1)(g) by aiding and abetting Sunstone's violations. The forum concluded that Complainant was not discharged because of her sexual orientation (gender identity) or because she opposed an unlawful employment practice. The forum declined to award Complainant lost wages and out-of-pocket expenses but did award Complainant $125,000 in emotional, mental, and physical suffering damages and ordered Respondents to cease and desist discriminating against employees based on sexual orientation (gender identity).

The above-entitled case came on regularly for hearing before Cynthia Domas, designated as Administrative Law Judge ("ALJ") by Val Hoyle, former Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 23, 2021, via video conference, with some witnesses appearing via telephone.

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. David Wallace ("Wallace"), attorney at law, represented Respondents Sunstone Organics ("Sunstone") and Hugh Holiday aka Norman Luebbert ("H. Holiday") throughout the proceeding. Complainant, Raven Spezialy ("Spezialy"), was represented by Jennifer Middleton ("Middleton"), attorney at law.

The Agency called Senior Civil Rights Investigator Irn Coury ("Coury"); Spezialy; Crystal Doan ("Doan"), Spezialy's fiancée; Robert Andrews ("Andrews"); and Rikki Erwin ("Erwin") as its witnesses. Coury, Spezialy, and Doan appeared via video conference. Andrews and Erwin appeared via telephone.

Respondents called H. Holiday and Todd Holiday (T. Holiday) as its witnesses, both of whom appeared via video conference. Respondents called Zyanna Esparza ("Esparza"), as a rebuttal witness, and she appeared via video conference. Respondents also called Matthew Verdugo ("Verdugo") and Joshua Roach ("Roach") as rebuttal witnesses, both of whom appeared via telephone.

The forum received into evidence: (a) Administrative exhibits X1-X19 and X21-X24; (b) Agency's exhibits A1-A15; and (c) Respondents' exhibits R1-R3. The Agency referenced exhibit A16 during its cross examination of H. Holiday, but did not offer the document as an exhibit for hearing. The addresses of those individuals listed in Exhibit A6 were redacted. Exhibit A20 was excluded as it did not pertain to this case.

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

FINDINGS OF FACT – PROCEDURAL

1) On October 26, 2018, Spezialy filed a complaint with the Agency's Civil Rights Division alleging Respondents engaged in "unlawful employment practices based on age, gender identity and for reporting unlawful discrimination" in that Respondents subjected [Spezialy] to a hostile work environment, retaliated against [Spezialy], and terminated [Spezialy's] employment." "Robert Spezialy" was the named complainant. (Ex. A1)

2) The complaint was subsequently amended to change the name of the complainant to "Raven Spezialy." (Ex. A2)

3) On June 18, 2019, the Agency's Civil Rights Division issued a Substantial Evidence Determination ("SED") in which it found substantial evidence of the following unlawful employment actions:

- Termination of Spezialy's employment based on sex (gender identity) in violation of ORS 659A.030(1)(a).
- Harassment of Spezialy based on sex (gender identity) in violation of ORS 659A.030(1)(b).
- Termination of Spezialy's employment based on opposition to unlawful practices in violation of ORS 659A.030(1)(f)

(Ex. A13)

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

4) The Agency's Civil Rights Division did not find substantial evidence of harassment or termination based on age. (Ex. A13)

5) On December 17, 2019, the forum issued a Notice of Hearing stating the time and place of the hearing as May 5, 2020, beginning at 9:30 a.m., at the Workers Compensation Board, Delta Triad Building, Suite 38, 1142 Willagillespie Road, Eugene, OR 97401. 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)

6) The Formal Charges included the following allegations:

- Respondents terminated Spezialy's employment because of her gender identity in violation of ORS 659A.030(1)(a).
- Respondents subjected Spezialy to harassment because of her gender identity that was sufficiently severe or pervasive, such that it unreasonably interfered with her work performance and created an intimidating, hostile and offensive working environment in a hostile work environment because in violation of ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(b).
- Respondent Sunstone was liable for the unlawful harassment because the harasser was H. Holiday, whose rank was sufficiently high that he served as the employer's proxy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c).
- Respondent Sunstone was liable for the harassment by a supervisor with immediately or successively higher authority over Spezialy because she was removed from training to be a driver, not promoted to the driver position, and was terminated. ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A), (C), (D).
- Respondents subjected Spezialy to different terms and conditions because she opposed Respondents' unlawful harassment pursuant to ORS 659A.030(1)(f). OAR 839-005-0125(1)-(3) and OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A)
- H. Holiday was an aider and abettor pursuant to ORS 659A.030(1)(g).

(Ex. X2a)

7) The Formal Charges sought the following damages:

"a. Lost wages in an amount to be determined at hearing.
"b. Out of pocket expenses in an amount to be determined at hearing.
"c. Damages for emotional, mental, and physical suffering in the amount of least $250,000.00."

(Ex. X2a)

8) The Formal Charges also sought a Cease and Desist Order be entered against the Respondents that included "such other relief as is appropriate to eliminate the effects of the unlawful practices found both as to Complainant and as to others similarly situated." (Ex. X2a)

9) On January 6, 2020, Respondents filed their Answer to the Formal Charges in which Respondents denied the allegations set forth in the Formal Charges. (Ex. X3)

10) On January 23, 2020, the forum issued its Interim Order Requiring Case Summaries to be Filed and Setting Case Deadlines setting the case summaries deadline for April 21, 2020. (Ex. X4)

11) On March 19, 2020, the forum issued its Interim Order Re: Temporary Procedures setting forth the document filing procedures implemented as a result of the COVID-19 outbreak. (Ex. X5)

12) On April 8, 2020, the forum conducted a telephone conference in this matter. Adriana Ortega ("Ortega") appeared on behalf of the Agency. Wallace appeared on behalf of Respondents. Middleton also appeared on behalf of Spezialy. As a result of that conference, the forum issued an Interim Order Re: New Hearing and Case Summary Dates setting the matter for hearing on July 28, 2020, with Case Summaries being due no later than June 30, 2020. (Ex. X6)

13) On April 29, 2020, the Agency filed a Notice of Change in Assigned Prosecutor. (Ex. X7)

14) On May 11, 2020, the forum issued an Interim Order Re: New Hearing and Case Summary Dates setting the matter for an in-person hearing on November 10, 2020, with Case Summaries being due no later than October 28, 2020. (Ex. X8)

15) On June 11, 2020, the Agency filed a Notice of Change in Assigned Prosecutor reassigning the case to Diamond-Cuneo. (Ex. X9)

16) On June 22, 2020, the forum conducted a telephone conference in this matter to discuss hearing options going forward, in light of the COVID-19 pandemic. Diamond-Cuneo appeared on behalf of the Agency. Wallace appeared on behalf of the Respondents. Middleton appeared on behalf of Spezialy. The parties and Middleton agreed that an in-person hearing was preferred, and a new hearing date was selected. The matter was set for hearing for November 10, 2020, with Case Summaries being due no later than October 28, 2020. (Ex. X10)

17) On October 2, 2020, the forum issued an Interim Order Re: Prehearing Conference Date and Time and sent an email to the parties with instructions for participating via video conference. (Exs. X11, X12)

18) On October 19, 2020, the forum issued an Interim Order Re: Cancelling Hearing and Setting New Hearing Date in which the matter was reset for hearing on February 23, 2021, with Case Summaries being due no later than February 9, 2021. The Interim Order included notice that the hearing would be held via video conference if a hearing location meeting social distancing requirements was not located. (Ex X13).

19) On October 21, 2020, the forum issued an Interim Order Correcting Caption to conform with the Formal Charges issued on December 17, 2019. (Ex. X14)

20) On October 23, 2020, Respondents filed Respondents' Amended Formal Objections to Videoconference Hearing. (Exs. X15, X16)

21) On November 17, 2020, the forum issued an Interim Order Ruling on Respondents' Formal Objections to Video Conference Hearing as set forth below:

> "A prehearing telephone conference was held on Friday, October 2, 2020, to discuss the hearing date of November 10, 2020. Present by telephone were Rachael Diamond-Cuneo for the Agency, David Wallace attorney for Respondent, and Jennifer Middleton, counsel for Complainant.
>
> "The prehearing conference was held to discuss the November 10, 2020, hearing date and to consider holding the hearing by video because of the continuing restrictions in place due to the COVID-19 pandemic. Mr. Wallace stated his preference for an in-person hearing. I stated that staff would attempt to find an alternate location for an in-person hearing because all state offices were closed to the public until the end of the year. Those attempts were unsuccessful. In my interim order dated October 19, 2020, I set the new hearing date of February 23, 2021. In the order, I stated that if restrictions were still in place at that time, the hearing would be held by video.
>
> "I further stated that if anyone objected to the virtual hearing, they should put their objections in writing no later than November 6, 2020. On October 23, 2020, Respondent submitted a document titled Respondents' Amended Formal Objections to Video Conference Hearing.
>
> "Pursuant to OAR 839-050-0150, the Agency, as the nonmoving participant, had seven days after Respondent filed his objections to respond. The forum has not received any documentation from the Agency regarding the interim order issued on October 19, 2020.
>
> "Respondent put forth three arguments in support of its desire for an in-person hearing. Respondent states that because of the dollar amount involved, there is a greater need for an in-person hearing. Respondent cites to possible technical difficulties, the possible inability to read body language and facial expressions, the possible inability to see if Complainant is shifting in her seat or if

she is being coached, etc. Respondent further cites to the possible number of and sharing of exhibits in support of its position that the matter should be held in person.

"Respondent also argues that a video hearing would rob Respondent of its due process right to a full and fair hearing. Respondent did expand on how it feels that it would be robbed of due process if this matter was held be video rather than in person. Respondent is being provided with a hearing in which it may cross examine Agency witnesses and put on its case in chief.
Although the Agency did not file a response regarding an in-person hearing verses a video hearing, the Agency previously stated a preference for an in-person hearing.

"The scheduling of hearings is within the purview of the ALJ as set out in OAR 839-050-0240(1)(d). Consideration has been given to the following factors: Respondents' concerns; the Agency's preference for an in-person hearing; the pandemic and the need to adhere to safety measures and government mandates; and the age of the case.

"Therefore, the forum will attempt to find a physical location in which safety precautions and mandates can be followed if safety precautions and mandates are still in place on February 23, 2021. If not, the hearing will be conducted via video with instructions given to the parties regarding witnesses that should address most of the concerns raised by Respondent regarding witnesses.

"The parties are reminded that temporary procedures are now in effect allowing for email filings. All 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). 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. Any documents filed by email must be submitted no later than 11:59 p.m. on the due date in order to be considered timely filed.

"**IT IS SO ORDERED.**"

(Ex. X19)

22) On January 25, 2021, the forum issued an Interim Order Re: Video Hearing advising the parties that the hearing would be conducted via video on February 23, 2021, due to ongoing COVID-19 restrictions. (Ex. X21)

23) On August 31, 2021, the forum issued an Interim Order Re: Reassignment of ALJ transferring the matter to ALJ Kari Furnanz. (Forum File)

24) On January 31, 2022, the forum issued an Interim Order Re: Reassignment of ALJ transferring the matter to ALJ Caroline Holien. (Forum File)

FINDINGS OF FACT – THE MERITS

Sunstone Operations

1) At all times material herein, Respondent Sunstone was an Oregon domestic limited liability company employing at least one employee with its principal place of business located in Springfield, Oregon. (Ex. A3)

2) Sunstone manufactures Kratom for wholesale to retail establishments. (Testimony of T. Holiday)

3) H. Holiday and T. Holiday founded the business in 2017. T. Holiday had worked on developing what became Sunstone with a friend prior to H. Holiday becoming involved in the operations. (Testimony of T. Holiday, H. Holiday)

4) T. Holiday and H. Holiday are the only members listed in the Secretary of State's Business Registry. H. Holiday is listed by his legal name, "Norman Luebbert." (Ex. A3)

5) H. Holiday changed his name "mostly for marketing" purposes several years ago. H. Holiday petitioned the district court to change his name, but, for reasons purportedly unknown to H. Holiday, the federal government has never accepted nor recognized his name change. (Testimony of H. Holiday)

6) T. Holiday was primarily responsible for overseeing production and distribution. H. Holiday was primarily responsible for overseeing sales. (Testimony of T. Holiday, H. Holiday)

7) T. Holiday had a "relaxed approach" to managing Sunstone operations. T. Holiday began by hiring friends or friends of friends to work in production without having to advertise or go through a formal hiring process. (Testimony of T. Holiday)

8) Sunstone did not have an employee handbook or corporate policies regarding hiring and firing during the first several months of operations. (Testimony of Spezialy, T. Holiday, Esparza, Roach, Erwin)

9) Sunstone experienced rapid growth during its first several months of operations. In March 2017, Sunstone moved into a larger facility and began hiring new production associates. (Testimony of T. Holiday and H. Holiday)

10) At the time of hearing, Sunstone was selling its products in 40 stores throughout Oregon and employed approximately 24 workers. T. Holiday was no longer

involved in Sunstone's operations at the time of hearing. (Testimony of T. Holiday, H. Holiday)

Spezialy's Employment with Sunstone

11) On or about November 2, 2017, Sunstone hired Spezialy as a production associate. Spezialy generally worked noon to 8:00 p.m. for an average of 30 hours per week. Spezialy's hourly wage was $12.00. (Testimony of Spezialy; Ex. A7)

12) Sunstone manager Michael Perren ("Perren") hired Spezialy, whom he knew from a previous job. Spezialy is friends with Perren, who is the godfather of her daughter. Neither T. Holiday nor H. Holiday were involved in Spezialy's hire or were aware she had been hired until after the fact. (Testimony of T. Holiday, H. Holiday)

13) Spezialy's duties as a production associate included preparing and measuring Kratom before capsulating the product and packaging the capsules for distribution, which included labeling boxes with Sunstone's information and the customer's name. Spezialy also packaged sample packs for drivers to distribute to retailers. (Testimony of Spezialy, Esparza)

14) Spezialy also maintained and loaded delivery vehicles. Spezialy understood that she would also be trained to work as a driver and ultimately be assigned to work as a driver in the Portland area. (Testimony of Spezialy)

15) Spezialy identified as "Robert" and went by he/him pronouns at the start of her employment at Sunstone. (Testimony of Spezialy; Ex. B1, pp. 8-18)

16) Approximately one month after she began working for Sunstone, Spezialy "came out as transgender" and told her supervisor and co-workers that she wished to be identified as "Raven," with she/her pronouns. Spezialy also began wearing more feminine clothing to work. Spezialy's co-workers and supervisor were generally respectful of her request and referred to her as "Raven" and used she/her pronouns when speaking with her or referencing her at work. (Testimony of Spezialy, Andrews, Erwin)

17) Although Spezialy "came out" to her supervisor and co-workers, she continued signing her timecards "Robert Spezialy" until May 2018. Spezialy offered no formal notice to either T. Holiday or H. Holiday that she no longer wished to be identified as "Robert Spezialy." However, both T. Holiday and H. Holiday became aware Spezialy wanted to be referred to as Raven with she/her pronouns. (Testimony of Spezialy, H. Holiday, T. Holiday, Erwin, Andrews; Ex. B1, pp. 8-18)

Spezialy's Performance Issues

18) Spezialy received a "handful" of warnings regarding her performance and failing to clock out for breaks throughout her employment. Spezialy took the warnings

seriously and attempted to correct the issues. (Testimony of Spezialy)

19) Spezialy did not work the same shift as her co-workers, who generally worked 8:00 a.m. to 4:00 p.m. or 4:00 p.m. to midnight. Spezialy typically clocked in and went outside to speak to her co-workers, who were often on break when she arrived at work, to get an idea of what she needed to do during her shift. (Testimony of Spezialy)

20) Esparza trained Spezialy on production associate duties, but she was not Spezialy's supervisor. Esparza found Spezialy's performance acceptable at the beginning of Spezialy's employment, but found it worsened as her employment continued. Esparza noticed Spezialy spent a significant portion of her shift chatting with her co-workers or looking at her phone. Esparza also noticed Spezialy was not clocking out for her breaks, and her breaks were excessively long. Esparza was also concerned about the quality of Spezialy's work and her speed. (Testimony of Esparza)

21) In early- to mid-January 2018, Esparza reported her concerns to T. Holiday at a meeting held at her home. Esparza considered T. Holiday her friend and felt more comfortable sharing her concerns outside of the workplace. (Testimony of Esparza)

22) T. Holiday had observed some of the same behaviors identified by Esparza. T. Holiday was generally reticent to confront employees whom he felt had performance issues. T. Holiday preferred the employee correct their behavior rather than be subject to discipline. (Testimony of T. Holiday)

23) After meeting with Esparza, T. Holiday observed Spezialy clock in at the start of her shift and immediately leave the production area to join her co-workers outside. T. Holiday checked Spezialy's timecard and confirmed she had clocked in for her shift. T. Holiday confronted Spezialy and told her that she could not clock in and then go on break. (Testimony of T. Holiday)

24) T. Holiday decided, after speaking with Esparza and observing Spezialy's behavior at work, that he did not want her working as a driver, which was a position that had a lot of independence and required a good deal of trust. T. Holiday did not consider Spezialy's behavior bad enough to fire her, but he did not feel her performance was good enough to move her to the driver position. (Testimony of T. Holiday).

25) Spezialy was informed of T. Holiday's decision at some point after January 15, 2018. (Testimony of Spezialy and T. Holiday)

26) T. Holiday observed Spezialy failed to clock out for a break on at least one other occasion but most likely did not confront Spezialy about her failure to do so given his admitted reticence about confronting employees. (Testimony of T. Holiday)

27) T. Holiday had also noticed that Spezialy spent time on her phone during her shift, which was not allowed. T. Holiday did not confront Spezialy about her phone usage, because he was unsure if her phone usage was for legitimate family reasons. Spezialy used her phone to change music and to keep in contact with drivers and with her manager, Perren, so she would be ready to load or unload vehicles. Spezialy rarely used her phone at work for non-work related reasons. (Testimony of T. Holiday and Spezialy)

28) On one occasion, H. Holiday found Spezialy seated at a table in a break area with her head on the table. H. Holiday asked Spezialy if she was okay, before asking if she had clocked out. Spezialy admitted she had not clocked out and indicated she would do so. H. Holiday never confirmed if she clocked out or not. (Testimony of H. Holiday)

29) On another occasion, H. Holiday came upon Spezialy and her co-worker, Andrews, eating a meal together in the breakroom. H. Holiday checked their timecards and discovered that neither had clocked out for their break. H. Holiday asked them if they had clocked out, and they both indicated they had not. H. Holiday reported the situation to T. Holiday and Perren. (Testimony of H. Holiday)

30) H. Holiday's observations of Spezialy and her failure to clock out for breaks "bothered [him] to no end." H. Holiday began reviewing Spezialy's timecards and observed that she regularly worked more than six hours and did not clock out for breaks. H. Holiday decided to discharge Spezialy, because his review of her timecards was consistent with information provided to him by Esparza, who had told him that Spezialy regularly bragged about not clocking out for breaks. (Testimony of H. Holiday)

Holiday's Conduct Toward Spezialy

31) Spezialy grew increasingly more anxious when H. Holiday questioned her about clocking out for breaks. Spezialy opted to not take a break somedays so she could avoid having to engage with H. Holiday. (Testimony of Spezialy)

32) Spezialy's co-workers had reported to her that H. Holiday had made comments about her being transgender that suggested he did not agree with her transition. Spezialy overheard H. Holiday comment during a conversation with another employee in the workplace that he did not care how she identified because he still considered her to be a man. Spezialy also overheard H. Holiday comment that he did not agree with her being transgender or her coming out. Spezialy was aware H. Holiday had asked Perren what bathroom she would use after she "came out," and knew Perren had told him that it did not matter because the bathrooms were not gender specific. (Testimony of Spezialy)

33) H. Holiday frequently referred to Spezialy as "Robert" and not Raven, and he used incorrect pronouns when speaking to her or about her with her supervisor and co-workers throughout her employment. (Testimony of Spezialy, Andrews, and Erwin)

34) H. Holiday continued referring to Spezialy as "Robert" and using he/him pronouns during his interview with Senior Civil Rights Investigator Coury and during the hearing. (Testimony of Coury; Observation of ALJ)

35) On one occasion, H. Holiday "cherrypicked" Spezialy and Andrews, who was known to be friends and associated with Spezialy, to clean out his personal storage unit and transport his personal items to Sunstone. Spezialy heard H. Holiday comment that she and Andrews needed to "do real men's work" when he assigned them the task. (Testimony of Spezialy, Andrews)

36) In mid-June or early July 2018, H. Holiday yelled at Spezialy after a customer questioned why she was wearing a feminine work shirt. H. Holiday said Spezialy should be wearing more masculine clothes. (Testimony of Spezialy)

37) H. Holiday's comments regarding Spezialy being transgender hurt Spezialy and caused her to feel upset and anxious, particularly when H. Holiday was in the workplace. As a result, Spezialy had difficulty completing her shifts due to the anxiety she felt as a result of H. Holiday's behavior. (Testimony of Spezialy)

38) Crystal Doan is Spezialy's fiancée and has known Spezialy since 2014. Doan observed that Spezialy was increasingly more comfortable "passing" as female when Spezialy began working at Sunstone. Spezialy told Doan about how much she liked her job and her co-workers and how excited she was at the prospect of working as a driver for Sunstone. (Testimony of Doan)

39) Spezialy frequently complained to Doan about H. Holiday's treatment of her, including using the incorrect pronouns when referring to her and referring to her as "Robert." Spezialy was initially excited to go to work each day, but she began to "freak out" and express dread and anxiety about going to work toward the end of her employment due to the conduct of H. Holiday. Spezialy became more anxious and depressed as her employment progressed. Spezialy became more focused on her physical characteristics that she did not consider to be feminine, and her dress became more disheveled. Spezialy was "terrified" to present as female at the end of her employment due to H. Holiday's conduct toward her and her transition "backtracked." Spezialy became less able to handle snide comments she overheard in public and frequently left stores and public areas. (Testimony of Spezialy, Doan)

40) Spezialy had completed the therapy program required as a part of her transition at or near the time of her employment with Sunstone. While Spezialy considered therapy to deal with her anxiety and depression that was worsened as a result of H. Holiday's conduct toward her, she was unable to return to her therapist due to the therapist already having a long waiting list. Spezialy was unable to locate a new therapist as she struggled to deal with the anxiety and depression caused by her working conditions at Sunstone. (Testimony of Spezialy)

Spezialy's Timecards[2]

41) At some point in 2017 or 2018, Sunstone management met with employees and implemented a break policy, which required employees to clock out for a 30-minute meal break if the employee was scheduled to work more than six hours. The "free reign" employees previously had with breaks "changed for everybody" after this meeting. (Testimony of Erwin)

42) It is unclear as to whether Spezialy attended this meeting. (Observation of ALJ)

43) Sunstone did not require employees to clock out for breaks shorter than 30 minutes. Anyone working less than six hours was not required to clock out for a 30-minute break. (Testimony of T. Holiday, H. Holiday)

44) Spezialy worked a total of 18 shifts in November 2017. Of those 18 shifts, Spezialy clocked out for a 30-minute meal break during only her first two shifts. (Exs. X3, B1)

45) Spezialy worked a total of 19 shifts in December 2017. Spezialy clocked out for a 30-minute meal break for one shift and did not clock out for a break during the other 18 shifts, all of which were longer than six hours. (Exs. X3, B1)

46) Spezialy worked a total of nine shifts in January 2018. Spezialy clocked in and out for a 30-minute meal break for four shifts and made handwritten entries for a 30-minute meal break for four shifts. The remaining shift was less than six hours long. (Exs. X3, B1)

47) Spezialy worked a total of 20 shifts in February 2018. There is one handwritten entry for the start of a 30-minute meal break. Three shifts were less than six hours long. Spezialy clocked out for a 30-minute break for the remaining shifts. (Exs. X3, B1)

48) Spezialy worked a total of 20 shifts in March 2018. Spezialy clocked out for 30-minute meal breaks for each shift except for those that were less than six hours. There is only one handwritten entry regarding the start time of a shift. (Exs. X3, B1)

49) Spezialy worked a total of 19 shifts in April 2018. Spezialy clocked out for a 30-minute break during nine shifts. There are handwritten entries for the beginning of

[2] While some of Spezialy's timecard entries were illegible, the majority of the timecard entries were sufficiently legible to make out the approximate length of the shift, as well as if any breaks were taken.

a 30-minute meal break for three shifts. The remaining shifts were less than six hours long. (Exs. X3, B1)

50) Spezialy worked a total of 21 shifts in May 2018. Spezialy clocked in and out for a meal break during four shifts. Ten shifts were less than six hours long. Spezialy worked seven shifts that were longer than six hours in which no break is noted as having been taken. (Exs. X3, B1)

51) In June 2018, Spezialy worked a total of 20 shifts. Eight of those shifts were less than six hours. Spezialy clocked out for a 30-minute break for one shift and did not do the same for the remaining shifts. (Exs. X3, B1)

52) In July 2018, Spezialy worked a total of 13 shifts. Five of those shifts were longer than six hours and no breaks were noted as having been taken. The remaining shifts were less than six hours in length. There were four handwritten entries regarding the start and end time of a shift. (Exs. X3, B1)

Sunstone Employees at the time of Spezialy's Employment

Robert Andrews

53) Andrews began working as a production associate for Sunstone on April 10, 2018. (Testimony of Andrews)

54) Andrews previously worked with Spezialy at another job where he knew her as Raven. (Testimony of Andrews)

55) On approximately the third day of Andrews' employment at Sunstone, he was working with Spezialy when H. Holiday threatened to fire both of them for talking too much. Spezialy was in the middle of training Andrews at the time. (Testimony of Andrews)

56) Andrews observed H. Holiday refer to Spezialy as "Robert" and use he/him pronouns when referring to Spezialy. (Testimony of Andrews)

57) H. Holiday fired Andrews for "talking too much" on the same day he fired Spezialy. (Testimony of Andrews)

Rikki Erwin

58) Erwin was hired to work as a production associate at or near the time Spezialy began in her employment at Sunstone. Erwin worked at Sunstone for approximately three years before leaving the employment in September of 2019. Erwin worked as a production associate before ultimately working as a Shift Lead. (Testimony of Erwin)

59) Erwin found H. Holiday was "not the easiest person to get along with." Erwin observed H. Holiday frequently interfered with production when he was in the facility. Erwin understood that both Perren and T. Holiday told H. Holiday to stop interfering with production. (Testimony of Erwin)

60) H. Holiday "cornered" Erwin on one occasion in the sticker room and demanded to know why she was given a key to the room. Erwin received the key as the night shift lead. Erwin noticed H. Holiday was "not nice" and things were "tense" when H. Holiday was in the facility. Erwin noticed this was most pronounced with female employees. (Testimony of Erwin)

61) Erwin never personally observed H. Holiday have a negative interaction with Spezialy but heard from other employees that H. Holiday had questioned what bathroom Spezialy would use after she came out as a transgender. (Testimony of Erwin)

Zyanna Esparza

62) Esparza worked for Sunstone for approximately three years beginning in 2017. Esparza began working for Sunstone as a production associate and subsequently worked as a shift lead and trainer. Esparza most recently worked as Sunstone's retail store manager. Esparza no longer works for Sunstone. (Testimony of Esparza)

63) Esparza became friends with T. Holiday and H. Holiday through her employment at Sunstone. Esparza considered H. Holiday a father figure and was impressed with his entrepreneurial skills. H. Holiday considered Esparza to be a daughter due to the closeness of their relationship. (Testimony of Esparza, H. Holiday)

64) Esparza observed H. Holiday had an "old school mentality," and he was stern when correcting employees' behavior. Esparza never observed H. Holiday act in a transphobic manner toward Spezialy or other Sunstone employees. However, Esparza did observe H. Holiday yell at Spezialy, but believed it was due to her performance and not Spezialy's gender identity. (Testimony of Esparza)

65) In mid-January 2018, Esparza reported concerns she had with T. Holiday regarding the performance of Spezialy and other employees. Esparza told T. Holiday that she thought Spezialy was taking advantage of his relaxed management approach, and she was not adequately performing her job duties. Esparza also reported concerns with the quality of Spezialy's work. Esparza also reported Spezialy took excessive breaks, frequently failed to clock out for breaks, and bragged to her and to others that she was not clocking out for breaks. (Testimony of Esparza)

Joshua Roach

66) Joshua Roach has worked for Sunstone for approximately three years. Roach began working in production and became a driver within a few weeks of his hire date. Roach observed Spezialy "brag" about picking up Andrews while still on the clock. (Testimony of Roach)

67) Roach never observed H. Holiday treat Spezialy poorly due to her gender identity. (Testimony of Roach)

68) Roach understood Spezialy was discharged due to timecard issues. (Testimony of Roach)

Matthew Verdugo

69) Verdugo is currently Sunstone's Division Manager for the Portland region. Verdugo has worked for Sunstone for approximately four years and has worked in production, deliveries, and logistics management. (Testimony of Verdugo)

70) Verdugo became familiar with Spezialy when he did deliveries, and Spezialy was responsible for cleaning and loading delivery vehicles. Verdugo never worked directly with Spezialy and was an infrequent presence at Sunstone's production facility. (Testimony of Verdugo)

71) Verdugo noticed that Spezialy usually wanted to chat when he arrived at the facility between 10:00 p.m. and 11:00 p.m. These conversations typically lasted an hour or more. Spezialy did not seem to care that she was on the clock when Verdugo questioned her about whether she was "on the clock." (Testimony of Verdugo)

72) Verdugo did not report his observations to either T. Holiday or H. Holiday, because he assumed the appropriate person would review the surveillance video at the facility and discover what he considered to be timecard fraud by Spezialy. (Testimony of Verdugo)

73) Verdugo never witnessed any discriminatory conduct by H. Holiday. (Testimony of Verdugo)

74) Verdugo understood Spezialy was discharged due to timecard issues. (Testimony of Verdugo)

Spezialy's Complaint to T. Holiday

75) On July 9, 2018, Spezialy sent an email to T. Holiday and Perren entitled, "Complaint." In the letter attached to the email, Spezialy complained about H. Holiday's behavior, which she described as including "screaming at employees, aggressively questioning about breaks and weather [sic] or not they are on the clock, harassing

people before they have clocked in, making threats to employment, and even remarks on employees [sic] personal matters. For example, gender and pronoun preferences." (Exs. A14, A15)

76) Spezialy noted in her letter that she believed H. Holiday had created a hostile work environment for her due to his behavior. Spezialy signed her letter, "Robert (Raven) Spezialy." (Exs. A14, A15)

77) T. Holiday was not in the office when he received Spezialy's email. T. Holiday did not address the email with Spezialy or discuss it with either Perren or H. Holiday. T. Holiday assumed Perren had received a copy of Spezialy's email and letter. (Testimony of T. Holiday)

78) Spezialy observed H. Holiday became "more aggressive" with her after she reported her concerns to T. Holiday. (Testimony of Spezialy)

79) On July 24, 2018, Perren approached Spezialy in the parking lot prior to her clocking in for her shift. Perren informed her that she had been fired by H. Holiday overnight. (Testimony of Spezialy)

80) H. Holiday was not aware of Spezialy's complaint to H. Holiday and Perren when he made the decision to terminate her employment on July 24, 2018. (Testimony of H. Holiday)

Credibility of the Witnesses

81) Spezialy's testimony was fairly detailed regarding events in which H. Holiday subjected her to different treatment than her co-workers due to her gender identity. Spezialy's testimony was direct and responsive to the questions asked by both Agency counsel and Respondents' counsel. (Testimony of Spezialy)

82) Respondents attempted to impeach Spezialy by introducing evidence showing she had been charged with several counts of contributing to the delinquency of a minor when she was 18 years old. Respondents also attempted to use issues Spezialy had regarding child custody and child support issues to impeach Spezialy's credibility. Spezialy's actions as an 18-year-old involving her younger brother and his friends does not tend to discredit her testimony regarding her experiences working for Sunstone.

Similarly, the forum was not persuaded to find Spezialy's testimony less credible based upon Respondents' attempt to impeach Spezialy with evidence pertaining to information she provided in her name change application pertaining to past child support issues and criminal history. It is unclear whether Spezialy deliberately provided false information to the court or if she was genuinely confused as to the legal status of the issues raised by Respondents at hearing. Spezialy's testimony was not impeached by any substantial and credible evidence. Further, concerns Spezialy had regarding the

treatment she received from Washington state authorities does not necessarily mean that her concerns were based upon issues she has with authority figures or taking criticism from her supervisors, as suggested by Respondents. (Testimony of Spezialy)

83) Doan has an obvious interest in the outcome of this case. Doan's testimony regarding the events that occurred in the workplace was not given great evidentiary weight, given that it was entirely based on information provided to her by Spezialy. However, Doan's testimony regarding her observations of Spezialy's emotional state during her employment at Sunstone and thereafter was considered to the extent it was consistent with other credible evidence. (Testimony of Doan)

84) H. Holiday discharged Andrews at the same time he discharged Spezialy. Andrews had a personal interest in the outcome of this case as he is a close friend of Spezialy's, and he believes he was discharged by H. Holiday as a result of his association with Spezialy. Andrews' testimony is deemed credible to the extent it is consistent with other credible evidence of record. (Testimony of Andrews)

85) Esparza's testimony was clear and direct and is deemed generally credible. Esparza's testimony as to her regard for T. Holiday and that she considered H. Holiday a "father figure" shows an interest in the outcome of the proceeding. Further, H. Holiday's testimony that he was "closest" to Esparza and considered Esparza daughter makes her testimony less credible. Esparza's testimony is deemed credible to the extent it is consistent with other credible evidence of record. (Testimony of Esparza)

86) Verdugo and Roach testified that they understood that Spezialy was discharged due to timecard issues. The Agency did not elicit testimony as to how they came to gain that knowledge given that he was working at a different location and rarely interacted with Spezialy. The similarity of their testimony as to their understanding of the reasons for Spezialy's discharge, as well as the fact they continue to work for Sunstone, calls into question the credibility of their testimony as to the reasons for Spezialy's discharge. (Testimony of Verdugo, Roach)

87) The testimony of T. Holiday was generally credible as he demonstrated no significant animus toward Spezialy or her gender identity. T. Holiday is no longer involved with Sunstone. However, he clearly has an interest in the outcome of the proceeding. Therefore, T. Holiday's testimony was considered to the extent it did not conflict with other credible evidence of record. (Testimony of T. Holiday)

88) The testimony of H. Holiday was generally credible as to what he observed in the production area regarding Spezialy's failure to clock out for breaks as it was consistent with the timecards and the testimony of several witnesses. However, H. Holiday's testimony was frequently self-serving and focused more on promoting Sunstone and his efforts in developing the business rather than providing a direct answer to the question asked. The forum has credited H. Holiday's testimony to the extent it was corroborated by other credible evidence. (Testimony of H. Holiday)

89) The forum credited Spezialy's testimony when it conflicted with H. Holiday's testimony.

CONCLUSIONS OF LAW

1) Respondents did not terminate Spezialy's employment because of her sexual orientation (gender identity). ORS 659A.030(1)(a).

2) Respondents did not discharge, expel, or otherwise discriminate against Spezialy because she opposed Respondents' unlawful harassment as there is no evidence showing either T. Holiday or Perren communicated Spezialy's complaint to H. Holiday prior to his making the decision to terminate her employment. ORS 659A.030(1)(f); OAR 839-005-0125(1)-(3) and OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A)

3) Respondents Sunstone Organics, LLC and H. Holiday subjected Spezialy to harassment because of her sexual orientation (gender identity) that was sufficiently severe or pervasive, such that it unreasonably interfered with her work performance and created an intimidating, hostile and offensive working environment in a hostile work environment because in violation of ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(b).

4) Respondent Sunstone Organics, LLC is liable for the unlawful harassment because the harasser was H. Holiday, whose rank was such that he served as the employer's proxy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c).

5) Respondent Sunstone Organics, LLC is liable for the harassment by H. Holiday, who was a supervisor with immediately or successively higher authority over Spezialy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A), (C), (D).

6) H. Holiday aided or abetted Respondent Sunset Organics, LLC's unlawful practice described above 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. 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.

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 issue a cease and desist order based on Respondents' unlawful practices. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges that Respondents engaged in discrimination on the basis of sexual orientation (gender identity) in violation of ORS 659A.030(1)(a),(b) and discrimination for opposing an unlawful practice in violation of ORS 659A.030(1)(f). The allegations set forth in the Formal Charges include the following:

- Respondent terminated Spezialy because of her sexual orientation (gender identity) in violation of ORS 659A.030(1)(a).

- Respondent subjected Spezialy to harassment based on her sexual orientation (gender identity) that was sufficiently severe or pervasive, such that it unreasonably interfered with her work performance and created an intimidating, hostile and offensive working environment. ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(b).

- Respondent is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy. As one of two members of Respondent Sunstone Organics, LLC, H. Holiday's rank is sufficiently high so that he serves as the employers' proxy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c).

- Respondent Sunstone Organics LLC is liable for harassment by a supervisor with immediate or successively higher authority over Spezialy because she was removed from training to be a driver, not promoted to a driver position and terminated. ORS 659A.030(1)(b), OAR 839-005-010(4)(a)(A)(B)(C),(d)(A),(C),(D).

- Respondents subjected Spezialy to different terms and conditions because she opposed Respondents' unlawful harassment pursuant to ORS 659A.030(1)(f). OAR 839-005-0125(1)-(3) and OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A).

- Respondent Hugh Holiday was an aider and abettor pursuant to ORS 659A.030(1)(g).

The Agency seeks lost wages and out of pocket expenses in amounts to be determined at hearing and damages for emotional, mental, and physical suffering in the amount of at least $250,000.

LIABILITY FOR DISCHARGE BECAUSE OF SEXUAL ORIENTATION (GENDER IDENTITY)

It is an unlawful employment practice for "[a]n employer, because of an individual's * * * sexual orientation * * * to discharge the individual from employment." ORS 659A.030(1)(a), amended by Or Laws 2021, ch. 585, § 10.

To establish that Sunstone violated ORS 659A.030(1)(a) by terminating Spezialy's employment, the Agency must establish a prima facie case consisting of the following five elements: (1) Sunstone was an employer pursuant to ORS 659A.001(4)(a); (2) Sunstone employed Spezialy; (3) Spezialy was in a protected class; (4) Sunstone discharged Spezialy; and (5) Sunstone discharged Spezialy because of her sexual orientation (gender identity). *In the Matter of Vision International Petroleum, LLC*, 37 BOLI 187, 196 (2019).

While there is no dispute as to Elements One, Two and Four, Elements Three and Five remain in dispute.

Element Three – Membership in a Protected Class

Prior to 2021, "gender identity" was not set forth individually as a defined protected class under ORS 659A.030(1)(a), *amended by* Or Laws 2021, c. 367, § 35, eff. June 23, 2021. Spezialy's employment with Sunstone was in 2018. At the time relevant to this matter, the Agency by OAR 839-005-0003(16) defined "sexual orientation" 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(8) defined "gender identity" as:

> "an individual's gender-related identity, whether or not that identity is different from that traditionally associated with the individual's assigned sex at birth, including, but not limited to, a gender identity that is transgender or androgynous."

OAR 839-005-0003(7) defined "gender expression" to mean:

> "the manner in which an individual's gender identity is expressed, including, but not limited to, through dress, appearance, manner, or speech, whether or not that expression is different from that traditionally associated with the individual's assigned sex at birth."

Spezialy presented as male at the time of her hire and was known as "Robert." Spezialy had started her gender transition near the time she began working at Sunstone. Spezialy informed her supervisor and her co-workers shortly after she began in her employment with Sunstone that she wished to be referred to as Raven and began wearing feminine style clothing to work. Spezialy expressed her gender identity through her dress, appearance, and manner. Spezialy was a member of a protected class based upon sexual orientation (gender identity) pursuant to ORS 659A.030(1)(a). OAR

839-005-0003(7),(8),(16). Therefore, the Agency has established Element Three of the prima facie case.

Element Five – Discharge Because of Sexual Orientation (Gender Identity)

The fifth element -- causal connection -- is disputed, with the Agency asserting Spezialy was discharged because of her gender identity and Respondents asserting Spezialy was discharged due to her lackluster job performance and repeated failure to clock out for 30-minutes breaks.

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. OAR 839-005-0010(1)(a)(A). *See, e.g., In the Matter of Cyber Center, Inc., dba Cybercenter Sports Grill and Gary Speaks as Aider/Abettor,* 32 BOLI 11, 32 (2012) citing *In the Matter of WINCO Foods, Inc.,* 28 BOLI 259, 300 (2007); *In the Matter of Wal-Mart Stores, Inc.,* 24 BOLI 37, 61 (2002). While specific intent may be established by direct evidence of a respondent's discriminatory motive, it may also be shown through circumstantial evidence. *Id.*

There is no direct evidence that Spezialy was discharged due to her sexual orientation (gender identity). Respondents' witnesses testified that the decision to discharge Spezialy was based on her performance issues and timecard issues. Spezialy conceded she had received a "handful" of warnings throughout her employment. Spezialy testified she took the warnings seriously and attempted to correct the issues as they were brought to her attention. Respondents offered no documentation as to the alleged performance concerns.

The Agency alleged in the Formal Charges that H. Holiday made the decision to remove Spezialy from driver training and to not promote her to a driver position. The preponderance of the evidence shows T. Holiday made that determination at or near the time he met with Esparza in January 2018 when he determined Spezialy's performance did not make her a good candidate for the driver position, which required a good deal of independence. There was no evidence offered showing H. Holiday influenced that decision or had any role in removing Spezialy from driver training or denying Spezialy a driver position.

Respondents' witnesses indicated in their testimony that Spezialy was discharged due to "timecard issues" or failure to clock out for breaks. Spezialy admitted she occasionally failed to clock out for breaks at the beginning of her employment. Spezialy testified she was not required to clock out for breaks at her last job, so she was not aware she was required to do so at Sunstone. Spezialy testified she stopped taking breaks toward the end of her employment because of the "constant" harassment by H. Holiday about not clocking out. Spezialy's timecards reflect that she did not clock out for a 30-minute break during several shifts in which she worked more than six hours.

Respondents have produced sufficient evidence by way of the timecards, as well as the testimony of its witnesses, to support its contention that Spezialy regularly failed to clock out for breaks. The forum is not convinced that Spezialy did not understand this requirement, given she clocked out for breaks for the majority of her shifts beginning in January 2018. However, consistent with Spezialy's testimony, she stopped clocking out for break in May 2018 and continuing through the rest of her employment at Sunstone. The forum is somewhat perplexed as to why Spezialy made the decision to stop taking breaks when, by all accounts, H. Holiday's issue was not with her taking breaks but, rather, her not clocking out for a 30-minute break.

Additionally, the evidence does not support a finding that H. Holiday made the decision to terminate Spezialy's employment when he discovered Spezialy was transitioning from male to female. Spezialy "came out" as transgender within a month of starting her employment. Spezialy testified she asked her co-workers and supervisor to refer to her as Raven and to use she/her pronouns. Spezialy testified everyone respected her wishes except H. Holiday, who referred to her as "Robert" and he/him pronouns, which suggests he had some knowledge of her gender identity well before he made the decision to terminate her employment. Further, Spezialy testified she suspected H. Holiday was treating her aggressively due to her gender identity throughout her employment, which does not suggest a discovery of that information by H. Holiday at or near the time he made the decision to discharge Spezialy.

As noted above, the evidence clearly shows that Spezialy was not clocking out for breaks. H. Holiday testified he reviewed Spezialy's timecards when he observed her having a meal with Andrews and they both confirmed they had not clocked out for break, which "bothered him to no end." (Finding of Fact # 29) H. Holiday testified he discharged Spezialy after reviewing her timecards and discovering she had not clocked out for several breaks despite being told she was required to do so. (Testimony of H. Holiday)

The forum finds credible H. Holiday's testimony that he decided to terminate Spezialy's employment after a review of her timecards confirmed for him that she was regularly not clocking out for breaks. Therefore, the Agency has failed to show a causal connection between Spezialy's membership in a protected class and the adverse employment action. For these reasons, the forum concludes that Respondents did not discharge Spezialy because of her sexual orientation (gender identity). ORS 659A.030(1)(a).

LIABILITY FOR DISCHARGE BECAUSE OF OPPOSITION TO UNLAWFUL HARASSMENT

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

> "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."

The Agency's prima facie case in an ORS 659A.030(1)(f) retaliatory discharge case consists of the following elements: (1) Spezialy opposed an unlawful employment practice; (2) Sunstone subjected Spezialy to an adverse action; and (3) there is a causal connection between Spezialy's opposition and the adverse action. *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 288 (2009)

The evidence shows Spezialy sent an email to T. Holiday and Perren on July 9, 2018, and was terminated by H. Holiday on July 24, 2018. T. Holiday testified he was out of the office at the time he received Spezialy's email and denied discussing the contents of the email with either H. Holiday or Perren. *See* Finding of Fact – the Merits #77. H. Holiday denied being aware of Spezialy's email at the time he made the decision to terminate her employment. *See* Finding of Fact – the Merits #80.

The Agency has shown that Spezialy opposed an unlawful employment practice by sending the email to T. Holiday and Perren outlining her concerns regarding H. Holiday's conduct toward her in the workplace. Therefore, the Agency has satisfied the first element of its prima facie case. Similarly, the Agency has shown that Spezialy suffered an adverse action when H. Holiday terminated her employment on July 24, 2018, thereby satisfying the second element of its prima facie case. However, the Agency has not shown a causal connection between the protected activity and the adverse action.

Proof of a causal connection between protected conduct and a materially adverse action can be established (1) "indirectly, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct" or (2) "directly, through evidence of retaliatory animus directed against a plaintiff by the defendant." *Boynton-Burns v. University of Oregon*, 197 Or. App. 373, 380, 105 P.3d 893 (2005) (emphases in original; internal quotation marks omitted). "If the plaintiff attempts to establish the causal connection indirectly, relying on mere temporal proximity between the events, the events must be 'very close' in time." 197 Or. App. at 381, 105 P.3d 893 (citing *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149 L.Ed. 2d 509 (2001)).

Respondents argue that Spezialy was terminated due to her continuing timecard issues and not due to her complaint to T. Holiday and Perren. The fact that only 15 days passed between Spezialy's July 9, 2018, email to T. Holiday and Perren and the termination of her employment on July 24, 2018, gives rise to an inference of a causal connection between the two events. However, the evidence does not show that the adverse action was taken because of Spezialy's complaint. *See Medina v. State of Oregon*, 278 Or. App. 579, 588, 377 P.3d 626 (2016). There is no evidence showing that H. Holiday was aware of Spezialy's complaint at the time he made the decision to terminate her employment. Even if it was found that temporal proximity alone was

established the requisite causal connection, there is no evidence showing that the reasons proffered by Respondents for Spezialy's termination was a pretext for retaliation. *LaCasse v. Owen*, 278 Or. App. 24, 35-36, 373 P.3d 1178 (2016). Therefore, the Agency has failed to establish the final element of its prima facie case. As such, the Agency has failed to show that Respondents retaliated against Spezialy because of her opposition to an unlawful employment practice in violation of 659A.030(1)(f).

LIABILITY FOR DISCRIMINATION BASED ON SEXUAL ORIENTATION (GENDER IDENTITY)

The Agency alleges that Respondents subjected Spezialy to discriminatory terms and conditions of employment based on her sexual orientation (gender identity) through the ongoing behavior of Respondent H. Holiday that was sufficiently severe or pervasive to have the effect of unreasonably interfering with their work performance or creating a hostile, intimidating or offensive working environment in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C),(b).

OAR 839-005-0030(2) provides:

> "The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it."

In determining whether conduct is sufficiently severe or pervasive to have created a hostile, intimidating or offensive working environment, the forum looks at the totality of the circumstances, i.e., the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of From the Wilderness, Inc*., 30 BOLI 227, 287 (2009). "The working environment must subjectively and objectively be perceived as abusive." *Freeho Inc., v. BOLI*, 319, Or App 548, 558, __ P.3d ___ (2022), citing *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21-22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993). "More specifically, whether the workplace is objectively hostile is determined "from the perspective of a reasonable person with the same fundamental characteristics" as the plaintiff." *Id*. at 549, citing *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995). The forum looks at the "totality of the circumstances" when making this determination. *In the Matter of Andrew W. Engel, DMD, PC*, 32 BOLI 94, 120 (2012), citing *In the Matter of Fred Meyer, Inc*., 15 BOLI 77 (1996), affirmed, *Fred Meyer v. Bureau of Labor and Industries*, 152 Or App 302, 309, 954 P2d 804 (1998).

In this case, the conduct consisted of (1) H. Holiday questioning what bathroom Spezialy would use in a facility without gender specific bathrooms; (2) H. Holiday using incorrect pronouns and referring to her as "Robert" despite being told of Spezialy's wishes and being corrected by employees such as Erwin and Perren; (3) H. Holiday yelling at Spezialy after a customer questioned why she was wearing a feminine style

work shirt; and (4) H. Holiday assigning Spezialy to clean out his personal storage space and declaring it to be "men's work." The forum is not persuaded that H. Holiday's questioning of Spezialy regarding her failing to clock out for breaks was based on her sex (gender identity). As an employer, he had the right and the duty to question whether an employee had properly clocked out for a break. Further, Spezialy conceded she did not clock out for breaks at times during her employment, despite demonstrating an ability to do so.

The conduct complained of all occurred at Spezialy's workplace and in the presence of her co-workers and friends. The conduct was all attributable to H. Holiday, an owner of Sunstone and the father of the second owner. As to the frequency, severity, and pervasiveness, the conduct occurred regularly, albeit not "constantly" as alleged by Spezialy, throughout her employment and frequently interfered with her ability to work her entire scheduled shift. Spezialy testified she often left work before the end of her shift due to her anxiety being exacerbated by H. Holiday's presence in the facility and his past conduct toward her. Spezialy testified these feelings of anxiety, anger, sadness and hurt continued outside of work and, at times, affected her home life.

Considering all of the above, the forum must ultimately determine whether a reasonable person in the circumstances of the complaining individual would have perceived the conduct to be sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment. OAR 839-005-0010(4)(b). A reasonable person in Complainant's circumstances would be an individual who is transgender and who had come out to her employer, co-workers, and friends. Under those circumstances, a reasonable individual facing similar circumstances would perceive H. Holiday's conduct to be sufficiently severe or pervasive to create a hostile, intimidating, or offensive working environment. The Agency has shown that H. Holiday's conduct toward Spezialy was sufficiently severe or pervasive to have the effect of creating a hostile, intimidating or offensive working environment for Spezialy's in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A).

Sunstone is Liable for H. Holiday's Discriminatory Conduct

To determine whether Sunstone is liable for H. Holiday's discriminatory conduct toward Spezialy, the forum must first determine whether H. Holiday's rank was at a level to warrant imposition of liability against Sunstone. The forum considered a similar issue in *Vision International*, 37 BOLI at 197, and noted:

> "Supervisors with 'immediate (or successively higher) authority over the employee' are considered agents of an employer for purposes of an employer's Title VII liability. *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998).[3] Determining whether a particular individual is a supervisor 'is not dependent

[3] Federal law similar to Oregon's civil rights laws is not binding on the forum, but federal decisions can be instructive in construing and applying similar state law. *Bravo Event Services, Inc. and Dan Kor*, 36 BOLI 250, 265 (2018). *See also In the Matter of Murrayhill Thriftway, Inc.,* 20 BOLI 130, 149 (2000) (stating that "decisions interpreting Title VII are instructive in construing and applying the similar state law").

> upon job titles or formal structures within the workplace.' *Dawson v. Entek Int'l.,* 630 F3d 928, 940 (9th Cir 2011), *citing McGinest v. GTE Service Corp*., 360 F3d 1103, 1119 n.13 (9th Cir 2004). Rather, for purposes of vicarious liability under Title VII a person is a supervisor 'if he or she is empowered by the employer to take tangible employment actions against the victim.' *Vance v. Ball State University*, 570 US 421, 424 (2013). A tangible employment action is 'a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits'." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)."

H. Holiday was one of two members of Sunstone Organics, LLC. H. Holiday had the apparent and actual authority to control and to direct the work performance of Sunstone's employees and the authority to take tangible employment action against Spezialy. As such, the forum determines that H. Holiday had "immediate (or successively higher)" authority over Spezialy, and is, therefore, considered an agent of Sunstone for purposes of any employer's liability. ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A), (C), (D). *See Vision International*, 37 BOLI at 197. Similarly, H. Holiday's rank as a part-owner of Sunstone was sufficiently high that he served as a proxy for the employer. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c). Therefore, Sunstone is liable for H. Holiday's discriminatory conduct.

LIABILITY OF H. HOLIDAY FOR AIDING OR ABETTING AN UNLAWFUL PRACTICE

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." The forum has found that a corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided or abetted the corporation's unlawful employment practice. *In the Matter of Vision International*, 37 BOLI at 218. *See also In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67 (2012); *In the Matter of Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012).

The forum's approach is consistent with the approach outlined by the Oregon Court of Appeals in *Allison v. Dolich*, 321 Or App 721, 726, 518 P.3d 591, 595 (2022). The court reasoned that the plain text of ORS 659A.030(1)(g) makes clear that it applies to any person, which "includes a business-entity employer's principal decision-maker directing the entity." *Id.* at 725. The court reasoned that the term "any person," as used in ORS 659A.030(1)(g) is "broad enough to cover those persons who act on behalf of the employer – indeed, the statute expressly references 'an employer or employee'." *Id.* at 726. The court concluded that it was the legislature's intention to hold "persons directing the business-entity employer's unlawful conduct" individually liable under ORS 659A.030(1)(g). *Id.* Ultimately, the court ultimately concluded, "whether the individual defendants were acting in their personal capacities or on behalf of the LLCs, they were 'persons' who assisted the LLCs by making decisions that enabled the violations." *Id.*

H. Holiday was one of two members of the limited liability corporation the other being his son, T. Holiday. H. Holiday had the ability to "aid, abet, incite, compel or coerce" the hostile work environment, " given his status within the limited liability corporation and the role he held in the daily operations of the business. ORS 659A.030(1)(g). H. Holiday aided or abetted the unlawful harassment of Complainant by failing to take corrective action to ensure Spezialy could work in an environment free of discrimination and actively participating in the discriminatory actions. Therefore, H. Holiday is in violation of ORS 659A.030(1)(g). As an aider or abettor, H. Holiday is jointly and severally liable with Sunstone for Sunstone's unlawful employment practices.

DAMAGES

Back Pay and Out of Pocket Expenses

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 respondents' unlawful employment practices. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *Id.* A complainant who seeks back pay is required to mitigate damages by using reasonable diligence to find other suitable employment. *Id.* As set forth above, the forum did not find Sunstone's discharge of Spezialy was an unlawful employment practice. As such, Spezialy is not entitled to a back pay award.

Out-of-pocket expenses that are directly attributable to unlawful employment practice are recoverable from a respondent as a means to eliminate the effects of any unlawful practice found, including actual expenses. *In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI 121, 158 (2014). Here, the forum awards no damages for out-of-pocket expenses because no evidence was presented at hearing that would give the forum a basis for calculating such an award. *Id*.

Damages for Emotional and Physical Suffering

In its Formal Charges, the Agency seeks "at least $250,000.00" in damages for Complainant's "emotional, mental, and physical suffering" resulting from Respondents' unlawful employment practices. Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering sustained. *In the Matter of Frehoo Inc.*, 36 BOLI 42, 71 (2015), *rev'd and rem'd on other grounds,* 319 Or App 548, __ P.3d ___ (2022).

Emotional distress damages are recoverable if they result from the harm caused by the unlawful conduct. *See, e.g., In the Matter of Andrew Engel, DMD, PC,* 32 BOLI at 123 (in a religious harassment case, the complainant's anxiety and stress were suffered as a result of the employer's unlawful conduct). As the forum has previously noted:

> "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 Edgewood Construction LLC, 37 BOLI 2, 15 (2018)(internal citation omitted). Further, "[t]his forum has long held that respondents must take complainants 'as they find them,'" meaning a respondents' unlawful conduct may cause more harm to a particular complainant than to others. *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 37 (2014), *aff'd sub nom Johnson v. Or. Bureau of Labor & Indus.,* 290 Or App 335, 415 P3d 1071 (2018).

Spezialy enjoyed her job and liked her co-workers but her attitude toward her job changed as a result of H. Holiday's conduct. *Id*. Doan testified that Spezialy frequently "freaked out" about having to go to work out of fear of dealing with H. Holiday and was visibly distressed when preparing to go to work at the end of her employment. *Id*. Doan described Spezialy's transition as being "backtracked" as a result of H. Holiday's conduct. *Id*. Spezialy became more dysphoric regarding her physical characteristics and began dressing in baggy jeans and "hole-y" t-shirts. *Id*. Spezialy became more anxious about leaving the house out of fear of people questioning her gender like H. Holiday had done. *Id.*

The forum finds that an award of $125,000 is appropriate in this case due to the effect H. Holiday's conduct had on Spezialy, who at the time of her employment was in the process of transitioning. Spezialy credibly testified that H. Holiday's conduct toward her caused her to become more anxious and depressed. Both Spezialy and Doan testified that Spezialy became terrified to present as female due to H. Holiday's conduct, which led to Spezialy avoiding public areas out of fear that that people would make comments about her similar to those made by H. Holiday. *See* Finding of Fact – the Merits #39. The record shows H. Holiday's conduct affected Spezialy not only at work but in her personal life outside of work.

The award of $125,000 in emotional distress damages is consistent with the forum's award in *In the Matter of Navex Global, Inc*., 36 BOLI 202 (2018), in which the forum awarded Complainant $120,000 in emotional distress whose preexisting anxiety condition was worsened as a result of the discriminatory conduct of the Respondent in discharging Complainant because of their jury service. Unlike the Complainant in *Vision International,* who was awarded $60,000 in damages for emotional, mental, and suffering, the record shows that H. Holiday's discriminatory conduct had a lasting impact on Spezialy up to the date of hearing. *Vision International*, 37 BOLI at 201.

The forum concludes $125,000 is an appropriate award of emotional distress damages as a result of H. Holiday's unlawful discrimination. *See, e.g. In the Matter of Blachana, LLC*, 32 BOLI 220, 249-253 (2013)($40,000 in emotional and mental

suffering damages awarded to 11 complainants who were denied a public accommodation because of their sexual orientation); *In the Matter of Andrew W. Engel, DMD, PC*, 32 BOLI at 140-141 ($325,000 awarded for emotional and mental suffering following discrimination and constructive discharge because of Complainant's religion); *In the Matter of Cyber Center, Inc*., 32 BOLI at 39 ($120,000 in emotional and mental suffering damages awarded after Complainant was demoted and discharged because of sex(pregnancy)); *In the Matter of Crystal Springs Landscapes,* Inc., 32 BOLI 144, 170 (2012)($150,000 in emotional and mental suffering damages awarded for sexual harassment and discharge); *In the Matter of From the Wilderness, Inc*., 30 BOLI at 291 ($125,000 in emotional and mental suffering damages awarded for sexual harassment and hostile work environment).

Additional Relief Requested by the Agency

In its Formal Charges, the Agency requested a Cease and Desist Order be entered against the Respondents that included "such other relief as is appropriate to eliminate the effects of the unlawful practices found both as to Complainant and as to others similarly situated." 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.

EXCEPTIONS TO THE PROPOSED ORDER

On February 24, 2022, the Agency and Sunstone timely filed exceptions to the Proposed Order. Most of the exceptions have been addressed in this Final Order above, except for four exceptions to procedural issues that are addressed below:

Exception 2

Respondents argue that Spezialy did not sign the Amended Complaint (Ex. A2) and it is unclear whether Spezialy amended the Complaint. The Amended Complaint

sets forth the same allegations as are set forth in the original Complaint (Ex. A1). The only difference between the two Complaints is the Complainant's name, which was changed from "Robert M. Spezialy" to "Raven M. Spezialy."

OAR 839-03-0040 provides in pertinent part:

> "(2) The division may amend a complaint to correct technical defects and to add additional persons as respondents. The division may amend a complaint on its own initiative or at the aggrieved person's request (with the division's agreement) at any time prior to the issuance of formal charges, except that respondents may only be added during the course of investigation. Examples of technical defects include: clerical errors, additions or deletions, name and address corrections, and statute or rule citation errors.
>
> "(3) A complaint may be amended to add a protected class only if the addition is supported by facts already alleged. New facts may not be added. If new facts are alleged, the aggrieved person must file a new complaint meeting the standards provided in OAR 839-003-0005(5).
>
> "(4) Amended complaints need not be verified or signed by the aggrieved person."

OAR 839-003-0040(2),(3),(4)

No new facts were added in the Amended Complaint. The only change made was to cure a technical defect, as defined in OAR 839-003-0040(2). Therefore, the signature of the Complainant is not required for an Amended Complaint. Respondents' exception to the Amended Complaint (Ex. A2) is OVERRULED.

Exception 22

Respondents object to the forum's decision to conduct the hearing via video conference rather than an in-person hearing.

On November 17, 2021, the forum issued an Interim Order Ruling on Respondents' Formal Objections to Video Conference Hearing. The forum acknowledged that the parties preferred an in-person hearing. The forum noted the efforts made to find a physical location that would accommodate the safety precautions in place at that time due to the COVID-19 pandemic. The forum acted according to the responsibilities outlined for ALJ's under OAR 839-050-0240(1)(d) and well within the authority granted under OAR 839-050-0255. The ALJ acted in a manner that was respectful of the parties' preference for an in-person hearing, while being mindful of the safety precautions mandated by state and federal health authorities at that time. Respondents' Exception 22 is OVERRULED.

Exceptions 23 and 24

Respondents' Exceptions 23 and 24 object to a different ALJ preparing the proposed order than the ALJ who conducted the hearing in this matter and argue their due process rights have been affected.

OAR 839-050-0020(15) defines "forum" as meaning "the Administrative Law Judge assigned to preside over the contested case proceeding and the Commissioner or Deputy Commissioner who signs the final order." OAR 839-050-0020(1) provides:

> "'Administrative Law Judge' means the commissioner or an individual or a special tribunal designated by the commissioner to preside over any or all aspects of a contested case proceeding including motions, oral or written hearings, preparation of the Proposed Order and assistance in preparation of the Final Order. The Administrative Law Judge may or may not be an employee of the Agency, except that when a case involves a complaint alleging an unlawful practice under ORS 659A.145 or 659A.421 or discrimination under federal housing law, the Administrative Law Judge or anyone appointed as a hearings officer or member of a special tribunal to hear the matter must be an employee of the Agency."

There is no requirement that the assigned Administrative Law Judge who conducted the hearing be the same as the Administrative Law Judge who prepared the proposed order or assists in the preparation of the Final Order. Therefore, Respondents Exception 23 and 24 are OVERRULED.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondents' violations of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C), (b) and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Sunstone Organics, LLC and Hugh Holiday aka Norman Luebbert** to deliver, within 60 days, 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 **Raven Spezialy** in the amount of:

1) ONE HUNDRED TWENTY-FIVE THOUSAND ($125,000.00), representing compensatory damages for emotional and physical suffering experienced by Complainant as a result of Respondents' unlawful employment practices found herein; plus,

2) Interest at the legal rate on the sum of ONE HUNDRED TWENTY-FIVE THOUSAND ($125,000.00), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby further orders **Respondents Sunstone Organics, LLC and Hugh Holiday aka Norman Luebbert** to cease and desist from discriminating against any employee based upon the employee's sexual orientation (gender identity).

In the Matter of
Reynolds Consultation, Inc,
dba Senior Helpers of Salem,
Respondent, Case No. 05-21

Final Order of Commissioner Christina Stephenson
Issued April 18, 2023

SYNOPSIS

The forum concluded that Respondent violated ORS 659A.030(1)(a), (b), (f); ORS 659A.199(1); OAR 839-005-0010; OAR 839-005-0030; OAR 839-010-0100; and OAR 839-005-0125 when it failed to take sufficient action to prevent unlawful harassment by Complainant's supervisor and terminated Complainant because of her sex and in retaliation for her complaints about unlawful harassment in the workplace. The forum concluded Complainant's supervisor took or caused tangible employment actions to be taken against Complainant, including her termination from employment, for which the Respondent was liable. OAR 839-005-0030(5). The forum awarded Complainant $60,000 in damages for mental and emotional distress and $204,575.11 for lost wages.

The above-entitled case came on regularly for hearing before Caroline A. Holien, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held May 24-25, 2022, via the Zoom video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Anita Smith, an employee of the Agency. Complainant Donna Bennett ("Bennett") was present throughout the hearing.

Respondent Reynolds Consultation, Inc., dba Senior Helpers of Salem ("Senior Helpers") was represented by Lucas W. Reese, attorney at law. James Reynolds ("J. Reynolds"), Senior Helpers Owner, was present throughout the hearing as Respondent's authorized representative.

The Agency called Bennett; James Pappas ("Pappas"), Senior Investigator, Civil Rights Division; Nichole Elliott ("Elliott") and J. Reynolds as witnesses. Respondent called J. Reynolds as its only witness. The parties stipulated to the admission of Agency Exhibits A1, A3, A5-A8, A10-A14, A16-A23, A26-A32, A34-A36, A39-45, A47-

A48, A52, A55, A62-A67[1] and Respondent Exhibits R1-R15. The Agency withdrew Exhibits A2, A4, A9, A15, A24, A25, A33, A37, A38, A46, A49, A50, A51, A53, A56, A57, and A58-A61. Exhibits A52, A63 and A64 are subject to the terms of the Protective Order issued on January 21, 2022. Identifying information of non-parties was redacted in Exhibit A55 to protect those individuals' privacy rights.

The parties submitted post-hearing briefing on the issue of the amount and nature of damages, if awarded in this matter, which were timely filed on June 3, 2022. Having fully considered the entire record in this matter, the Commissioner hereby makes the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[2] Conclusions of Law, Opinion, and Final Order.

FINDINGS OF FACT – PROCEDURAL

1) On April 23, 2019, Bennett filed a verified complaint with the Agency's Civil Rights Division alleging Senior Helpers engaged in unlawful employment practices on the basis of her gender by subjecting her to severe and pervasive sexual harassment. Bennett further alleged she was discharged in retaliation for opposing an unlawful practice. (Ex. A1)

2) On April 22, 2020, after investigation, the Civil Rights Division issued a Notice of Substantial Evidence Determination in which it found "substantial evidence of an unlawful practice based on gender/sexual orientation, pursuant to ORS 659A.030(1)(a), (b), (f) in that Complainant was subjected to severe or pervasive sexual harassment and was terminated from employment for opposing an unlawful employment practice." (Ex. A14)

3) On July 20, 2021, the Forum issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as January 25, 2022, beginning at 9:30 a.m., at the Offices of the Bureau of Labor and Industries, 3865 Wolverine Street NE, Building E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

4) The Formal Charges included the following allegations:

a. "Respondent discriminated against Complainant in compensation or in terms, conditions or privileges of employment based on Complainant's sex in

[1] Ex. A66A is a corrected copy of Ex. A66.

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

violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a), (A), (B), (b), (2), (3), (4)(a), (d), (5)(a), (b), (A), (B), (6), (7), (8) and/or (9)."

b. "Respondent discharged, expelled, subjected Complainant to adverse treatment, discriminated against and/or retaliated against Complainant because Complainant opposed an unlawful practice or what Complainant reasonable believed to be an unlawful practice in violation of ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A), (b) and (c); OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (h)."[3]

c. "Respondent discharged Complainant from employment because of Complainant's sex in violation of ORS 659A.030(1)(a); OAR 839-005-0030(1)(a)(A), (B), (b), (2), (3), (4)(a), (d), (5)(a), (b), (A), (B), (6), (7), (8) and/or (9)."

d. "Respondent discharged, demoted, suspended and/or in any manner discriminated and/or retaliated against Complainant for the reasons that Complainant had in good faith reported information that Complainant believed was evidence of a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1); OAR 839-010-0100(1); OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (h)."

(Ex. X2b)

5) On July 28, 2021, the forum issued an Interim Order Re Temporary Procedures and Requiring Case Summaries, which included notice that the parties were to file documents by email only, and set January 11, 2022, as the deadline for filing Case Summaries. (Ex. X3)

6) On August 6, 2021, Senior Helpers filed Respondent's Answer to Formal Charges in which it denied several of the allegations set forth in the Formal Charges and admitted the following:

a. "[A]t sometime during her employment, Mr. Smith engaged in unwelcome interactions towards complainant."

[3] Based on the evidence presented at hearing, the forum understands this to be a scrivener's error and understands the correct citation to be to OAR 839-005-0010(4)(g), which references harassment by non-employees. ("An employer is liable for harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases, the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.

b. "[C]omplainant made a good faith complaint regarding Mr. Smith's conduct towards her" and "opposed Mr. Smith's behavior by complaining about such behavior on or about August 1, 2018."

c. "[I]t replaced Mr. Smith with Nichole Elliot for the day-to-day duties of the operations director on or about August 3, 2018. Mr. Smith continued as a consultant to assist in the transition to a new full-time operations director, though respondent's owner took steps to ensure no interaction between Mr. Smith and any of respondent's employees other than respondent's owner."

d. "It hired Samantha Torres as its new full-time operations director, and Torres terminated Complainant's employment on January 3, 2019, after she had taken vacation over the holidays in 2018."

e. "Respondent abandoned a plan to allow Mr. Smith to return with the home staff after receiving staff complaints and cut all ties with him, including their consulting relationship."

(Ex. X4, ¶¶ 5, 14-17, 20-22, 23)

7) On August 6, 2021, Senior Helpers filed a Motion to Postpone Contested Case Hearing citing a scheduling conflict. The Agency did not object. (Ex. X5)

8) On August 19, 2021, the forum issued an Interim Order Re Respondent's Motion to Postpone granting the motion to postpone. (Ex. X6)

9) On August 20, 2021, the forum issued an Interim Order Re New Hearing Date and Case Deadlines setting February 15, 2022, as the deadline for filing Case Summaries, and rescheduling the hearing to begin March 1, 2022. (Ex. X7)

10) On January 11, 2022, the Agency filed an Unopposed Agency Motion for Protective Order seeking a protective order for certain documents produced during the course of discovery. The Agency requested the Protective Order permit the parties to designate those documents subject to the terms of the Protective Order as "Confidential-Subject to Protective Order." (Ex. X8)

11) On January 21, 2022, the forum issued an Interim Protective Order granting the Agency's unopposed motion for a protective order. (Ex. X9)

12) On February 10, 2022, the Agency filed its Agency Motion to Change Place of Hearing requesting the hearing be held via video conference due to the health risks associated with the ongoing COVID-19 pandemic. (Ex. X10)

13) On February 11, 2022, the Agency filed Amended Formal Charges, which included additional information pertaining to efforts Complainant made to oppose and to report sexual harassment by her supervisor in January 2018, March 2018, July 30,

2018, and August 2018, under the heading, "The Bases for Unlawful Discrimination are That." (Ex. X11, pp. 3-7)

14) On February 15, 2022, the parties filed their Case Summaries. Included with the Agency's Case Summary was a set of Stipulated Facts set forth below:

a) "Respondent employs one or more persons in the state of Oregon."

b) "Respondent is a "person" within the meaning of ORS 659A.001(9)(a), OAR 839-003-0005(12), OAR 839-005-0125(3) and OAR 839-005-0003(12)."

c) "Respondent is a "respondent" within the meaning of ORS 659A.001(12), OAR 839-003-0005(13), and OAR 839-005-0003(14)."

d) "Respondent is an "employer" within the meaning of ORS 659A.001(4) and OAR 839-005-0003(5)."

e) "Complainant, Donna Bennett, (hereinafter "Complainant") identifies as female."

f) "On or about September 18, 2017, Respondent began employing Complainant as a marketing / community relations director."

g) "Between approximately September 18, 2017, and approximately early August 2018, Richard Lynn Smith (hereinafter "Smith"), was Complainant's supervisor and Respondent's Operations Director."

h) "On or about August 1, 2018, Complainant submitted a written complaint to Respondent's human resources specialist, Dara Queen ("Queen"), regarding unwelcome interactions Complainant alleges she suffered from Smith during her employment with Respondent."

i) "Respondent commenced an investigation into Complainant's written complaint and found Smith had engaged in unwelcome behavior towards Complainant and others."

j) "In approximately August 2018, Respondent replaced Smith with Nichole Elliott ("Elliott") as Complainant's supervisor and as Interim Operations Director."

k) "On or about December 17, 2018, Respondent replaced Nichole Elliott with Samantha Torres ("Torres") as Complainant's supervisor and as Interim Operations Director."

l) "On or about January 3, 2019, Respondent terminated Complainant's employment."

m) "Complainant was unemployed from on or about January 3, 2019, until approximately August 2019."

n) "Complainant worked part-time at Oregon Rental Property Management as an Office Manager from approximately August 2019 until approximately March 2020. Complainant earned approximately $17 per hour and worked approximately 20 hours per week in 2019 for Oregon Rental Property Management. Complainant earned approximately $13,178.50 during her employment with Oregon Rental Property Management."

o) "Complainant worked at Pacifica Calaroga Terrace LLC aka Trion Solutions II aka Cobon as a Sales Marketing Director from approximately November 2019 until approximately January 2020. Complainant earned approximately $11,998.17 during her employment with Pacifica Calaroga Terrace LLC aka Trion Solutions II aka Cobon."

p) "Complainant worked at RSL Salem LLC aka Farmington Square as a Sales Marketing Director from approximately January 2020 until approximately March 2020. Complainant earned approximately $8,844.23 during her employment with RSL Salem LLC aka Farmington Square."

q) "Complainant worked at MSNW Group LLC as a Regional Sales and Marketing Manager from approximately September 2020 until approximately late April 2021. Complainant earned approximately $45,108.57 during her employment with MSNW Group LLC."

r) "Complainant was unemployed from approximately late April 2021 until approximately September 2021."

s) "Complainant worked for Pacific Row Senior Living aka Pacific Grove Senior Living aka Forest Grove Senior Living LLC as the Sales Marketing Director from approximately September 2021 until approximately late October 2021. Complainant earned approximately $12,820.03 during her employment with Pacific Row Senior Living aka Pacific Grove Senior Living aka Forest Grove Senior Living LLC."

t) "Complainant worked at HOLI Senior Living and Senior Services of America as the Marketing Director from approximately November 2021 until approximately December 2021. Complainant earned approximately $6,250 during her employment with HOLI Senior Living and Senior Services of America."

u) "Since approximately December 2021, Complainant has worked at Sinceri Senior Living aka Senior Living EE Group, LLC as Community Relations Director."

(Exs. X12-X13)

15) On February 16, 2022, the forum issued an Interim Order Re ALJ Change assigning the matter to ALJ Caroline Holien. (Ex. X14)

16) On February 17, 2022, Senior Helpers filed Respondent's Answer to Amended Formal Charges. (Ex. X15)

17) On February 28, 2022, Senior Helpers notified the forum that its counsel would not be available for hearing due to a personal matter and requested the matter be rescheduled. The Agency did not object to the request. (Forum File)

18) On March 3, 2022, the forum issued an Interim Order Rescheduling Hearing setting the hearing to begin on May 24, 2022, the date the parties agreed upon. (Forum File)

19) On May 19, 2022, the Agency filed its Third Addendum to Agency Case Summary. (Ex. X21) (*see* Exs. X16-X20 for the First and Second Addendums to Agency Case Summary)

20) On December 1, 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. On December 8, 2022, the Agency and the Respondent timely filed exceptions to the proposed order.

FINDINGS OF FACT – THE MERITS

1) Senior Helpers is a local franchise that provides in-home care to individuals requiring day to day assistance. Senior Helpers is owned by James and Melanie Reynolds. (Testimony of J. Reynolds; Ex. A6)

2) Senior Helpers did not have an employee handbook at the time of Bennett's hire. (Testimony of Bennett and J. Reynolds)

3) Bennett received a copy of Senior Helpers' Harassment Policy at the time of hire that she signed on September 17, 2018. The Harassment Policy outlined what conduct Senior Helpers considered to be sexual harassment and provided the following reporting procedure:

"Any employee who believes that he/she has been the victim of harassment should report the alleged conduct immediately to his/her supervisor or to the Company's employee counselor. An investigation of

> the complaint will be conducted in accordance with Reynolds Consultation, Inc., procedures. Sanctions against employees for sexual harassment may range from reprimand to termination depending on the severity of the conduct and the circumstances of the particular case. Any questions should be directed to your immediate supervisor or senior management."

(Testimony of Bennett; Exs. A27, R4)

4) Bennett received a copy of Senior Helpers' Employee Equal Opportunity Policy, which provided that Senior Helpers "fully complies with applicable federal, state, and local laws concerning equal employment opportunity" and set forth its policy prohibiting discrimination in the workplace. Bennett also received a copy of Senior Helpers' Employee Work & Ethics Agreement. Bennett signed both policies on September 18, 2017. (Testimony of Bennett; Exs. A27, R5, R6)

Bennett's Role as Marketing/Community Relations Director

5) As Operations Director, Smith was Bennett's direct supervisor and was responsible for managing the daily operations of the business as the Reynolds transitioned to retirement. Neither of the Reynolds were in the office on a regular basis and relied upon information provided by Smith to make business decisions. (Testimony of Bennett, J. Reynolds)

6) Bennett applied for the Marketing/Community Relations Director position after being asked to do so by Smith. At the time Bennett was working as an administrator at a local assisted living facility that had the same referral sources as Senior Helpers. Bennett interviewed with the "whole team," including Smith and J. Reynolds. Bennett presented as a superior candidate and was hired for the position. (Testimony of Bennett, J. Reynolds)

7) Bennett's duties included marketing, advertising, networking, sales and social media. There were no other employees in the marketing department at the time of Bennett's employment. (Testimony of Bennett)

8) Bennett was required to enter her contacts with referral sources and potential leads in ClearCare, which, in turn, formed the basis for weekly Community Relations Contact reports ("CRC reports"). CRC reports tracked new prospect appointments, meetings with referral sources, "closed deals," presentations made, and networking events attended. Smith used the CRC reports to track Bennett's marketing efforts and form projections based upon that information. (Testimony of Bennett, J. Reynolds; Ex. A55)

9) Bennett's job duties also included listening to phone calls received by Pronexis, which is a platform used by assisted living facilities to handle inquiries from prospective clients. Bennett was required to determine if the calls were handled

appropriately and to follow up on any potential leads. Bennett spent several hours each week reviewing calls and following up with potential leads. (Testimony of Bennett)

10) Senior Helpers provided Bennett with a vehicle that she was to use only for business related travel during the workday. There was a GPS tracker on the vehicle that had been used to track the vehicle prior to Bennett's hire and remained on the vehicle during her employment with Senior Helpers. (Testimony of Bennett; Exs. A21, R7)

11) Bennett's annual salary was $50,000. Bennett was eligible to receive a 4% bonus based upon profits in excess of $93,000, which was calculated and paid on a bi-weekly basis. From January 2018 through June 2018, Bennett received bonus payments totaling $19,234.74. Bennett also received a $500 monthly stipend to be applied to her COBRA health insurance benefits. Bennett was not eligible for overtime pay for hours worked in excess of 40 hours per week. (Testimony of Bennett; Exs. A45, R2, A44, p. 4)

Smith's Conduct Toward Bennett

12) Bennett's relationship with Smith became "weird" shortly after she began working for Senior Helpers. Smith regularly commented on Bennett's attire and appearance, as well as her body and her attractiveness. Smith's comments were unwanted by Bennett and made her feel uncomfortable. (Testimony of Bennett)

13) Smith informed Bennett shortly after she was hired that he had found her on the social media dating platform PlentyofFish.com and that "they had matched 100%." Smith told Bennett that he had "really enjoyed" looking at all of her pictures, which made Bennett feel uncomfortable. Bennett blocked Smith so he could not access her profile on that and or any other social media website. (Testimony of Bennett)

14) Bennett first learned that Smith could monitor her use of the employer-owned vehicle when Smith confronted her and demanded to know why she had stopped at a certain address. Bennett explained to Smith that she had stopped at her son's house, which was between two work-related stops she had scheduled that day, so she could use the restroom. (Testimony of Bennett)

15) A few months after she had started working for Senior Helpers, Smith invited Bennett to join him on a ski trip to his cabin in Bend, Oregon. Smith suggested he could get free lift tickets for Bennett's four children. Bennett responded by telling Smith that it "was never going to happen" and that she "would not have sex with him." Smith later became angry with Bennett when he learned that she had told the front desk receptionist about his invitation and suggested he could get lift tickets for the receptionist's children as well. Smith called Bennett a "loudmouth troublemaker" and accused her of spreading rumors. (Testimony of Bennett)

16) Bennett's working relationship with Smith became strained after she declined his invitation to accompany him to his Bend cabin. Smith began telling Bennett frequently that she "was not worth anything" and criticized her attire as being too tight or too short even though her wardrobe had not changed. Smith became highly critical of Bennett's performance and began "micromanaging" her work. (Testimony of Bennett)

17) Bennett wanted to file a complaint regarding Smith's behavior but was reticent to do so because she was fearful that she and her son, who also worked for Senior Helpers at the time, would be fired due to the friendship between Smith and J. Reynolds. Bennett understood Smith and J. Reynolds to be close, personal friends who frequently socialized together outside of work. (Testimony of Bennett)

18) In January 2018, Bennett approached J. Reynolds and asked who she should talk to about her workplace concerns, including Smith's frequent criticism and micromanagement of her daily work. J. Reynolds directed Bennett to speak to Smith. (Testimony of Bennett, J. Reynolds; Exs. A6, p. 2, A10)

19) In approximately March 2018, Bennett left a voice mail message for J. Reynolds that she termed a "confidential voice mail" requesting a "confidential" meeting. Bennett did not give a reason for her meeting request but asked for another woman to be present for the meeting. Bennett felt compelled to request the meeting, because she sensed that Smith was "going after" another female employee and she wanted to protect that employee. (Testimony of Bennett)

20) J. Reynolds sent Smith to meet with Bennett. Smith was accompanied by Respondent's human resources specialist, Dara Queen, when he met with Bennett. Smith asked Bennett why she wanted to meet and told her that only he was allowed to communicate directly with the Reynolds. Bennett did not make a formal complaint at that time, because she believed it would have been futile. (Testimony of Bennett)

Bennett's Calendar Entries

21) In February 2018, Bennett began noting events on her calendar in which she felt Smith was micromanaging her or was unfairly critical of her performance. Bennett entered her calendar notes at or near the time of the event. (Testimony of Bennett; Exs. A22, R10[4])

22) On February 5, 2018, Bennett noted that Smith criticized her marketing approach, which included visiting various facilities in the area and leaving treats or other gifts for the staff. Bennett believed this approach led to increased referrals from that facility. Bennett's February 5, 2018, calendar entry included:

> "Reiterated: for the 3rd time wants me visiting Dr.'s offices and hospitals. Told me no networking meetings doesn't see any sense in it – told him we

[4] References to specific pages of Bennett's calendar will be made using Ex. A22 for the sake of clarity.

> have had 3 referrals from it. He said that wasn't enough for 7 months. He said he wants me to network on my own time. He told me that I can go to the Retirement Connections Networking but only wants me to go to the first 15 minutes and leave. I told him I wasn't going to do that (I will not jeopardize my reputation)."

(Ex. A22, p. 1)

23) Bennett made similar notations in her calendar on February 9, February 13, and June 11, 2018. (Ex. A22, pp. 1,7)

24) Bennett's February 9, 2018, calendar entry notes Bennett's concern that Smith was using the tracker on her employer provided vehicle to track her movements during the day. (Ex. A22, pp. 1,7)

25) Bennett's February 13, 2018, calendar entry notes Smith told Bennett that Melanie Reynolds did not believe Bennett's job was necessary but Smith and J. Reynolds "would have her back." Bennett's note included:

> "He needs to be able to prove that I'm worth the money they pay [me]." Bennett's March 5, 2018, note includes mention that Smith told her that he did not see how she had contributed to the growth of the company.

(Ex. A22, pp. 2-3, 7)

26) Bennett's March 12, 2018, calendar entry notes that Smith told her that he needed her to be in the field 80% of the time and that she needed to dress more appropriately "(no mini-skirts or low cut shirts)." Bennett also noted that Smith told her that he was tired of her "sitting back and raking in all the money from the sweat of [the] team." (Ex. A22, pp. 4, 7)

27) Bennett's May 16, 2018, calendar entry includes:

> "Lynn called me at work on his day off [and] asked me why I was spreading rumors and when I said I wasn't, he said that from previous experience he knows that's a lie. He then said a multitude of people say that I was dressed inappropriately and continued to yell at me. Not doing my job, not getting in front of people. He needs me in the field and all I do is go around office to office and not work. He's talked to me about…my clothes. He pays me a lot of money to do a job and he's not seeing any results that he can account to me. He was not letting me explain that I was. He would just say nothing that is happening he can contribute to me and that he is going to change my bonus structure. I ended up crying and couldn't stop."

(Ex. A22, pp. 5, 7)

28) Bennett's June 11, 2018, calendar entry includes:

"Meeting – Lynn has indicated that he now wants me to visit dependent and assisted and why haven't I been (previously he said why was I visiting those when they have their own caregivers). He also said that he wants me to focus on all places in one area when before he has told me I have to visit all hospitals [twice] weekly – three times for Salem."

(Ex. A22, p. 6)

29) Bennett's June 25, 2018, calendar entry includes:

"CRC Meeting (weekly)

Lynn talked to me about my weekly report and all the places I visited. He asked if all data was put into ClearCare. I told him all but one or two and I would finish those before I left. He asked about hiring another CRC to help me. I said it could be a good idea [because] the large area to cover and that we would need someone down south. I said I'd like to keep Salem, Dalles, Mammoth, Independence, Slayton, and Silverton he said that he would probably have me take … Albany and Corvallis because of BNI and all the work I was doing there. I told him that wouldn't be my preference. He said he gets to make that choice and he'll do what he thinks is right for the company. Went over weekly schedule – talked to him about presentation at Center 50+ and that Dara was coming with me."

(Ex. A22, pp. 8-9)

30) Bennett's June 26, 2018, calendar entry includes:

"Lynn called while I was driving. I pulled off the freeway to talk to him. He asked what happened yesterday. I went over my day activities. He asked what happened at Center 50+. I told him I didn't have the correct presentation but that we used the A+D presentation and talked more about … and that Kay and the reviews said it went pretty well. He said why did Kay call looking for me. I said we were set up by 1:45. He asked when we were asked to be there? I said 30 to 46 minutes before. He said he had talked to Kay and she's going to say it went okay to my face. I asked what did she say. He asked why he did he have to hear about all this from Jim. I told him I thought he already knew because of the email he sent me at 4:06 yesterday. He said how was he to know I talked to Jim earlier in the day. I told him that I figured he was busy and didn't send it out till later. He said I didn't understand how bad this was. I assured him I did.

> "He said we get referrals from Center 50+ and that how we looked liked we were unprofessional. I said we got pretty good reviews. He asked where were they and I told him on my desk. He said that numbers are down and why aren't I getting any more referrals. I said the two we [got] last week were pretty big (24 hours) and now we're getting little ones. It takes time. He asked why I took Dara with me. I said because he wanted her and Nichole to take over. He said only the Gems. I told him that I didn't understand that. He asked why I wasn't prepared. I said I had looked for the presentation and couldn't find it. I told him that I don't get enough office time and I forgot about it until it hit my calendar week of. He asked why I hadn't asked him. I said because previously he had me talking to Jim about all presentations. He said not that Jim showed him where everything was. I said okay I'll ask him. He said he was going to have a meeting with Jim to see about who's going to do presentations."

(Ex. A22, pp. 8,10)

31) Bennett's June 27, 2018, calendar entry includes:

> "9:30 meeting with Lynn. I went out and apologized to him for not being prepared for the presentation. He asked what about it. I said not having the correct slides. He said when was this scheduled. It said about four months ago and I had originally looked on the M: drive but couldn't locate it. Since I'm not in the office a lot, I completely forgot till it was on my calendar for the week. He said what really made him mad is that it was the first he heard of it.
>
> "He said that he didn't want to be checking up on me…telling me how to do my job that they pay for a professional and I'm not giving them and as much as I'm paid he shouldn't have to tell me how to do my job or to check up on me that he doesn't have time. He said that he has to tell me where to go…He said the reports are supposed to be in on time. I said that to confirm the CRC Report is due by 10 and that ClearCare is due by noon on Monday. He said that was correct. It said that I did have them in on time this week. He said he was generalizing for the last few weeks. He said this was a formal reprimand. I said I was wrong for not being prepared for the presentation on Monday and I'm sorry for that."

(Ex. A22, p. 8, 10 – portion of second paragraph is illegible)

Bennett's Issues in the Workplace

32) On February 22, 2018, Smith sent an email to Queen noting that he had a situation involving Bennett in which she failed to follow up with a new lead, approximately three days after the individual requested information. Smith noted a

verbal coaching was issued and asked that the information be added "to the ongoing documentation file of Donna Bennett." (Ex. A28)

33) On or about March 16, 2018, Smith yelled at Bennett for being in the office rather than in the field. Bennett had received information related to the scheduling of a client who received 24-hour services, which she left for another employee to follow up on after being ordered out of the office by Smith. Bennett sent an email to the employee explaining the situation and left documents related to the client in a basket on the employee's desk. The employee never acted on the information and, as a result, Senior Helpers lost the client. Bennett later learned that the employee was engaged in a sexual relationship with Smith. (Testimony of Bennett)

34) On May 7, 2018, Elliott addressed issues she observed in care plans completed by Bennett. Care plans are used by Senior Helpers staff to identify a client's specific needs and outline the services required. Bennett told Elliott that she did not prepare care plans that frequently and often forgot what was needed in each section. Bennett told Elliott it took her several hours to complete care plans, which were low on her list of priorities given her other assigned duties. Ultimately, care plan preparation was assigned to the Client Services Manager due to the time constraints Bennett had as a result of her other duties. (Testimony of Elliott; Ex. A44, pp. 32-33)

35) On June 25, 2018, Smith sent Bennett an email outlining issues he had addressed with her during the previous weeks, including her attire and appearance; timely completion of CRC reports; amount of time spent in the field; and Bennett's marketing efforts. Smith sent the email to Queen to be included in Bennett's personnel file. (Ex. A44, pp. 31-33)

36) On July 20, 2018, Bennett and Smith attended an event at the 50+ Center when Bennett sent Smith a picture of a sign at a vendor's stand via text messaging questioning the dimensions of the sign. Bennett later met Smith outside the restroom. Smith excused himself to go to the restroom and returned to where Bennett was standing. Smith pointed to his crotch and told Bennett that "it was large and very visible." Smith then said he had not been that embarrassed since seeing a picture of a catheter at a nurse's desk at the office. (Testimony of Bennett; Ex. A6)

37) In September 2018, Senior Helpers stopped paying Bennett's monthly stipend of $500 for health insurance with little explanation. (Testimony of Bennett)

Bennett's Complaint Regarding Smith

38) On or about July 31, 2018, Bennett sent a text message to Smith informing him of a family emergency that required her to attend to her brother's children. Smith told Bennett that if she did not report for work that she would be fired. Bennett reported to the office as Smith ordered. (Testimony of Bennett)

39) Bennett felt Smith was unreasonable in ordering her to report to the office when she needed to care for her brother's minor children. Bennett felt Smith's order was merely a continuation of his harassment. (Testimony of Bennett)

40) On August 1, 2018, Bennett filed a written complaint alleging Smith had sexually harassed her in the workplace. Bennett's complaint was addressed, "To the Department of Human Resources," and included copies of her notes and text messages between her and Smith. (Testimony of Bennett; Exs. A17, R7)

41) Queen and Respondent's co-owner Melanie Reynolds interviewed every individual mentioned in Bennett's complaint, including Smith and Bennett. The notes taken from each interview are signed by Melanie Reynolds, Queen, and the individual interviewed. Those employees interviewed generally described Smith as treating employees harshly and responsible for creating a tense and stressful work environment. (Exs. A19, R9, R12[5])

42) One individual reported that Smith treated Bennett "differently" and frequently questioned her attire and talked about her clothing with other employees. The individual noted that Smith treated Bennett "like she's a target." (Ex. A19, pp. 1-2)

43) One individual reported overhearing Bennett's side of a telephone conversation with Smith in which it sounded like Bennett was "under attack." The individual reported hearing Bennett say, "but the skirt I was wearing was only two inches above my knees." The individual described having to console Bennett because she was so upset after the telephone call had ended. (Exs. A19, pp. 7-8, A23)

44) Another individual confirmed that Smith was "too harsh a lot with Donna" and he often commented on Bennett's whereabouts. Another individual confirmed that Smith "berated" Bennett. It was noted by one individual that the female employee with whom Smith was having a sexual relationship dressed "way worse" than Bennett, who was described as looking "work appropriate." (Ex. A19, p. 7-8)

45) One individual described Smith as treating the female employee with whom he was having a sexual relationship preferentially as compared to his treatment of other employees. The individual described Bennett as being "berated" by Smith and that Smith had once commented that Bennett's skirt was "so short [he] could see everything." (Ex. A19, p. 9-14)

46) J. Reynolds ultimately decided to transfer supervision of Bennett to Elliott. On August 3, 2018, Bennett was informed that Elliott was her new supervisor. (Testimony of Bennett, Elliott; Exs. A6, p. 9, A34)

47) On August 7, 2018, when Queen advised Smith that he would be interviewed, Smith began "yelling and screaming" and demanded to know information

[5] References to specific notes will be made using Ex. A19 for the sake of clarity.

regarding Bennett's situation. Elliott secured the security video after Queen reported it to her. Elliott immediately reported the incident to J. Reynolds. (Testimony of Elliott)

48) J. Reynolds called a staff meeting later that day in which J. Reynolds announced that Smith would be staying on as Operations Director, but he would be apologizing for his behavior. After Smith spoke, several employees walked out of the meeting and left the office. J. Reynolds called Queen, who had gathered with the employees at a nearby coffee shop, and told her that it was his fault and asked Queen and the other employees to return to the office. Smith offered a half-hearted apology for his behavior after the employees returned to the office. (Testimony of Bennett, Elliott)

49) J. Reynolds ultimately decided that Smith could no longer work as the Operations Director due to the apparent dissatisfaction of the staff with Smith. (Testimony of J. Reynolds)

50) On or about August 7, 2018, Senior Helpers "terminated" Smith's employment as Operations Director. On August 16, 2018, Senior Helpers and Smith entered into a separation agreement. (Testimony of J. Reynolds; Exs. A44, pp. 12-19, R47-51)

Elliott Named Interim Director of Operations

51) Elliott became the interim Operations Director, an appointment that was to be "reconsidered" after six months, after Smith's "termination." Elliott's role as interim Operations Director was limited, and she was required to communicate with Smith about all management issues. (Testimony of Elliott; Exs. A44, p. 39, A45)

52) J. Reynolds contracted with Smith as a consultant because he considered Smith to be a "great data analyst." Despite the change in his employment status, Smith continued performing the duties of the Operations Director but without the staff being apprised of that fact. Reynolds directed Elliott to not tell the staff of his decision to retain Smith as a consultant. (Testimony of J. Reynolds, Elliott; Exs. A10, A44, p. 12)

53) Bennett quickly figured out Smith was still involved in management after noticing that Smith was included on several emails. (Testimony of Bennett; Ex. A11)

54) During her time as interim Operations Director, Elliott observed Bennett regularly met sales goals and the office was generally on an "upswing." Smith and J. Reynolds repeatedly expressed concerns about Bennett's performance. Elliott believed that Smith and J. Reynolds focused more on projected sales rather than present performance. Elliott tried explaining to both Smith and J. Reynolds that Bennett's job was to obtain the referrals and potential leads, and she had no control if the client ultimately cancelled the contract. Overall, Elliott considered Bennett's performance and attendance acceptable. (Testimony of Elliott; Ex. A55)

55) In July 2018, Senior Helpers' total client hours, which is the measure by which Smith determined the "health" of the business, was at a record high in July 2018 and continued being high over the next several months. (Ex. A44, pp. 41-43)

56) An opportunity to attend training on dementia arose while Elliott was interim Operations Director. Bennett had previously expressed an interest in attending the training. However, Smith and J. Reynolds decided not to send Bennett to the training and, instead, sent Elliott and Queen. (Testimony of Elliott)

57) Smith and J. Reynolds often complained about Bennett to Elliott. J. Reynolds told Elliott that he had received complaints from community members regarding Bennett's conduct at an event in which she allegedly spoke about Smith's harassment. Elliott tried to contact the individuals named by J. Reynolds, but both individuals declined to make any comment. (Testimony of Elliott)

58) J. Reynolds asked Elliott twice to terminate Bennett. Elliott refused, because there was only one warning in Bennett's human resources file. Elliott had not observed any issues with Bennett's performance that she felt warranted termination. (Ex. A11)

59) Elliott had personally only addressed one issue with Bennett. Elliott approached Bennett with concerns about how she completed assessment forms. It quickly became clear to Elliott that Bennett had not received the proper training on how to complete the form. Elliott did not consider this issue to be reflective of Bennett's job performance. (Testimony of Elliott)

60) J. Smith told Elliott several times while she was interim Operations Director that she should discharge Bennett for performance issues. Elliott refused due to concerns she had regarding the potential legal liability for discharging Bennett without a sufficient basis for doing so. Smith repeatedly told Elliott to "watch" Bennett and alluded to Bennett as being untrustworthy. (Testimony of Elliott)

61) J. Reynolds also directed Elliott to track Bennett "closely," which she believed came from Smith. (Testimony of Elliott)

62) Elliott noticed that there was a difference in the information Smith used to prepare his reports and the reports he actually generated. Smith's reports suggested Bennett's performance was lacking. Smith's assessment appeared inconsistent to Elliott given the successful performance of the business, which she believed was tied directly to Bennett's performance. (Testimony of Elliott)

63) On October 24, 2018, J. Reynolds notified staff via email that the national Franchise Operations Director would be in the office. The email included an agenda that listed Smith as a presenter at the meeting. Several employees, including Bennett, questioned Smith's role at the meeting, which resulted in J. Reynolds notifying staff that Smith would not be attending the meeting. (Ex. A44, pp.109-120)

64) J. Reynolds sent the following email to staff:

> "After careful consideration and listening to our valued team members, Melanie and I agreed to terminate [Smith's] employment as an employee of Reynolds Consultation, Inc. He remains terminated and will not be rehired.
>
> "Upon recommendation of the franchise and Melanie's and my decision, we chose to use [Smith] for a period of time in a consulting role. Although he has certain tasks to perform on behalf of the owners, [Smith] has not and will not have any interface with any staff, other than Nichole [Elliott]."

(Ex. A44, pp. 121-123)

65) Elliott was involved in a car accident and was out of the office for one week beginning December 17, 2018. When she returned to the office, she learned she had been demoted and was given no reason for the demotion. (Testimony of Elliott)

66) Torres, who was the Office Manager at the time, took over as Operations Director. Torres was also the employee with greatest seniority at the time. J. Reynolds did not feel Elliott "was up to the challenges" facing the business based upon Smith's projections. (Testimony of J. Reynolds)

Senior Helpers' Employee Surveys and Team Member Handbook

67) Senior Helpers sent out surveys to all employees about workplace issues following the August 7, 2018, meeting. Each employee was required to complete the survey. Several of the surveys returned referred to workplace issues with references to "he" and "him," which Elliott understood to be in reference to Smith. (Testimony of Elliott; Ex. A44, pp. 28, 49-66)

68) In August 2018, Senior Helpers implemented a Team Member Handbook, which was later reissued in December 2018. The most recent version of the handbook includes Senior Helpers' open door policy, as well as its policy prohibiting retaliation and the EEO Statement and Nonharassment Policy. (Ex. A30, pp. 12, 14, 20-21)

Bennett's Termination

69) From December 9, 2018, through January 2, 2019, Bennett was out of the office for approved leave. (Testimony of Bennett)

70) J. Reynolds recommended Torres discharge Bennett based upon a projected downward trend identified by Torres. J. Reynolds felt a different marketing approach was needed. (Testimony of J. Reynolds)

71) On January 3, 2019, Torres and Queen discharged Bennett without explanation. Torres' purported reasons for discharging Bennett were due to poor tracking of sales leads and a downturn in sales. (Testimony of J. Reynolds; Ex. A13)

72) Bennett and Torres previously had a dispute over how much money Bennett was spending on "swag" that Bennett left as gifts and treats for local facilities that were considered valued referral sources. Torres ultimately took over purchasing and chose to purchase what Bennett believed to be inferior products. Bennett felt the change in "swag" adversely affected her ability to obtain referrals from the various nursing facilities. (Testimony of Bennett)

73) Bennett later learned that Torres, who she thought reported directly to J. Reynolds, was actually reporting to Smith after his "termination." (Testimony of Bennett)

Senior Helpers' Continuing Relationship with Smith

74) On February 13, 2019, J. Reynolds announced at a staff meeting that Smith would be returning as the Operations Director. A majority of staff left the meeting in protest. J. Reynolds ultimately decided against bringing Smith back based upon the staff's demonstrated displeasure. (Testimony of Elliott, J. Reynolds)

Credibility of the Witnesses

75) The forum found all three witnesses who testified to be credible. To the extent that the testimony of Bennett and Elliott described Smith's conduct toward Bennett and other employees, their testimony is considered more credible than the testimony of J. Reynolds, who was in the office infrequently and not in a position to personally observe several of the incidents described by Bennett and Elliott.

76) The forum relied upon information provided by individuals interviewed by Melanie Reynolds and Queen as part of their investigation of Bennett's August 1, 2018, complaint. *See* Findings of Fact – the Merits ## 44-47. The notes from each interview are signed by Melanie Reynolds, Queen, and the person interviewed. The forum finds the notes sufficiently reliable as to be credible evidence of Smith's conduct toward Bennett. (Exs. A19, R9, R12)

Bennett's Damages as a Result of Smith's Harassment and Termination

77) Bennett felt anxiety throughout much of her employment due to Smith's repeated threats about her job security. Bennett worried about her ability to provide for her family if she were to lose her job. (Testimony of Bennett)

78) Bennett was upset at being discharged from a job she "put her heart and soul into." Bennett felt it was unfair that Smith was free to make inappropriate comments about her appearance and to make frequent comments that "she wasn't

worth the money" she was being paid. Bennett often felt "less than" and was often reduced to tears by Smith's conduct. (Testimony of Bennett)

79) Bennett sought mental health counseling after her discharge but had difficulty establishing a relationship with a counselor due to not having insurance. Bennett ultimately saw a counselor for approximately three months to deal with her anger and sadness at her experience working with Smith and being discharged by Senior Helpers. Bennett had to discontinue counseling because she did not have insurance and did not qualify for any health care assistance. Bennett lost 25 pounds due to her distress. (Testimony of Bennett)

80) Bennett had trouble paying her bills and had to seek financial help from her son to pay her rent. Bennett's credit rating was "in the toilet" after her termination from Senior Helpers. Bennett defaulted on loans she took out for her son's college education. (Testimony of Bennett)

81) Bennett made reasonably diligent efforts to obtain similar employment following her discharge from Senior Helpers. (Testimony of Bennett; Ex. A65)

82) Bennett was unemployed from January 3, 2019, through approximately August 2019. (Ex. X13)

83) Bennett's annual compensation from her employment with Senior Helpers was $102,686.17 in 2018, and included her salary, bonuses and monthly COBRA stipend. Bennett's average monthly compensation was $8,557.18. (Ex. A66)

84) Bennett did not obtain similar or comparable employment until she began working for Senior Living in approximately December 2021. As of April 30, 2022, Bennett's average monthly earnings from Senior Living were $8,987.12 ($35,948.46 YTD / 4 months). (Exs. A52, A64)

85) Bennett suffered approximately $204,575.11 in wage losses as a result of her termination from Senior Helpers. (Ex. A66)

CONCLUSIONS OF LAW

1) At all times material herein, Senior Helpers was an "employer" within the meaning of ORS 659A.001(4) and OAR 839-005-0003(5). Respondent employs one or more persons in the state of Oregon. Respondent employed Bennett.

2) Senior Helpers is a "person" within the meaning of ORS 659A.001(9)(a), OAR 839-003-0005(12), OAR 839-005-0125(3) and OAR 839-005-0003(12). Senior Helpers is a "respondent" within the meaning of ORS 659A.001(12), OAR 839-003-0005(13), and OAR 839-005-0003(14).

3) Senior Helpers, through the actions of Smith (Bennett's supervisor), discriminated against Bennett on the basis of sex in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a), (A), (B), (b), (2), (3), (4) (a), (d), (5)(a), (b), (A), (B), (6), and (7)

4) Senior Helpers discriminated against Bennett because she opposed an unlawful practice or what she reasonably believed was an unlawful practice in violation of ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and (g).

5) Senior Helpers discharged Bennett in retaliation for her good faith report of information that she believed was in violation of state or federal law, rule or regulation in violation of ORS 659A.199(1); OAR 839-010-0100(1); and OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and (g).

6) The actions of Bennett's supervisor are properly imputed to Respondent. OAR 839-005-0030(3) and (4).

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 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 the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

The Agency alleges that Senior Helpers discriminated against and discharged Bennett on the basis of sex in violation of ORS 659A.030(1)(a), (b) and OAR 839-005-0030(1)(a)(A), (B), (b), (2), (3), (4)(a), (d), (5)(a), (b), (A), (B), (6), (7), (8), and (9). The Agency further alleges Senior Helpers retaliated against Bennett because she opposed an unlawful practice or what she reasonably believed to be an unlawful practice in violation of ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I),(II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (g). The Agency further alleges Senior Helpers retaliated against Bennett because she had in good faith reported information that she believed was evidence of a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1); OAR 839-010-0100(1); OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (g).

SEXUAL HARASSMENT

It is an unlawful employment practice for "[a]n employer, because of an individual's * * * sex * * * to * * * discriminate against the individual in compensation or in terms, conditions or privileges of employment." ORS 659A.030(1)(b). Unlawful sexual harassment may take the form of *quid pro quo* harassment or hostile work environment harassment. *In the Matter of Bravo Event Service, Inc.,* 36 BOLI 250, 264 (2018).

A. SEXUAL HARASSMENT – QUID PRO QUO

OAR 839-005-0030(1)(a) defines *quid pro quo* sexual harassment as:

> "(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:
>
> (A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
>
> (B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual."

The Agency's prima face case in a matter involving OAR 839-005-0030(1)(a)(A) is as follows: (1) Senior Helpers was an employer subject to ORS 659A.001 to 659A.030; (2) Senior Helpers employed Bennett; (3) Bennett is a member of a protected class (sex); (4) Smith engaged in unwelcome conduct (verbal or physical) directed at Bennett because of her sex; (5) Bennett's submission to this conduct was made an explicit or implicit term or condition of her employment, or as the basis of employment decisions affecting her. *See In the Matter of Bravo Event Service, Inc.,* 36 BOLI at 264-265. The first three elements are established in that it is undisputed that Senior Helpers is an Oregon employer that employed Bennett, a member of a protected class (sex). The final two elements of the prima facie case remain in dispute.

1. Smith engaged in unwelcome verbal conduct directed at Bennett because of her sex.

Bennett credibly testified that Smith initially approached her shortly after she was hired and informed her that he had found her on a social media dating website and told her that they "matched 100%." Bennett testified that Smith made several comments about her physical appearance and attire throughout her employment. Those comments became increasingly more critical after her rejection of his invitation to Bend and her pronouncement that she was never going to have sex with him.

The forum concludes that the conduct was unwelcome to Bennett based on her testimony that it made her feel uncomfortable and evidence of record showing that other employees observed Bennett's emotional reaction to Smith's comments. The forum

further concludes that Smith's conduct was because of Bennett's sex based on the fact that Smith's initial overture to Bennett about matching on a social media dating website and his frequent comments on her appearance and attire.

2. Bennett's submission to Smith's conduct was an implicit term of her employment and ultimately formed the basis for employment decisions affecting her.

The final element is whether Bennett's submission to Smith's conduct was made an explicit or implicit term of her employment. Bennett credibly testified that Smith's behavior markedly changed after she rejected his invitation and told him that "It was never going to happen." Bennett testified that Smith became highly critical of her work and suggested repeatedly that her employment was in jeopardy. Both Bennett and Elliott testified that Smith frequently criticized Bennett's attire and appearance although Bennett's choice of attire did not change while she worked for Senior Helpers.

The forum finds that Bennett's submission to Smith's conduct was an implicit term of her employment. Bennett's testimony establishes that her employment was secure until she refused Smith's invitation. At that point, it became increasingly precarious as evidenced by Smith's frequent comments regarding Bennett's performance and job security.

Further, Bennett's refusal to submit to Smith's advances ultimately formed the basis of decisions affecting her employment. OAR 839-005-0030(1)(a)(B). The evidence shows Smith became increasingly critical of Bennett's performance after she rejected his Bend invitation. Smith's attacks on Bennett's performance, her attire and appearance, and personal conduct became heightened and more regular. As a result, Smith's frequent attacks on Bennett led to her discharge as discussed more fully below.

The Agency has established the final element of its prima face case of *quid pro quo* harassment. The forum concludes that Senior Helpers violated ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a)(A)(B). Senior Helpers is liable for this harassment under OAR 839-005-0030(3) and (4) as discussed in more detail later in this Opinion in the section titled "Liability."

B. SEXUAL HARASSMENT – HOSTILE WORK ENVIRONMENT

> OAR 839-005-0030(1)(b) defines this form of sexual harassment as:
> "Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment."

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

The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2).

The elements of a prima facie case in a hostile work environment case include: (1) Senior Helpers was an employer subject to ORS 659A.001 to 659A.030; (2) Senior Helpers employed Bennett; (3) Bennett is a member of a protected class (sex); (4) Bennett was subjected to unwanted conduct because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Bennett's work performance or creating a hostile, intimidating or offensive work environment for Bennett; and (6) Bennett was harmed by the unwelcome conduct. *In the Matter of Vision International Petroleum, LLC,* 37 BOLI 187, 197-198 (2019).

As discussed above, the first four elements of the Agency's prima facie case have been satisfied in that Senior Helpers is an Oregon employer that employed Bennett, a member of a protected class (sex), who was subjected to unwelcome conduct directed at her by Smith because of her sex.

1. Smith's unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Bennett's work performance or creating a hostile, intimidating or offensive working environment.

The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2); *Vision International,* at 198. In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of Andrew W. Engel, DMD, PC,* 32 BOLI 94, 120 (2012).

Nature of the conduct and its context – The unwelcome conduct involved Smith making or directing verbal comments of a sexual nature at Bennett in her work environment.

Frequency – All of the unwelcome conduct occurred within the first few months of Bennett's hire in September 2017 and continued through July 2018. After Bennett rejected Smith's invitation to accompany him to Bend, Smith's comments about Bennett's appearance and attire, while previously complimentary, turned highly critical. Smith continued to comment on Bennett's appearance and attire to her supervisor and to the owners even after his "termination" in August 2018.

Severity or Pervasiveness – The severity and pervasiveness of Smith's conduct was intensified because it began during the first few weeks of Bennett's employment. Smith stopped trying to date Bennett after his Bend invitation was rejected but continued commenting on Bennett's appearance and attire, at times causing Bennett to break down and cry at work. Other employees observed Smith treated Bennett differently than other employees and often berated her in the workplace.

Bennett's calendar notes show Smith's hostility toward Bennett was sustained for several weeks and months following her rejection of the Bend invitation. Smith's harassing conduct toward Bennett did not end with his "termination" but, rather, continued while he served in a "consultant" role where he continued criticizing Bennett's performance to her supervisor and to the owners of the business.

Physically threatening or humiliating – Bennett credibly testified that Smith's conduct made her feel "less than" and scared her as a woman in her 50's who could ill afford to lose her job. Bennett testified she was eager to work for Senior Helpers due to their reputation in the community and what they appeared to stand for as a company. Bennett testified that Smith quickly poisoned her work environment and made it more difficult for her to do her job. Smith's conduct made Bennett feel upset, awkward, uncomfortable, and embarrassed.

Most persuasive on this point are the notes taken during the interviews conducted as part of Senior Helpers' investigation of Bennett's complaint. Many of the comments show that Smith's conduct was sufficiently severe so as to have been noticed by other employees. These employees described Smith as berating Bennett and treating her differently than he did other employees. One employee described Smith talking to Bennett in such a manner that Bennett was left in tears and the employee felt she needed to console Bennett.

Unreasonable interference with Complainant's work performance – Bennett credibly testified that Smith's conduct made it difficult for her to do her work on a daily basis, which she had not previously experienced in another job. Bennett's testimony establishes that Smith's conduct toward her unreasonably interfered with her work performance.

Based on the above, the forum concludes that Smith's unwelcome conduct was sufficiently severe or pervasive to have unreasonably interfered with Bennett's work performance and that it created a hostile, intimidating or offensive work environment for her from the objective standpoint of a reasonable person in Bennett's particular circumstances.

2. Bennett was harmed by the unwelcome conduct.

Smith's conduct toward Bennett effectively poisoned her work environment causing her substantial and emotional distress as detailed above. The Agency has satisfied each of the required elements of its prima facie case.

Senior Helpers, acting through Smith, committed an unlawful employment practice by subjecting Complainant to sexual harassment in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(b). Senior Helpers is liable for this harassment under OAR 839-005-0030(3) and (4) as discussed in more detail later in this Opinion in the section titled "Liability."

DISCHARGE BECAUSE OF SEX

The Agency's prima facie case in an OAR 839-005-0030(4)(a) case consists of the following elements: (1) Senior Helpers was an employer subject to ORS 659A.001 to 659A.030; (2) Senior Helpers employed Bennett; (3) Bennett is a member of a protected class (sex); (4) Smith engaged in unwelcome conduct (verbal or physical) directed at Bennett because of her sex; (5) Smith had immediate or successively higher authority over Bennett; and (6) Smith took or caused Senior Helpers to take a tangible employment action against Bennett. *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 31 (2012). A tangible employment action includes * * *terminating employment * * *." OAR 839-005-0030(4)(a).

As noted above, the Agency has satisfied the first four elements of the prima facie case. The final two elements remain in dispute.

1. Smith had immediate or successively higher authority over Bennett even after his "termination."

The forum addressed harassment by a supervisor *In the Matter of Vision International Petroleum LLC & Hai Chheng Gov*, 37 BOLI 168, 197 (2019), citing *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998).

> "The forum first examines whether there is evidence of harassment by a supervisor. Supervisors with "immediate (or successively higher) authority over the employee" are considered agents of an employer for purposes of an employer's Title VII liability. Determining whether a particular individual is a supervisor "is not dependent upon job titles or formal structures within the workplace." *Dawson v. Entek Int'l.,* 630 F3d 928, 940 (9th Cir 2011), *citing McGinest v. GTE Service Corp*., 360 F3d 1103, 1119 n.13 (9th Cir 2004). Rather, for purposes of vicarious liability under Title VII a person is a supervisor "if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State University*, 570 US 421, 424 (2013). A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)."

Smith was no longer Bennett's direct supervisor at the time she was terminated from her employment. However, the evidence shows that Smith continued to control the daily operations of the business after his "termination." The forum is not persuaded

that Smith's authority to take tangible employment actions against Bennett ended with his "termination." Elliott's credible testimony establishes that "all decisions had to go through" Smith. Elliott described her role as interim Operations Director as limited in that she did not have access to the information that Smith had access to and, as a result, Elliott effectively reported to Smith. As such, the forum is not persuaded that Torres alone made the decision to terminate Bennett. It is more likely than not that Torres acted at the behest of Smith or, at the very least, relied upon information provided to her by Smith. The Agency has shown that Smith had immediate or successively higher authority over Bennett while Operations Director and that continued without any interruption while he worked as a consultant for the Respondent.

2. Bennett was not discharged because of her sex.

The preponderance of the evidence shows that Smith had direct involvement in this decision to terminate Bennett's employment. However, the evidence does not show that the termination was because of Bennett's sex. Rather, the evidence shows the termination was in retaliation for Bennett's opposition to Smith's illegal conduct, as discussed below. Therefore, the Agency has not sustained its burden of proof to establish a violation of ORS 659A.030(1)(a) for the termination of Bennett. The Agency has therefore not shown that Senior Helpers discharged Bennett because of her sex in violation of ORS 659A.030(1)(a).

RETALIATION – DISCHARGE

ORS 659A.030(1)(f) makes it an unlawful employment practice for an employer to "discharge * * * any person because that * * * person has opposed any unlawful practice[.]" The Agency's prima facie case in an ORS 659A.030(1)(f) retaliatory discharge case consists of the following elements: (1) Bennett opposed an unlawful employment practice; (2) Senior Helpers subjected Bennett to an adverse action; and (3) there is a causal connection between Bennett's opposition and the adverse action. *In the Matter of From the Wilderness, Inc.,* 30 BOLI 227, 288 (2009).

The same facts that prove Complainant was discharged because she rejected Smith's unwelcome conduct directed at her also prove that she was discharged in retaliation for opposing an unlawful employment practice by filing her complaint on August 1, 2018. Within days of her complaint, Senior Helpers assigned her to a new supervisor before "terminating" Smith's employment as Operations Director. Despite this "termination," Smith continued to control the daily operations of the business. As Elliott testified, all decisions went through Smith when she was interim Operations Director. The forum has no doubt that Smith's control continued after Torres was made Operations Director. Further, the forum has no doubt that Torres acted at the behest of Smith when she discontinued the payment of Bennett's $500 monthly insurance stipend and discharged Bennett a few weeks later. The Agency has shown that Senior Helpers violated ORS 659A.030(1)(f) when it discharged Bennett in retaliation for her reporting Smith's behavior.

The Agency also alleges that Senior Helpers violated ORS 659A.199. The analysis used in determining that Senior Helpers violated ORS 659A.030(1)(f) applies equally to the Agency's ORS 659A.199 claim. Accordingly, the forum's conclusion that Senior Helpers violated 659A.030(1)(f) necessarily leads to the conclusion that Senior Helpers also violated ORS 659A.199(1) when it discontinued Bennett's monthly insurance stipend and terminated her employment after her report of harassment. *See Vision International,* 37 BOLI at 199.

LIABILITY

"An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer." OAR 839-005-0030(3).

The preponderance of the evidence shows Smith served as the employer's proxy in his role as Operations Director. Even after his "termination," all decisions related to the daily operations of the business went through Smith. Further, J. Reynolds admittedly relied upon Smith's advice and counsel in making decisions regarding the business and continued to do so when Smith became a contracted consultant. It is therefore determined that Smith served as the employer's proxy.

Respondent's liability for Smith's illegal conduct is also based on Smith's role as Bennett's supervisor. OAR 839-005-0030(4) provides:

> "Harassment by Supervisor plus Tangible Employment Action: An employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against that individual. A tangible employment action includes but is not limited to the following:
>
> (a) Terminating employment, including constructive discharge;
> (b) Failing to hire;
> (c) Failing to promote; or
> (d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit."

As discussed above, Smith continued to exercise immediate or successively higher authority over Bennett even after he was "terminated" and began working for Respondent as a consultant. Tangible employment actions were taken against Bennett, which Smith either took directly or caused to be taken by others during his time as a consultant. For example, Bennett lost her health insurance stipend in September 2018; she suffered a reduction in her marketing budget that directly interfered with her ability

to successfully perform her job duties; Smith denied Bennett's request for time off to tend to a family emergency; and Bennett was ultimately discharged because of the actions of Smith both in his role as Bennett's direct supervisor and in his role as a consultant. Senior Helpers is, therefore, liable for the tangible employment actions taken against Bennett either taken directly by Smith or indirectly by others as a result of Smith's continuing harassment and retaliatory conduct toward Bennett.

DAMAGES

Lost Wages

The purpose of a back pay award in an employment discrimination case is to compensate a complainant for the lost wages she would have received but for the unlawful employment practice. *Vision International*, 37 BOLI at 200. Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the unlawful termination. *Id.*

An award for lost wages involves a three-step analysis. First, whether Complainant exercised due diligence in seeking work to mitigate her wage loss. OAR 839-003-0090(3). Second, is to determine the amount of wages Complainant would have earned, but for the unlawful termination, to be offset by her subsequent earned income. OAR 839-003-0090(3)(a), and third, when the period for which lost wages are sought should end. A complainant who is seeking damages for back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). The burden of proof for failure to mitigate damages lies with the Respondent. *In the Matter of Wal-Mart Stores, Inc*., 24 BOLI 37, 65 (2003).

Bennett exercised reasonably diligent efforts to seek comparable work following her termination from Senior Helpers. Bennett was unable to obtain employment in her preferred field and ultimately found work for Oregon Rental Property Management in August 2019, with average monthly earnings of $1,647.31. Bennett found a second job in November 2019 with Pacifica Calaroga Terrace LLC, with average monthly earnings of $3,999.39. While greater than her wages at ORPM, Bennett's wages at Pacifica were not comparable to the wages she would have earned if she had not been terminated by Senior Helpers. Bennett subsequently obtained other employment and worked for four other employers where she earned substantially less than what she would have earned if she had been allowed to continue working for Senior Helpers. See Ex. A66. Bennett ultimately obtained employment that offered comparable compensation in mid-November 2021, when she began working for Sinceri, which offered a regular hourly wage of $30.7692, and an overtime hourly wage of $46.1538. Bennett was also eligible for bonuses in her employment with Sinceri. *See* Ex. A52, p. 34. As of the pay period ending April 30, 2022, Bennett's average monthly earnings were $8,987.12. Therefore, an award for lost wages is properly ending after 36 months, which would have been the first pay period in which Bennett received the same or comparable pay following her termination from Senior Helpers.

The forum adopts the calculations of the Agency in its lost wage assessment. *See Agency Post-Hearing Brief: Damages*, p. 4 (filed 06/03/2021). Bennett's total earnings from subsequent employment totaled $104,173.49. But for her termination from Senior Helpers, Bennett would have enjoyed earnings totaling approximately $308,748.60. Bennett is, therefore, entitled to a lost wage award of $204,575.11.

Emotional Distress Damages

Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering 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 Oregon Truck Painting*, 37 BOLI at 115. 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 at 141.

Bennett provided compelling testimony that she suffered emotional and mental suffering as a result of the hostile work environment caused by Smith's sexual harassment and behavior after she rejected his advances, as well as the emotional and mental suffering she experienced following her termination from a job that she loved and put her "heart and soul into." Bennett was visibly upset at hearing as she described the financial issues she experienced, including having to ask her son for financial help to pay her rent. Bennett felt hurt, embarrassed and distressed as she attempted to handle Smith's behavior for several months and in the months following her termination.

The Agency seeks damages on behalf of Bennett in the amount of "at least" $200,000 for emotional, mental and physical suffering. 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 discrimination cases.

The forum awarded $120,000 in emotional distress damages where Respondent terminated Complainant within days of learning she was pregnant and Complainant subsequently lost the child shortly after she lost her job. *In the Matter of Next Step Carpet, LLC*, 38 BOLI ___ (2021). The forum awarded $60,000 in emotional distress damages to a Complainant who experienced harassment based on his race and was discharged in retaliation about his complaints regarding unlawful harassment in the workplace. *In the Matter of Vision International Petroleum LLC*, 37 BOLI 187, 200 (2019). The forum awarded Complainants $50,000 and $100,000 in emotional distress damages where the Complainants were physically assaulted by their co-workers without provocation and the hostile work environment they experienced during the remainder of

their employment. The forum's award was also based upon discrimination and retaliation the Complainants experienced, as well as their ultimate discharge, due to their participation in a criminal investigation of the assault. *In the Matter of Maltby Biocontrol, Inc*., 33 BOLI 121, 159 (2014)

The forum awarded $150,000 in emotional distress damages where a Complainant was sexually harassed by Respondent's president and general manager and ultimately discharged in retaliation for her complaint about the unlawful harassment. The forum found that there were at least 12 specific incidents that occurred during Complainant's three-month period of employment. The forum noted the financial issues Complainant experienced as a result of her termination, as well as other issues such as experiencing panic attacks; difficulty sleeping, and self-imposed social isolation. *In the Matter of Crystal Springs Landscapes, Inc*., 32 BOLI 144, 170 (2012). The forum awarded $50,000 in emotional distress damages where a Complainant was subjected to verbal and physical sexual harassment in two three-day periods, which culminated in her discharge after Respondent hit her on the head with his fist. *In the Matter of Charles Edward Minor*, 31 BOLI 88, 104 (2010).

The hostile work environment created by Smith's conduct toward Bennett and her subsequent discharge in retaliation for her complaint regarding Smith's sexual harassment caused Bennett distress and financial issues that continued until she was able to secure comparable employment. The situation at Senior Helpers has had a lasting impact on Bennett and has adversely affected her daily life. Based on the facts of this case, the forum therefore concludes that an award of $60,000 for emotional distress damages is appropriate in this case.

OTHER REQUESTED RELIEF

In its Amended Formal Charges, the Agency requested that a cease and desist order be issued against Respondents, requiring them to immediately stop all of the unlawful employment practices alleged in the Amended Formal Charges. 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 that the Agency's requested cease and desist order to be appropriate relief in this case. The forum further finds that the Agency's request that Senior Helpers' managers, supervisors, and human resources personnel complete training, at the expense of Senior Helpers, on preventing discrimination based on sex in the workplace appropriate relief. The training must be completed by the Bureau of Labor and Industries' Employer Assistance Unit, or another trainer agreeable to and approved by the Agency.

EXCEPTIONS TO THE PROPOSED ORDER

On December 8, 2022, the Agency filed exceptions to the Proposed Order, seeking corrections to scrivener's errors. As the Agency's exceptions are well taken, the Agency's exceptions are GRANTED as reflected above.

Respondent filed its exceptions to the Proposed Order on December 8, 2022, seeking the removal of language requiring Respondent to undergo training pertaining to sexual harassment in the workplace. Respondent argued that its current manager participated in a webinar on workplace harassment and discrimination conducted by BOLI on June 29, 2021, and that it was Respondent's intention to continue engaging in similar trainings in the future.

In order to ensure that the effects of Respondent's unlawful employment practices are eliminated, the Respondent's managers, supervisors and human resources personnel shall be required to undergo annual training pertaining to sexual harassment in the workplace. This training shall be completed no later than December 31, 2023, and each year thereafter for five years.

Respondent's Exception is therefore DENIED and the language set forth below is modified to reflect that Respondent shall be required to participate in annual training pertaining to sexual harassment in the workplace.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(a), (b), (f); ORS 659A.199(1); OAR 839-005-0030(1)(a), (b), (4)(a), (b); OAR 839-005-0125(2)(a)(A); OAR 839-010-0100(1) by Respondent **Reynolds Consultation, Inc., dba Senior Helpers of Salem**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Reynolds Consultation, Inc., dba Senior Helpers of Salem** 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 **Donna Bennett** in the amount of:

1) SIXTY THOUSAND DOLLARS ($60,000.00), representing compensatory damages for emotional and physical suffering experienced by

Complainant as a result of Respondents' unlawful employment practices found herein; plus,

2) TWO HUNDRED FOUR THOUSAND FIVE HUNDRED SEVENTY-FIVE DOLLARS AND ELEVEN CENTS ($204,575.11), representing wages lost as a result of Respondents' unlawful employment practices; plus

3) Interest at the legal rate on the sum of TWO HUNDRED SIXTY FOUR THOUSAND FIVE HUNDRED SEVENTY FIVE DOLLARS AND ELEVEN CENTS ($264,575.11), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of violations of ORS 659A.030(1)(a), (b), (f) and ORS 659A.199(1) by Respondent **Reynolds Consultation, Inc., dba Senior Helpers of Salem.**, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Reynolds Consultation, Inc., dba Senior Helpers of Salem** to:

1) At Respondent's expense, undergo training, along with all managers, supervisors, and human resources personnel, on the correct interpretation and application of Oregon laws pertaining to sexual harassment in the workplace, with the training to be conducted by the Bureau of Labor and Industries Employer Assistance Unit or another trainer agreeable to the Agency, with the training to be completed no later than December 31, 2023, and by December 31, of each successive year for five years.

2) To create and implement a harassment policy that accurately reflects Oregon law, to be approved by the Bureau of Labor and Industries, Civil Rights Division. If such a policy is in place, Respondent shall provide a copy of that policy to the Bureau of Labor and Industries, Civil Rights Division, to ensure the policy conforms with Oregon law. Respondent shall provide a copy of any policy currently in place to the Civil Rights Division of the Bureau of Labor and Industries no later than sixty (60) days following the issuance of this Final Order.

3) Cease and desist from violating laws pertaining to unlawful discrimination against persons with disabilities in the scope of the operation of Senior Helpers of Salem.

In the Matter of
Ramarjundev, LLC dba Dev's Burgers, and Rakesh Sharma, individually pursuant to ORS 659A.030(1)(f) and as aider or abettor pursuant to ORS 659A.030(1)(g), Respondents, Case No. 53-21

Final Order of Commissioner Christina Stephenson
Issued May 11, 2023

SYNOPSIS

The Agency established by a preponderance of the evidence that Respondent Ramarjundev, LLC dba Dev's Burgers subjected Complainant to unlawful sexual harassment from a non-employee and retaliated against Complainant in violation of ORS 659A.030(1)(b),(f), ORS 659A.199(1), OAR 839-005-0010(1),(4), OAR 839-005-0125(2)(a)(A), OAR 839-005-0030(7) and OAR 839-005-0100(1). The forum also concluded that Respondent Rakesh Sharma aided or abetted the unlawful sexual harassment and retaliation. ORS 659A.030(1)(g). The forum awarded Complainant $9,693 in lost wages and $100,000 in compensatory damages for the mental and emotional distress she experienced as a result of the unlawful conduct. The forum also ordered Respondents to undergo training on preventing sexual discrimination in the workplace. ORS 659A.050(2), (4).

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 2-3, 2021, via the GoToMeeting video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Rachel Diamond-Cuneo, an employee of the Agency. Respondents were represented by their attorney, Christopher Cauble. Complainant Freda Rymer ("Rymer") was present throughout the hearing; Rakesh Sharma ("Sharma") was present throughout the hearing, on behalf of Respondents. Hindi language interpreters were also present throughout the hearing. The interpreters translated the proceedings for the benefit of Sharma and translated Sharma's testimony for the record. In addition, Rymer's attorney, Nicholas Yanchar, was also present throughout the hearing.

The Agency called Senior Civil Rights Investigator James Pappas ("Pappas"), Lana Miller ("Miller"), Rymer, Nicole Watson ("Watson") and Jason Morgan ("Morgan") as witnesses. Respondents called Sharma, Tina Burnett ("Burnett") and Jennifer Williams ("Williams") as witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X9,[1] (b) Agency exhibits A1-A14 and (c) Respondents exhibits R1-R5.

Having fully considered the entire record in this matter, I, Christina Stephenson, 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.

FINDINGS OF FACT – PROCEDURAL

1) Complainant filed a complaint with the Agency's Civil Rights Division on August 14, 2019, alleging that Dev's Burgers & Deli/A-1 Market/A-One Market, LLC and Respondent Ramarjundev, LLC ("DB") engaged in gender discrimination, sexual harassment and retaliation. The complaint also named Sharma as an aider or abettor. (Ex. A1; Testimony of Pappas)

2) On August 14, 2020,[2] the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence that Respondents committed unlawful employment practices (sexual harassment and retaliation) in violation of ORS 659A.030. The Notice further identified Sharma as an aider/abettor. (Ex. A14)

3) On January 21, 2021, the forum issued a Notice of Hearing to Respondents, the Agency, and Complainant stating the time and place of the hearing as June 2, 2021, beginning at 9:30 a.m., at the Oregon Employment Department, 119 N. Oakdale Ave., Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445. (Ex. X2)

4) The Formal Charges alleged that DB engaged in unlawful employment practices under ORS 659A.030(1)(a),(b); OAR 839-005-0030(1)-(7); and OAR 839-005-0010(1), (4). Additionally, the Formal Charges alleged that Sharma unlawfully aided and abetted the unlawful employment practices of DB in violation of ORS 659A.030(1)(g). The Formal Charges also alleged that Sharma violated ORS 659A.030(1)(f); ORS 659A.199(1); OAR 839-005-0125(2)(a)(A) and OAR 839-005-0010(1),(4) by discharging Rymer because she opposed an unlawful practice. The Formal Charges sought damages for lost wages in the amount of "at least $45,000," and mental and/or emotional distress in the amount of "at least $100,000.00." The

[1] Exhibits X8 –X9 (the parties' written closing arguments) were received after the hearing ended.

[2] The first page of the SED states that the filing date is August 14, 20*19*. Based on other exhibits in evidence, the forum concludes that "2019" was a typographical error, and that the SED was issued on August 19, 20*20*. *See, e.g.,* Ex. A13 (containing email communications from August 13, 2020, indicating that the "cause memo" would be issued "tomorrow.")

Formal Charges also asked that Respondents be trained, at their expense, "on unlawful harassment and discrimination in the workplace" and that Respondents be enjoined from violating laws. In addition, the Formal Charges asked that Respondents be required to provide training to its managers, supervisors and human resources personnel on preventing sex discrimination in the workplace. (Ex. X2b)

5) On February 5, 2021, Respondents, through counsel Christopher Cauble, filed an answer in which Respondents denied that Respondents had committed the alleged violations. (Ex. X3)

6) On March 3, 2021, the forum issued an Interim Order Re Temporary Procedures and Requiring Case Summaries, which included a notice that the parties were to file documents by email, and set May 19, 2021, as the deadline for filing Case Summaries. (Ex. X4)

7) The forum issued an interim order on May 4, 2021, stating, in pertinent part: "Due to ongoing COVID-19 requirements for in person gatherings and social distancing, this hearing will be conducted by video conference on the currently scheduled hearing date of **June 2, 2021, beginning at 9:30 a.m**." Further instructions regarding participation in a video conference hearing were attached to the interim order. (Ex. X5)

8) The Agency and Respondents filed their case summaries on May 19, 2021. (Exs. X6-X7)

9) The Agency and Respondents stipulated to the following facts:

a. Rymer is a "person" a defined by 659A.001(9)(a) and OAR 839-005-0003(12);
b. Complainant was employed by DB;
c. At the time of the events in the Formal Charges, DB was an active domestic limited liability company;
d. At the time of the events in the Formal Charges, Sharma was an owner, member and registered agent of DB and the authorized representative of DB;
e. DB employs one or more persons in the state of Oregon;
f. Complainant identifies as female;
g. Complainant was employed by DB beginning on or about June 4, 2018.

(Exs. X6-X7; Hearing Record)

10) Prior to the hearing, Respondents requested Hindi language interpreter services for the benefit of Sharma. On May 27, 2021, the forum issued an interim order appointing Hindi language interpreters Suman Gupta and Vijaylaxmi Desaram to serve as interpreters in this matter. On the record at hearing, the ALJ amended the order to also appoint Kalpna Bentler to serve as an interpreter. All of the interpreters were

certified or registered interpreters in other states, but not in Oregon. Before each interpreter began translating testimony, the ALJ questioned them about their qualifications and experience, concluded that they were qualified and administered an oath. Before each interpreter began, the ALJ recessed the hearing briefly so that the interpreter and Sharma could communicate. After the recess, each interpreter stated that they could effectively communicate with Sharma. Prior to the cross examination of Sharma, the entire proceedings were interpreted into Hindi for Sharma's benefit, and Sharma's testimony was translated into English for the record.

Immediately prior to Sharma's cross examination, Respondents' counsel stated that Respondents were willing to withdraw their request for interpreter services so that the hearing could move more quickly. The proceedings continued for approximately 13 minutes in English, without Hindi language interpretation, until the ALJ determined that Hindi language interpreter services should be reinstated. The remainder of the proceedings were interpreted into Hindi for Sharma's benefit, and his testimony was translated into English. (Ex. X8; Hearing Record)

11) 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)

12) The parties stipulated on the record during the hearing that Raj Kumar ("Kumar") was the name of the individual Rymer accused of sexually harassing her. Kumar is distantly related to Sharma. Sharma's brother also has the first name "Raj" and is involved with the company, but he is not the person whose conduct is at issue in this matter. (Hearing Record)

13) During the hearing, the parties informed the ALJ that they would like to submit written closing arguments instead of making oral arguments. The ALJ set a 10-page limit and a deadline of June 18, 2021, for the filing of closing arguments. The Agency filed its closing argument on June 18, 2021. Respondents filed their closing arguments by mail on June 17, 2021. (Exs. X9-X11)

14) On April 14, 2023, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondents filed exceptions on April 24, 2023. The Agency filed exceptions on April 27, 2023.

FINDINGS OF FACT – THE MERITS

1) At the time of the events in the Formal Charges, DB was an active domestic limited liability company, and employed one or more persons in the state of Oregon. (Stipulation)

2) DB was a convenience store located in Wolf Creek, Oregon, which sold burgers, beer, wine, cigarettes, and gas. DB also had video gambling machines on its

premises, and 22 video surveillance cameras were located throughout the store. (Testimony of Sharma, Morgan, Burnett)

3) Sharma was an owner, member and registered agent of DB and the authorized representative of DB. Sharma was sometimes called "Rocky." He is from India and moved to the United States in 2003. He originally lived in California and moved to Oregon in 2012. (Stipulation; Hearing Record)

4) Rymer is a female who worked for DB beginning on or about June 4, 2018. Her responsibilities included serving beer and making sandwiches. (Stipulation; Testimony of Sharma)

5) Sharma believed that Rymer was a good worker. (Testimony of Sharma)

6) Rymer worked an average of 25 hours per week while employed by DB. She was paid a wage of $12.50 per hour and averaged another $1000 per month in tips. (Testimony of Rymer)

7) Beginning in the spring of 2018, Watson worked at DB, performing gambling hall and cooking duties. She was discharged just before Christmas in 2018. The business continued to operate after Watson's termination, and she gambled and ate food there. (Testimony of Watson)

8) Burnett managed a couple of markets owned by Sharma and was employed by Sharma at the time of her testimony. She had the authority to hire and fire employees. (Testimony of Burnett)

9) Kumar is related to Sharma. Kumar used to live in California in a U.S. immigration detention center. Sharma allowed Kumar to live in the apartment located above DB. Kumar did not have a work permit and was not employed by DB. However, Sharma permitted Kumar to be on the premises at DB to cook in the kitchen and watch how the business operated. Kumar also had access to DB's office. (Testimony of Sharma)

10) While Rymer was working one evening in August of 2018, Kumar approached her and stood in front of a door. He pointed upstairs to his apartment. While making an up and down hand gesture near his groin with his hand cupped, Kumar asked to Rymer to "go like this to me." Rymer believed that Kumar was asking her for a "hand job" and to engage in a sexual act with her. She said, "No, I don't 'go like this' to you." Rymer told Kumar that his conduct was inappropriate, and that she did not appreciate it. Kumar made her feel "cheap" and "gross." She felt "less than" and like she "was nothing." (Testimony of Rymer)

11) Rymer told one of her supervisors, Miller, that Kumar made advances towards her and that he was constantly watching her on a camera from the kitchen.

Miller did not witness any inappropriate conduct from Kumar towards Rymer. Miller told Rymer to talk to Sharma about Kumar's conduct. (Testimony of Miller, Rymer)

12) Watson observed Kumar watching Rymer on a camera in the kitchen and noticed that Kumar's behavior upset Rymer and that she did not want to work with him. (Testimony of Watson)

13) On one occasion, Morgan, a gas station attendant for DB, was in the next room and overheard Rymer and Kumar exchange words.[3] Morgan could not see them or hear what Kumar said, but observed that Rymer "came flying out of the room" like something had happened and she was extremely upset. He heard Rymer say something to Kumar like "you can't talk to me like that" and "I'm a married woman." (Testimony of Morgan)

14) About three days after the first incident with Kumar, Rymer contacted Sharma to make a complaint about Kumar engaging in inappropriate conduct towards her. Sharma came to DB and met with Rymer and Kumar in person. (Testimony of Rymer, Sharma)

15) Rymer was hoping that Sharma would suspend Kumar from the store or make Kumar avoid being around her. (Testimony of Rymer)

16) Kumar admitted to Sharma that he had placed his hand in his groin area in front of Rymer, but said that he did so to scratch an itch due to a medical condition, and that he did not try to make a sexual gesture. Sharma told Rymer that he did not believe her complaint, and that Kumar had an itching problem in his groin area. Sharma did not ask Kumar to stop touching his groin area. (Testimony of Sharma)

17) In response, Rymer told Sharma that there was "no way" that she could be mistaken, and that Kumar's hand gesture was not scratching. Rymer showed Sharma "exactly" what Kumar did with his hand. (Testimony of Rymer)

18) After the meeting with Sharma, Kumar's behavior towards Rymer worsened. Kumar watched her on the store's surveillance videos, stared at her breasts and touched himself in front of her. Rymer felt gross. She was uncomfortable and did not enjoy her job anymore. (Testimony of Rymer)

19) Rymer complained to Sharma about Kumar a second time, and told Sharma that Kumar was watching her on the surveillance cameras. In response, Sharma told Rymer that she should tell Kumar that she "was not that kind of girl." (Testimony of Rymer)

[3] Morgan testified that "Raj" was the person at issue, but that he did not know Raj's last name. The parties stipulated during the hearing that Raj Kumar was the person accused of harassment in this matter. (Stipulation; Finding of Fact – Procedural #12)

20) Sharma discharged Rymer on or about August 22, 2018. Sharma terminated her in front of "five guys," including Kumar, and the men laughed at her. She felt it was unfair, like she was "zeroed in on" and that she did not matter. (Testimony of Rymer)

21) After her termination, Rymer no longer felt comfortable working with men or being alone with men, and became worried that men would take advantage of her if she was too nice. (Testimony of Rymer)

22) Sharma did not tell Rymer that he would re-hire her if business at DB increased. If offered a position at another store owned by Sharma, she would not have accepted it because of the way she was treated at DB; she did not want to be harassed again. (Testimony of Rymer)

23) Rymer actively sought employment after her termination, but found it difficult to find a job with hours allowing her to accommodate the needs of her family and children. (Testimony of Rymer)

24) About one month after her discharge, Rymer worked at the Holiday Inn for two weeks averaging 22.5 hours per week and earned $12.50 per hour for a total of $562.50 ($12.50/hour x 22.5 hours x 2 weeks). (Testimony of Rymer)

25) From the beginning of October 2018 until November 23, 2018, Rymer worked at the Wolf Creek Inn averaging 25 hours per week and earned $14 per hour for a total of $2800 ($14/hour x 25 hours x 8 weeks). (Testimony of Rymer)

26) From March 2019 until April 30, 2019, Rymer worked as a custodian at Rogue River High School for 40 hours per week and earned $17.30 per hour for a total of $5882 ($17.30/hour x 40 hours x 8.5 weeks).[4] (Testimony of Rymer)

27) The DB convenience store closed on April 30, 2019. (Testimony of Miller)

28) After DB closed, there were positions available at other businesses owned by Sharma in Southern Oregon. No one who had been discharged from DB spoke to Burnett about other job opportunities to work for Sharma's companies after the business closed. (Testimony of Burnett)

Credibility

29) Rymer testified credibly and consistently about the events at issue in the case. Her testimony was straightforward, and she did not appear to embellish or exaggerate the events at issue in the case. Her testimony was credited in its entirety.

[4] Rymer worked in this position until "the beginning of COVID" in 2020. (Testimony of Rymer) However, damages are only calculated until the date DB closed on April 30, 2019.

30) The forum did not find Sharma's testimony to be credible because there were several instances in which his testimony conflicted with that of other credible witnesses, or simply did not make sense.

First, Sharma testified that Rymer was "lying" when describing the sexually harassing conduct of Kumar and that she did not tell him that Kumar was looking at her breasts. In addition to Rymer's own consistent testimony, several witnesses saw Rymer immediately after her interactions with Kumar and described her as visibly upset and "flying out of the room." There was also testimony that they observed Kumar watching Rymer on the video surveillance screens at DB.

Second, Sharma's testimony that Kumar was itching his groin due to a medical condition was not credible given that Rymer credibly testified that she demonstrated the hand motion that Kumar made towards her and told Sharma that it did not look like someone scratching an itch. Also, when questioned as to whether he asked Kumar to stop itching his groin area, Sharma mentioned that he had a similar condition and responded: "How can I stop him?" This suggested that Sharma did not take Rymer seriously and that he was biased in favor of Kumar, who is his relative.

Third, the forum also does not believe Sharma's testimony that he terminated Rymer because the business was closing. Rymer was terminated on or about August 22, 2018, but the business did not close until April 30, 2019.

Finally, the forum did not give credit to Sharma's testimony that no one could have watched an employee such as Rymer on DB's video surveillance cameras. This contradicted the credible testimony of Rymer, Miller and Watson.

The forum did not give credit to Sharma's testimony when it contradicted testimony from other credible witnesses.

31) Miller and Watson are friends of Rymer's and, thus, could potentially have a motive to be biased in favor of Rymer. However, both Miller and Watson appeared straightforward and honest in their testimony, they did not appear to be advancing an agenda on behalf of Rymer, and their testimony was not impeached with credible evidence.

32) Morgan was a credible witness.

33) Burnett and Williams were credible witnesses, but they lacked personal knowledge of the interactions between Kumar and Rymer, and neither of them had met Rymer.

CONCLUSIONS OF LAW

1) At all times material herein, DB was an employer as defined in ORS 659A.001(4) and employed Complainant.

2) The actions, statements and motivations of Sharma are properly imputed to DB. *In the Matter of Lioness Holdings, LLC dba Tan Republic and Peter Lamka*, 36 BOLI 229, 264 (2018).

3) DB subjected Complainant to sexual harassment and sex discrimination in violation of ORS 659A.030(1)(a), (b) and OAR 839-005-0030(7).

4) DB's action, taken through Sharma, of discharging Rymer from employment violated ORS 659A.030(1)(f), and OAR 839-050-0125(2)(a)(A) and OAR 839-005-0010(1).

5) Rymer, acting in good faith and while employed by DB, reported information that she believed was evidence of a violation of a state law (unlawful harassment) to Sharma.

6) DB, acting through Sharma, terminated Rymer, because of her good faith reports about Kumar sexually harassing her in the workplace, thereby violating ORS 659A.199(1) and OAR 839-010-0100(1).

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

8) Sharma aided or abetted DB in its unlawful employment practices in violation of ORS 659A.030(1)(g).

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

10) Pursuant to ORS 659A.850(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 an award requiring training, and the award of lost wages and compensatory damages to Complainant, based on Respondents' unlawful practices. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

The Agency's Formal Charges include the following four alleged violations:

1. DB engaged in unlawful discrimination based on sex against Rymer in violation of 659A.030(1)(b) and OAR 839-005-0030(1) - (7). Sharma aided [or] abetted DB in this unlawful practice, in violation of ORS 659A.030(1)(g).

2. DB and Sharma discharged Rymer because she opposed an unlawful practice, in violation of 659A.030(1)(f), OAR 839-005-0125(2)(a)(A) and OAR 839-005-0010(1),(4). Sharma aided and abetted DB in this unlawful practice,

in violation of ORS 659A.030(1)(g).

3. DB discharged Rymer because of her sex in violation of 659A.030(1)(a), OAR 839-005-0030(1)-(7) and OAR 839-005-0010(1),(4). Sharma aided [or] abetted DB in this unlawful practice, in violation of ORS 659A.030(1)(g).

4. DB terminated Rymer, because of her good faith reports about sexual harassment her in the workplace, thereby violating ORS 659A.199(1) and OAR 839-010-0100(1). Sharma aided [or] abetted DB in this unlawful practice, in violation of ORS 659A.030(1)(g).

The Agency seeks lost wages and emotional distress damages for Rymer and requests an order requiring Respondents to undergo training regarding sexual discrimination laws.

LIABILITY OF DB FOR SEXUAL DISCRIMINATION

A. Sexual Harassment Analysis

It is an unlawful employment practice for "[a]n employer, because of an individual's * * * sex * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment." ORS 659A.030(1)(b). Employers are prohibited from using sex as the basis for employment decisions with regard to the "terms conditions or privileges of employment such as benefits and compensation." OAR 839-005-0021(1). "Discrimination because of sex includes sexual harassment * * *." OAR 839-005-0021(2).

Unlawful sexual harassment may take the form of *quid pro quo* harassment or hostile work environment harassment. The allegations in this case center on hostile work environment harassment. OAR 839-005-0030(1)(b) defines hostile work environment sexual harassment as:

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

OAR 839-005-0030(1). The conduct must be based on an individual's sex. *Id.*

The Agency's prima facie case in a hostile environment case consists of the following elements: (1) DB was an employer subject to ORS 659A.001 to 659A.030; (2) DB employed Complainant; (3) Rymer is a member of a protected class (sex); (4) Rymer was subjected to unwanted conduct because of her sex; (5) the unwelcome conduct was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with Complainant's work performance or creating a hostile, intimidating or offensive work environment for Complainant; and (6) Rymer was harmed by the unwelcome conduct. *In the Matter of Bravo Event Service, Inc.,* 36 BOLI 250,

267 (2018). The Agency and Respondents stipulated to facts that establish Elements 1-3. *See* Finding of Fact – Procedural, # 9. Accordingly, the forum will examine the additional elements below.

Element 4 – Unwelcome Conduct

The Agency contends that Rymer was subjected to unwelcome conduct from Kumar, including Kumar asking Rymer to go upstairs to his apartment to engage in a sexual act. DB and Sharma deny that Kumar engaged in the harassing conduct.

The forum concludes that Rymer credibly testified that one evening Kumar (a resident of the apartment located above DB) stood in front of a door, pointed upstairs to his apartment and, while making a hand gesture, asked to Rymer to "go like this to me." Rymer believed that Kumar was asking her for a "hand job" and to engage in a sexual act with her. Rymer told Kumar that his conduct was inappropriate and that she did not appreciate it. After the initial incident, Kumar's behavior worsened. Rymer and other employees observed Kumar watching her on the store's video cameras. Kumar also stared at Rymer's breasts and continued to touch his genital area in front of her.

The forum did not believe Sharma's testimony that Rymer was "lying." Furthermore, the forum discredited Sharma's contention that Kumar was not simulating a "hand job" but instead was "scratching" his genital area due to a medical condition.

Accordingly, the Agency established Element 4 (Unwelcome Conduct).

Element 5 – Sufficiently Severe and Pervasive

The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2); *Vision International,* at 198. In making that determination, the forum looks at the totality of the circumstances, *i.e.*, the nature of the conduct and its context, the frequency of the conduct, its severity or pervasiveness, whether it is physically threatening or humiliating, and whether it unreasonably interferes with an employee's work performance. *In the Matter of Andrew W. Engel, DMD, PC,* 32 BOLI 94, 120 (2012).

The evidence in this case established that a reasonable person in Rymer's circumstances (a woman) would have perceived Kumar's conduct towards her as creating a hostile environment. Although there are no allegations that Kumar physically touched Rymer, his conduct was severe in that he stood in front of a door, pointed to his upstairs apartment and simulated a sexual act with his hand. Even after Rymer complained to Sharma, Kumar stared at Rymer's breasts and watched her on the store's video cameras. Accordingly, the Agency established that Kumar's conduct was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment.

Element 6 – Harm to Rymer

Rymer credibly testified that Kumar made her feel uncomfortable and "gross." She felt "less than" and like she "was nothing." Other witnesses also described Rymer being upset after her encounters with Kumar. *See* Findings of Fact ## 12, 13. Accordingly, the Agency established all five elements of a hostile work environment.

B. DB's Responsibility for the Harassment

OAR 839-005-0030(3)-(7) sets forth the standards for analyzing whether an employer is liable for sexual harassment based on whether the harasser is a proxy, supervisor, co-worker or non-employee.

The Formal Charges included an allegation of harassment by proxy, which is addressed in 839-005-0030(3). If Kumar was a proxy for Respondents, then his sexual harassment of Rymer should be imputed to DB. OAR 839-005-0030(3) provides that "[a]n employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer." *See, e.g. In the Matter of Dr. Andrew Engel*, *DMD, PC*, 32 BOLI 94, 122 (2012) (respondent's sole owner was proxy); *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 167 (2012) (respondent's owner, who was also a corporate officer, was respondent's proxy); *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 286 (2009) (corporation liable for harassment by respondent's sole shareholder); *In the Matter of Spud Cellar Deli, Inc*., 31 BOLI 106, 133 (2010) (respondent was held strictly liable for sexual harassment committed by respondent's owner, president, and manager).

Kumar was Sharma's relative and lived in the apartment above the DB business. He did not have a work permit and could not be legally employed. However, because of his familial relationship with Sharma, Kumar was permitted to spend time in the store while it was open. He cooked meals there and watched how the business operated. However, there was insufficient evidence showing that he was employed by Respondents or had any kind of role in the business. Accordingly, the Agency did not sustain its burden to prove that Kumar held a rank that is "sufficiently high" so as to be deemed the proxy of DB. Therefore, DB is not strictly liable for Kumar's harassment of Complainant.

Similarly, the Agency did not establish that Kumar was a supervisor, employee or an agent of DB. Accordingly, DB is not liable under the theories set forth in 839-005-0030(4)-(6).

Therefore, DB's liability is to be examined under 839-005-0030(7) which addresses harassment by non-employees. DB is liable for the sexual harassment committed by Kumar if DB or one of its agents "knew or should have known of the conduct unless [DB] took immediate and appropriate corrective action. In reviewing

such cases, the [forum] will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees." OAR 839-005-0030(7).

In this case, it is undisputed that DB became aware of Kumar's conduct when Rymer reported it to Sharma. However, instead of taking immediate and appropriate corrective action, Sharma told Rymer that he did not believe her. Sharma allowed Kumar to remain in the workplace and Kumar continued to harass Rymer. Therefore, the forum concludes that DB is responsible for Kumar's sexual harassment of Rymer.

LIABILITY OF DB AND SHARMA – TERMINATION FOR OPPOSING UNLAWFUL PRACTICE

The Agency alleges in its Formal Charges that DB and Sharma violated ORS 659A.030(1)(f) by terminating Rymer's employment, because she opposed what she reasonably believed to be an unlawful practice (Kumar's sexual harassment). The Agency's prima facie case consists of the following elements: (1) DB and Sharma were an employer as defined by statute; (2) DB and Sharma employed Rymer; (3) Rymer explicitly or implicitly opposed an unlawful practice or what she reasonably believed to be an unlawful practice; (4) DB and Sharma subjected Rymer 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 Sis-Q Cellular*, LLC, 38 BOLI _ (2022); *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).

Elements 1 and 2 are not in dispute as to DB. With respect to Sharma, the record does not establish that he was an employer, and the Agency did not address this allegation in its Closing Argument brief. Accordingly, the forum will proceed to analyze this alleged violation as to DB only.

As to Element 3 (report), the evidence is undisputed that Rymer reported to Sharma, and others, that Kumar was sexually harassing her. As the forum concluded above, Kumar sexually harassed her and, thus, she had a "reasonable belief" that she was harassed in the workplace.

With respect to Element 4 (adverse action), Rymer was terminated following her report of harassment and, thus, there was an adverse action.

Finally, as to Element 5 (causation), there is evidence that Sharma did not like Rymer's complaint of harassment and thought she was lying. As well, he terminated her in August of 2018, the same month in which she began complaining of Kumar's sexual harassment. The manner in which Rymer was terminated also supports an inference of causation in that Sharma discharged Rymer in front of Kumar and four other men, and they all laughed at her. Respondents claim that Rymer was terminated because the business closed and all employees were discharged. However, Rymer

was terminated on August 22, 2018, but the business did not close until April 30, 2019. Therefore, the Agency established the element of causation and met its burden of proof to show that DB violated ORS 659A.030(1)(f).

LIABILITY OF DB FOR TERMINATION BECAUSE OF SEX

The Formal Charges allege that DB discharged Rymer because of her sex in violation of ORS 659A.030(1)(a). It is an unlawful employment practice for "[a]n employer, because of an individual's * * * sex * * * to * * * discharge the individual from employment." ORS 659A.030(1)(a). To prove that DB violated ORS 659A.030(1)(a) by discriminating against and terminating Rymer's employment because of her sex, the Agency must establish a prima facie case consisting of the following five elements: (1) DB was an employer; (2) DB employed Rymer; (3) Rymer was in a protected class (sex); (4) DB discharged Rymer and (5) DB terminated Rymer because of her sex. *In the Matter of Next Step Carpet, LLC,* 38 BOLI _ (2022); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 32 (2012).

The first four elements are not in dispute. Therefore, the forum must determine if there is causation and that Rymer was terminated because of her sex. As set forth above, the forum concludes that she was terminated for her opposition to unlawful activity. As well, there is evidence that other female employees continued to work at DB after Rymer was terminated. Finally, the Agency's closing argument brief does not address this claim to explain what evidence may be in support of the alleged violation. Accordingly, the forum concludes that the Agency did not sustain its burden of proof to establish a violation of ORS 659A.030(1)(a) for the termination of Rymer.

LIABILITY OF DB FOR TERMINATION DUE TO REPORT OF UNLAWFUL PRACTICE

The Agency also alleges that DB violated ORS 659A.199 when it terminated Rymer. The analysis used in determining that DB violated ORS 659A.030(1)(f) applies equally to the Agency's ORS 659A.199 claim. The forum also notes that the Agency established that Rymer made a good faith report of information she believed was evidence of a violation of state law (unlawful sexual harassment). Accordingly, the forum's conclusion that DB violated 659A.030(1)(f) also leads to the conclusion that DB also violated ORS 659A.199(1) when it terminated her employment after her report of harassment. *See Vision International,* 37 BOLI at 199; *In the Matter of Grand Management Services, Inc*., 38 BOLI _ (2022).

LIABILITY OF SHARMA 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." A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided or abetted the corporation's unlawful employment

practice. *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene*, 34 BOLI 80, 97 (2015). *See also In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012).

As set forth above, the parties stipulated that Sharma was an owner, member and registered agent of DB. "[P]ersons directing the business-entity employer's unlawful conduct can be held individually liable under ORS 659A.030(1)(g)." *Allison v. Dolich*, 321 Or App 721, 726, 518 P3d 591 (2022). Accordingly, in his role for DB, Sharma aided both the harassment of Rymer that violated ORS 659A.030 and the retaliation that violated ORS 659A.030 and ORS 659A.199 and he is in violation of ORS 659A.030(1)(g). As an aider/abettor, Sharma is jointly and severally liable with DB for all of DB's unlawful employment practices.

DAMAGES

Lost Wages

The Formal Charges sought lost wages of "at least $45,000." In its closing brief, the Agency revised that figure to a total of $12,387.50 in lost wages and tips.[5] The purpose of a back pay ward in an employment discrimination case is to compensate a complainant for the lost wages she would have received but for the unlawful employment practice. *Vision International*, 37 BOLI at 200. Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the unlawful termination. *Id.*

"In order to recover damages for lost wages, the aggrieved person will generally be required to mitigate damages by seeking employment." OAR 839-003-0090(3). "Earned income from employment may be deducted from lost wage damages." OAR 839-003-0090(3)(a). A complainant who is seeking damages for back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). The burden of proof of showing the failure to mitigate damages lies with Respondents. *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

In this case, it would be appropriate to award Rymer lost wages from the date of her termination (August 22, 2018) until the DB business closed on April 30, 2019. Had she continued to remain employed during this time, she would have earned $10,937.50 in wages ($12.50/hour x 25 hours/week x 35 weeks). In addition, she would have earned tips in the amount of $8000 ($1000/month x 8 months), for a total of $18,937.50 in lost wages and tips.

[5] The forum has previously included tip money when calculating lost wages. *See, e.g. In the Matter of Leo Thomas Ryder dba Leo's BBQ Bar & Grill*, 34 BOLI 67, 76 (2015).

Rymer earned income from employment after her termination in the amount of $9,244.50. *See* Findings of Fact – Procedural ##24-26.

Accordingly, her total lost income minus the income she earned from other work is $9,693.

Emotional Distress Damages

The Agency seeks damages on behalf of Rymer in the amount of "at least $100,000" for physical, mental and emotional suffering. Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering sustained. *In the Matter of Oregon Truck Painting, LLC, On Time Painting, Inc., Richard Bowman, and Amanda M. Marin*, 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.* at 115.

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).

Rymer credibly testified that Kumar sexually harassed her by simulating a "hand job," and asking her to go upstairs to his apartment and engage in a sexual act with him. Rymer told Kumar that his conduct was inappropriate, and that she did not appreciate it. Kumar made her feel "cheap" and "gross." She felt "less than" and like she "was nothing."

After Rymer's complaint to Sharma, Rymer was subjected to worse conduct from Kumar, including watching her on video, staring at her breasts and touching his groin area in front of her. This made her feel gross and uncomfortable. She did not enjoy her job anymore. When Sharma terminated her in front of Kumar and four other men, they laughed at her. She felt that her termination was unfair, like she was "zeroed in on" and that she did not matter. Rymer no longer felt comfortable working with men or being alone with men, and became worried that men would take advantage of her if she was too nice.

The forum looks to similar BOLI contested cases when considering an appropriate damage award. For example, the forum awarded $100,000 to a woman sexually harassed by her supervisor when she credibly explained how the harassment impacted her feelings of safety, and made her change how she dressed and acted when working around men. *In the Matter of Bravo Event Service, Inc.,* 36 BOLI at 268-69. The forum also recently awarded $125,000 to a complainant that was subjected to sex discrimination based on her gender identity. *In the Matter of Sunstone Organics, LLC*, 38 BOLI _ (2023). As well, the forum recently awarded $120,000 to a woman subjected to pregnancy discrimination and discharge. *In the Matter of Next Step*

Carpet, LLC, 38 BOLI _ (2022). *See also In the Matter of Oregon Truck Painting, LLC,* 37 BOLI at 115 (awarding $75,000 to a complainant terminated for complaining about unsafe working conditions).

In this case, the forum finds $100,000 to be an appropriate amount of emotional distress damages for the harm that Rymer suffered due to the sexual harassment, retaliation and termination of her employment.

OTHER REQUESTED RELIEF

In its Formal Charges, the Agency asked that Respondents and Respondents' managers and supervisors be trained, at Respondents' expense, "on unlawful harassment and discrimination in the workplace" by "the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to and approved by the Agency." BOLI's Commissioner is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring a respondent to:

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

This statute gives the Commissioner the authority to require Respondents and Respondents' managers and supervisors to undergo training of the type sought in the Formal Charges. The forum finds that this requirement is appropriate in this case.

Exceptions to the Proposed Order

The Proposed Order was issued on April 14, 2023. Any exceptions to the Proposed Order were due 10 days later on April 24, 2023. *See* OAR 839-050-0380(4) (stating that exceptions "must" be filed "within ten days of the date of issuance of the Proposed Order" unless a party seeks an extension of time "as provided in OAR 839-050-0050.")

The Agency filed its Exceptions on April 27, 2023 (13 days after the Proposed Order was issued), and did not file a request seeking an extension of time. The Agency's Exceptions state that the Proposed Order was issued on April 18, 2023, but the Proposed Order clearly contains an issue date and service date of April 14, 2023.

Accordingly, the forum rejects the Agency's Exceptions because they were not timely filed.[6] *See In the Matter of Green Thumb Landscape and Maintenance, Inc*., 32 BOLI 185, 189 (2013) (failure to follow written directions in the Proposed Order's "Exception Notice" did not constitute "good cause" for granting an extension); *see also In the Matter of Stahler*, 34 BOLI 56, 65 (2015).

Respondents timely filed their Exceptions on April 24, 2023. Respondents' Exceptions 1 and 2 request that the forum make corrections of scrivener's errors. The forum concludes that those exceptions are well taken and those exceptions are granted, as reflected in revisions to the sections above.

Respondents' Exception 3 states that "the ALJ has erred in failing to exclude" the witness testimony of Burnett when that testimony conflicted with the testimony of Sharma. Notably, Burnett was a witness called by Respondents, not the Agency. The forum credited Burnett's testimony on matters on which she had personal knowledge. When Burnett's testimony conflicted with Sharma, the forum credited Burnett's version because of credibility concerns with the testimony of Sharma, as explained in greater detail in Finding of Fact #30. In a situation such as this where Respondents are asking the forum to disregard the testimony of their own witness, the forum declines to reject the credibility findings of the ALJ. *See In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, 219-20 (2020) (overruling an exception when the Agency did not demonstrate convincing reasons for rejecting the ALJ's credibility findings), citing *In the Matter of Kenneth Wallstrom*, 32 BOLI 63, 92-93 (2012) and *In the Matter of Gordy's Truck Stop, LLC*., 28 BOLI 200, 216 (2007).

Respondents' Exceptions 4, 7 and 8 take exception to the conclusions that DB and Sharma engaged in unlawful practices. The bulk of these exceptions ask the forum to adopt the testimony of Sharma over that of other witnesses and also argue that there can be no violations when no one witnessed Kumar's alleged harassment of Rymer, except for Rymer herself. As explained above, the forum declines to overturn the credibility findings. As well, it is important to note that a complainant's credible testimony can be sufficient to support the elements of a violation. *See, e.g., In the Matter of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett*, 33 BOLI 121, 146 (2014); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 123 (2012). In addition, there was testimony from other witnesses to support Rymer's version of events in that people observed Kumar watching Rymer on DB's security cameras. Also, Morgan testified that he overheard a heated exchange between Kumar and Rymer, and then saw her come flying out of the room. Moreover, with respect to the retaliation violation, the record included evidence which supported an inference that Respondents terminated Rymer because of her complaints of harassment and not because the business was closing. That evidence included the fact that Sharma admitted that he thought Rymer was lying when she complained of harassment,

[6] Most of the Agency's Exceptions refer to scrivener's errors and do not take exception to the conclusions in the Proposed Order. When appropriate, revisions were made in this Final Order to correct citations and typographical errors.

Respondents terminated Rymer not long after her complaint and the business remained open for several months after her termination. All of this evidence supports an inference that Respondents terminated Rymer because of her complaints of harassment. *See In the Matter of Moho Enterprises, LLC*, 38 BOLI _ (2022) (noting that "the forum has long held that evidence includes inferences"); *see also 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).

Respondents' Exception 5 asserts that the award of economic damages (lost wages) is erroneous and not supported by the evidence in the record. This Exception first raises arguments about the violations found, which have already been addressed above. Respondents also argue that Rymer is not entitled to economic damages because she could have accepted employment at one of the other businesses owned by Respondents. This argument is not supported by credible evidence in the record, in particular where it is Respondents' burden of proof to show a lack of mitigation. *See In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI at 65. Therefore, Exception 5 is denied.

Respondents' Exception 6 argues that the award of noneconomic or emotional distress damages is erroneous and not supported by the evidence in the record. This Exception first raises arguments about the violations found, which have already been addressed above. Respondents also take issue with the fact that most of the testimony regarding mental and emotional distress damages came from Rymer herself. However, a complainant's testimony, if believed, is sufficient to support a claim for mental suffering damages. *See also Oregon Truck Painting, LLC,* 37 BOLI at 115. Respondents also argue that this case differs from those cited in support of the noneconomic damages. However, Respondents do not point out what those differences are and do not offer any explanation for why those cases do not support the award in this case. Accordingly, the forum also denies Exception 6.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(b), (f), (g), ORS 659A.199(1), OAR 839-005-0030(7), and OAR 839-005-0010(1),(4) and OAR 839-005-0125(2)(a)(A) by Respondents **Ramarjundev, LLC dba Dev's Burgers and Rakesh Sharma**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Ramarjundev, LLC dba Dev's Burgers and Rakesh Sharma** 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 **Freda Rymer** in the amount of:

1) NINE THOUSAND SIX HUNDRED AND NINETY-THREE DOLLARS ($9,693.00), less lawful deductions, representing wages lost by Freda Rymer as a result of Respondents' unlawful employment practices found herein; plus,

2) ONE HUNDRED THOUSAND DOLLARS ($100,000.00), representing compensatory damages for emotional and physical suffering experienced by Freda Rymer as a result of Respondents' unlawful employment practices found herein; plus,

3) Interest at the legal rate on the sum of ONE HUNDRED NINE THOUSAND SIX HUNDRED AND NINETY-THREE DOLLARS ($109,693.00), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Ramarjundev, LLC dba Dev's Burgers and Rakesh Sharma** to participate in training on the correct interpretation and application of the Oregon laws pertaining to sexual harassment in the workplace by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency. This training shall be completed no later than December 31, 2023, and by December 31, for each successive year for five years.

In the Matter of
Stefani Doss dba Knockers Strip Club;
MGC Holdings LLC dba Knockers Strip Club;
Kirk M. Ostermiller, Individually and
Lazarus Williams, Individually,
Respondents, Case No. 61-18

Final Order of Commissioner Christina Stephenson
Issued May 16, 2023

SYNOPSIS

The Amended Formal Charges alleged that Respondents violated ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(l) and OAR 839-005-0010(4)(a)(A)(B)(C) (b) by subjecting Complainant to different terms and conditions of employment, and harassed her because or her race. The Agency also alleged that Respondents Ostermiller and Williams aided or abetted the unlawful actions under ORS 659A.030(1)(g). After a hearing on the merits, the forum concluded that the Agency failed to prove the alleged violations by a preponderance of the evidence and dismissed all charges against Respondents.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 9 and September 25-26, 2019, at the Eugene office of the Worker's Compensation Board, located at 1140 Willagillespie Road, Suite 38, in Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega ("Ortega"), an employee of the Agency. Complainant, Marisella Contreras ("Contreras") was present throughout the hearing. Respondents Stefani Doss ("S. Doss") and MGC Holdings, LLC ("MGC") were represented throughout the proceeding by Attorney Michael Schocket ("Schocket"). Attorney John Woodworth ("Woodworth") represented Respondent Kirk M. Ostermiller ("Ostermiller"). Respondent Lazarus Williams ("Williams") was also present.

The Agency called Contreras and Civil Rights Division Operations Manager Chris Lynch ("Lynch")[1] as its witnesses.

Ostermiller, Williams, S. Doss and Matthew Doss ("M. Doss") testified for Respondents.

[1] Respondents objected to the testimony of Chris Lynch. *See* Finding of Fact – Procedural # 23.

The forum received into evidence: (a) Administrative exhibits X1 through X39; (b) Agency's exhibits A1-A9, A12, A14-A15, and A17;[2] and (c) ALJ exhibit ALJ1 (7/10/2019 Email). Respondents did not offer any exhibits into evidence.

Having fully considered the entire record in this matter, I, Christina Stephenson, 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.[3]

FINDINGS OF FACT – PROCEDURAL

1) Contreras filed a complaint with the Agency's Civil Rights Division on March 24, 2017, citing ORS 659A.030(1)(b), and alleging that MGC engaged in unlawful employment practices and discriminated against her based on her race and national origin in that MGC subjected her to a hostile work environment and different terms and conditions of employment. (Ex. A1)

2) Contreras later filed an amended complaint adding "Stefani Doss dba Knockers Strip Club" as an additional Respondent. (Ex. A2)

3) On March 24, 2017, Contreras amended the complaint again to identify Ostermiller and Williams an aiders and abettors. The amended complaint added a citation to 659A.030(1)(g). (Exs. A3, A4)

4) On March 16, 2018, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") for Case No. STEMRC170324-50367 in which it found substantial evidence of an unlawful employment practice (terms and conditions) in violation of ORS 659A.030. (Ex. A17)

5) On July 30, 2018, the forum issued Notices of Hearing to Respondents,[4] the Agency, and Contreras, stating the time and place of the hearing as November 6, 2018, beginning at 9:30 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

[2] Respondents objected to Exhibits A4-A7, A9, A12, A14-A15 and A17 due to lack of foundation because the Investigator who created the documents did not testify and Respondents did not have the opportunity to cross examine her. The objection was sustained, in part, and the exhibits were received solely for the purpose of showing that they were documents in the Civil Rights Division's investigation file, but not for the statements made in the documents. With respect to Ex. A9 (Investigator's Notes from Witness Interview of Summer Iverson), Respondents further objected because Iverson did not testify, and they did not have the opportunity to cross examine her. Ex. A9 was admitted solely for the purpose of showing that Iverson was interviewed, and was not admitted to prove the truth of Iverson's statements in the document.

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

[4] As explained below in Finding of Fact – Procedural, # 20, not all of Respondents received the initial Notice of Hearing issued on July 30, 2018.

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 839-050-0000 to 839-050-0445. (Exs. X2, X5, X12)

6) The Formal Charges alleged that (1) Respondents subjected Contreras "to different terms and conditions" because of her race in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B(i)(l); (2) Respondents subjected Contreras to harassment because of her race in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C), (b); and (3) that Ostermiller and Williams aided and abetted the unlawful actions in violation of ORS 659A.030(1)(g). (Exs. X2b, X5b)

7) On August 20, 2018, Ostermiller timely filed an answer to the Formal Charges in which he denied the allegations asserted against him. (Ex. X3)

8) On September 5, 2018, the ALJ issued an interim order requiring case summaries to be filed no later than October 23, 2018, 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. X4)

9) On September 18, 2018, the ALJ issued an interim order rescheduling the prehearing conference for Thursday, September 20, 2018, at 10:00 a.m. A telephonic prehearing conference was held on September 21, 2018. Ortega appeared on behalf of the Agency; Woodworth appeared on behalf of Ostermiller; Schocket appeared on behalf of S. Doss and MGC. Williams did not telephonically appear for the prehearing conference.

During the prehearing conference, Woodworth stated he had a conflict with the contested case hearing date that was set for November 6, 2018. The parties were asked to find a mutually agreeable date and directed to provide it to the forum, via email, no later than 5:00 p.m. on September 28, 2018. The issue of proper service was also briefly discussed. Schocket stated he had not received the documents in this matter. Based on his statements, the forum requested that Schocket provide an accurate address on the record. Schocket stated that the words "upper unit" needed to be added to his address. (Exs. X7, X11)

10) On September 11, 2018, the Agency filed a Motion for Default against MGC. Pursuant to OAR 839-050-0150(9), MGC's response was then due September 18, 2018. On September 17, 2018, MGC filed a motion for extension of time to answer the Agency's Formal Charges. The Agency filed a timely response to the extension motion on September 24, 2018. Since both motions involved arguments regarding the Agency's service of Formal Charges on MGC, the forum addressed both motions in one interim order, issued on September 27, 2018, ruling as follows:

"**AGENCY'S MOTION FOR DEFAULT**

"Pursuant to OAR 839-050-0030(1), * * * the charging document will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:

(a) Receipt by the party or the party's representative; or

(b) Mailing when sent by registered or certified mail *to the correct address* of the party or the party's representative.'

(emphasis added) In its motion, the Agency argued that service was complete upon the mailing of a copy of the Agency's Formal Charges to Respondent MGC's registered agent, * * * Schocket. The Agency further provided proof of service to 'an individual' located at '2118 SE 11th Ave., Portland, OR 97214.' (Agency's Motion, Ex. A, p. 4, Ex. F, p. 1) The Agency argued in error that the Secretary of State's record lists the address as '2118 SE 11th Ave., Portland, OR 97214.' The record, which was attached to the Agency's motion, lists the address as:

'MICHAEL SCHOCKET
2118 SE 11TH AVE *UPPER*
PORTLAND, OR 97214'

(emphasis added) (Agency's Motion, Ex. B, p. 1).[5] Based on the evidence offered by the Agency, Respondent MGC was not properly served with the Formal Charges in this matter. The Agency's Motion for Default is **DENIED**.

"**RESPONDENT'S MOTION FOR EXTENSION OF TIME TO ANSWER**

"'When a participant requires additional time to submit any document, a written request for such extension must be filed with *and received by* the Forum no later than the date set for filing of the document in question * * *.' (emphasis added) OAR 839-050-0050(2). Respondent MGC's Answer to the Agency's Formal Charges was due on August 6, 2018. Respondent MGC's Motion for Extension was not filed until September 17, 2018. When a nonmoving party objects to a request for extension, the moving party must show good cause as to why the extension should be granted. OAR 839-050-0050(3). The Agency objected to Respondent's motion in its Answer to Respondent's Motion for

[5] The Agency also noted that * * * Schocket's address on the Oregon State Bar website does not include the word "upper." (Agency's motion, Ex. E, p. 1) Although this seems potentially problematic for * * * Schocket, given his representation that it causes service issues for important documents, the address listed on the Secretary of State's Office is the relevant address for purposes of the Agency's Motion for Default, based on service to Respondent MGC's registered agent.

Extension of Time to File Answer to Formal Charges, filed on September 24, 2018.

"'"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.' OAR 839-050-0020(16). Respondent MGC argued that it had not received a copy of the Agency's Formal Charges. In its motion, Respondent MGC explained that the registered agent's address is a duplex, consisting of two separate residences. The registered agent is located in the upper unit of the address. Respondent MGC stated that it first received notice of the Formal Charges and the Agency's Motion for Default when * * * Schocket spoke with co-Respondent Ostermiller's attorney, * * * Woodworth.

"In its response, the Agency countered that Respondent MGC was properly served and that Respondent MGC failed to establish good cause in its motion.[6] However, based on the Agency's Motion for Default, the charges were not sent to the correct address. It is correct that Respondent MGC failed to offer any supporting evidence regarding its argument of improper service. However, Respondent MGC's argument is corroborated by the Secretary of State's Office record, offered by the Agency, which includes the word 'upper' in * * * Schocket's address. The Agency's error in the address of Respondent MGC's registered agent is a circumstance beyond Respondent MGC's control and establishes good cause for Respondent MGC's delay in filing its motion and for its requested extension. Respondent MGC's Motion for Extension for Time to File an Answer is **GRANTED**.

"The Agency is directed to serve Respondent MGC with its current charging document at the address on file with the Secretary of State, and confirmed on the record by * * * Schocket during the September 21, 2018, prehearing conference:

MICHAEL SCHOCKET
2118 SE 11TH AVE UPPER
PORTLAND, OR 97214

Respondent MGC must file its Answer within 20 days after service of the charging document. OAR 839-050-0130(4)."

(Exs. X6, X13, X14)(emphasis in original)

[6] The Agency argued that Respondent failed to show good cause for relief from default; however Respondent MGC has not been found in default. The same good cause standard is used, however, to determine if an extension should be granted when a nonmoving party objects. *See* OAR 839-050-0050(3) *and* OAR 839-050-0340(2).

11) The Agency filed Amended Formal Charges on September 27, 2018, which removed the requests for lost wages and out-of-pocket damages. (Ex. X14)

12) On September 28, 2018, the Agency filed a Notice to Forum regarding the participants' availability for hearing. The Agency stated that the case participants had mutually agreed upon a suggested date for the contested case hearing. Based on Woodworth's unavailability for the November 6, 2018, hearing date, the ALJ issued an interim order on October 1, 2018, resetting the contested case hearing to begin on Tuesday, February 26, 2019. The interim order also rescheduled the case deadlines as follows:

"Formal Discovery Motions:	Must be filed no later than **January 15, 2019.**
Dispositive Motions:	Must be filed no later than **February 5, 2019.**
Case Summaries:	Must be filed no later than **February 12, 2019. If you do not file a case summary, you may not be able to call witnesses or present evidence at the contested case hearing**."

(Exs. X16, X17)

13) S. Doss and MGC filed an Answer to the Formal Charges on October 15, 2018. (Ex. X18)

14) The Agency timely filed its case summary on February 12, 2019. (Ex. X19)

15) Following an unopposed email request from the administrative prosecutor, on February 14, 2019, the forum issued an interim order moving the location of the hearing to Oregon Worker's Compensation Offices, 1140 Willagillespie Road, Suite 38 Eugene, Oregon. The interim order also changed the start time of the hearing to 1:00 p.m. on Tuesday, February 26, 2019. (Exs. X20-X21)

16) On February 25, 2019, the Willamette Valley experienced inclement weather. As temperatures were not expected to sufficiently rise and icy conditions were likely to remain Tuesday afternoon, making travel conditions hazardous, the ALJ postponed the hearing by one day until Wednesday, February 27, 2019, at 9:30 a.m. The location of the hearing remained unchanged.

On February 26, 2019, the Agency filed a motion for postponement due to the continued inclement weather affecting the Willamette Valley. Respondents did not object to the postponement. Based on the dates provided by those who responded to the ALJ's emails, the ALJ issued an interim order postponing the hearing until Tuesday, June 18, 2019, at 9:30 a.m. (Exs. X25-X28)

17) On February 25, 2019, the ALJ issued an interim order regarding Respondents' Motion For Remote Testimony of Stefani Doss. Given that the motion was filed the day before the contested case hearing was expected to begin, the forum

sent an email to all case participants requiring emailed responses by 9:30 a.m. on February 26, 2019. The forum informed the Agency and Woodworth that it would accept their emailed responses as permissibly filed with the forum, pursuant to OAR 839-050-0040(1). Woodworth timely responded that he objected. The Agency did not respond. Attached to Respondents' motion was an affidavit, signed under penalty of perjury by S. Doss. In the affidavit, S. Doss stated that she was the primary caretaker for a family member and could not leave the family member alone for the length of time necessary to testify in person at the hearing. The ALJ's interim order stated, in part:

> "Pursuant to OAR 839-050-0250(11), '[w]hen the testimony of a witness not present at the hearing is necessary to the complete and fair adjudication of the case, the administrative law judge may admit testimony of the witness by telephone or other two-way communication device. In such cases:
>
> > (a) The testimony of the witness will be broadcast simultaneously to all participants and to the administrative law judge;
> > (b) All rules governing the questioning of witnesses present at the hearing apply to witnesses whose testimony is taken by telephone; and
> > (c) The participant presenting the witness by telephone will provide the witness's telephone number and the approximate time that the witness will be available.'
>
> "Based on the postponement of the contested case hearing, it is unclear if Respondent Doss will still need to testify by phone for the June 18, 2019, hearing.
> If her circumstances remain the same, however, her request to testify remotely is **GRANTED <u>assuming her testimony complies with the following conditions:</u>**
>
> > 1. * * * Schocket must file a Notice of Telephonic Testimony Information, listing any anticipated time restraints on Respondent Doss's testimony, with the Contested Case Coordinator, no later than June 4, 2019.
> > 2. If there are restraints on Respondent Doss's time to testify, direct examination will be limited to the degree necessary, at the discretion of the forum, to allow for adequate cross-examination by * * * Ostrander and the Agency. OAR 839-050-0240(1)(d) and (g).
> > 3. Respondent Doss must have real-time access to an operable email account that is capable of receiving attachments during her testimony.
> > 4. Respondent Doss must include an operable telephone number at which she can be reached and the address of the operable email account within her Notice of Telephonic Testimony Information, filed no later than June 4, 2019.
> > 5. * * * Schocket is directed to provide Respondent Doss with a copy of the Agency's Case Summary and any Addendums

thereto, assuming the Agency files such Addendums in a timely fashion, **no later than June 4, 2019**.

"**If the aforementioned conditions cannot be met, Respondent Doss may not testify telephonically**."

(Exs. X22-X24, X29) (Emphasis in original)

18) On May 15, 2019, the ALJ contacted the case participants to inform them that the contested case in this matter would need to be postponed. The forum requested that the participants provide their availability for hearing, in the months of June and July, by no later than May 22, 2019. Based on those who responded to the ALJ's request, the forum issued an interim order on May 23, 2019, resetting the contested case hearing to begin on Tuesday, July 9. 2019, at 10:00 a.m. (Ex. X30)

19) On May 20, 2019, ALJ Gaddis issued an interim order transferring the case to ALJ Kari Furnanz. (Ex. X31)

20) At the time set for hearing on July 9, 2019, Williams appeared and indicated that he had only recently become aware of this matter and received a copy of the Amended Formal Charges from the Agency that morning. The Agency and other Respondents had made several previous attempts to locate him, but were unsuccessful until S. Doss was able to reach him shortly before the hearing.

S. Doss, MGC and Ostermiller made oral motions to postpone the hearing, stating that they needed additional time to talk with Williams and to prepare to defend the case with Williams involved. After a lengthy discussion on the record, the forum ruled that the matter would be postponed to provide for proper service of the Amended Formal Charges on Williams, and to give him an opportunity to file a written response to the Amended Formal Charges and a case summary, and to coordinate with counsel for the other Respondents. The parties were given the opportunity to provide their availability for hearing within the upcoming months. Based on the availability of the Agency and Respondents, the ALJ issued an interim order on July 11, 2019, rescheduling the hearing to begin on Wednesday, September 25, 2019, at 10:00 a.m., and reiterated the requirements for filing documents and what each participant must include in their case summary.

The interim order of July 11, 2019, also stated, in part:

"Williams must file a case summary **on or before Wednesday, September 11, 2019**. With the exception of Williams, the case summary deadline for the other parties has passed. Since the Agency timely filed a case summary, it may file an addendum to its case summary, if necessary. Respondents Doss, MGC and Ostermiller may file case summaries if there is newly discovered evidence received from Williams. With respect to any other evidence, [their] case will be limited to (1) presenting the testimony of the party

and (2) offering testimony or evidence solely for the purpose of impeachment. *See Bravo Event Service, Inc., & Dan Kor*, 36 BOLI 250, 257-58 (2018).

"* * *

"* * * At the hearing, the Agency was instructed to serve Williams with the Amended Formal Charges by both regular service and email. Williams must file a response 20 days after the Agency completes service by both methods.

"* * * * *"

(Ex. X33) (Emphasis in original)

21) On September 23, 2019, the forum issued an interim order ruling on the Agency's motion for default against Williams. The interim order stated:

"**PROCEDURAL BACKGROUND**

"At the time set for hearing on July 9, 2019, [Williams] appeared and indicated that he had only recently became aware of this matter and received a copy of the Amended Formal Charges from the Agency that morning. After a lengthy discussion on the record, the forum ruled that the matter would be postponed to provide for proper service of the Amended Formal Charges on Respondent Williams, and to give him an opportunity to file a written response to the Amended Formal Charges and a case summary, and to coordinate with counsel for the other Respondents.[7] On July 11, 2019, the forum issued an interim order postponing the hearing until September 25, 2019. The Interim Order of July 11, 2019, also contained the following instructions:

> 'During the hearing, Respondent Williams confirmed that his correct mailing address is "2921 Autumn Haze Ln., Las Vegas, NV, 89117." Respondent Williams indicated that he would like a courtesy copy of filings and orders sent to him at lasvegaslazarus@gmail.com. The case participants are directed to provide emailed copies of all filed documents to all case participants and the forum, no later than 5pm on the date of filing. **Emailed copies of documents are merely courtesy copies and do not replace required methods of filing documents, pursuant to the Division 50 Contested Case Hearing Rules.**'

(Emphasis in original.)

[7] Although the other Respondents had moved for a postponement, their motion was not granted. The matter was postponed for the benefit of Williams who had just received a copy of the Amended Formal Charges that day.

"On September 6, 2019, the Agency moved for an Order of Default against Williams, asserting that Williams 'was properly served and has not filed a timely answer to the Formal Charges in this matter.'[8] The Agency represented that it served a copy of the "Notice of Hearing and Formal Charge"" on Williams on July 10, 2019, but he had not filed an answer.

"On September 10, 2019, the ALJ sent an email to the parties which stated:

'**Request to the Agency to Supplement the Record in Support of Motion for Default as to Lazarus Williams:**

'The Agency is directed to supplement the record in support of the Motion for Default as to Lazarus Williams with the following information:

- A copy of the email the Agency sent to * * * Williams on July 10, 2019, (including all attachments) that is referenced in Section I.f. on page 2 of the Agency's motion.
- A copy of the email from * * * Williams in which he confirmed that he received the documents the Agency emailed on July 10, 2019, and that he would "review and reply accordingly" as indicated in Section I.f. on page 2 of the Agency's motion.
- Documentation showing that the Agency emailed a courtesy copy of the motion for default "to all case participants and the forum, no later than 5pm on the date of filing" as required by the forum's interim order of July 11, 2019.

'Please file the requested supplemental information as soon as possible, but no later than noon on **Wednesday, September 11, 2019**. As a reminder, courtesy copies of the filings must be emailed to all participants and myself.'

(Emphasis in original.)

"Later that day, Administrative Prosecutor Adriana Ortega sent an email to the ALJ and the parties which stated that the documents the ALJ requested were attached as Exhibit A. However, the Agency did not 'file' the supplemental information contained in Exhibit A by September 11, 2019, with the forum as requested in the ALJ's email.[9]

[8] Throughout its motion, the Agency refers repeatedly to the "Formal Charges" instead of the "Amended Formal Charges" which are currently at issue. The forum assumes that the references to the "Formal Charges" are typographical errors and that the Agency intended to argue that Williams failed to file an answer to the *Amended* Formal Charges.

[9] Since the documents in Exhibit A were requested by the ALJ using the authority in OAR 839-050-0250(9), the ALJ printed the documents, marked them as Exhibit ALJ 1 and place them in the forum file.

"On September 11, 2019, the ALJ emailed the parties and stated, among other things, that the deadline for filing Williams's response to the motion for default was extended to September 17, 2019, and that his response 'must be filed with BOLI's Contested Case Coordinator *and emailed* to the parties by 5:00 p.m. that day.' (Emphasis added.)

"On September 19, 2019, BOLI's Contested Case Coordinator received two documents from Williams that were titled 'Response to Motion for Default as to Lazarus Williams' and 'Case Summary.' The documents were enclosed in an envelope that was stamped with postage but not postmarked by the United States Postal Service. Accordingly, pursuant to OAR 839-050-0040(2), the documents were filed two days later on September 19, 2019, the date they were received by the forum.

"**RULING ON THE AGENCY'S MOTION**

"Standard for Default

"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 charging document.' OAR 839-050-0130(4) requires that 'a party must file an answer within 20 days after service of the charging document.' OAR 839-050-0030(1), describes the methods of serving the charging document and states, in pertinent part:

> '* * * [T]he charging document [in a BOLI contested case] will be served on the party or the party's representative by personal service or by registered or certified mail. Service of a charging document is complete upon the earlier of:
>
> "(a) Receipt by the party or the party's representative; or
>
> "(b) Mailing when sent by registered or certified mail to the correct address of the party or the party's representative.'

"*Notice of Hearing Requirement*

"Additionally, OAR 839-050-0080(2) states that when Formal Charges are issued, 'the notice of hearing will accompany the Formal Charges.' In its motion, the Agency represented to the forum that 'the Notice of Hearing and Formal Charges' were provided to Williams on July 9, 2019, when the parties initially convened for hearing. However, on the record at the hearing, Administrative Prosecutor acknowledged that she had only provided Williams with the Amended Formal Charges and that she 'did not provide' documents to Williams that typically accompany charging documents and explain his rights. Accordingly, the

forum concludes that the Agency did not prove that Williams received the Notice of Hearing on July 9, 2019.

"The Agency's motion for default also states that it 'served a Notice of Hearing and Formal Charges upon' Williams on July 10, 2019. The motion was accompanied by the Declaration of Diane Anicker, which stated that on July 10, 2019, Anicker 'issued Formal Charges and a Notice of Hearing' to Williams and cites to 'Attachment 1.' Attachment 1 to Anicker's declaration did not include a copy of the Notice of Hearing in this case. Attachment 1 also did not include a copy the 'Formal Charges,' but did include the *Amended* Formal Charges, along with copies of the following:

- Certificate of Service signed by Anicker stating that she served a copy of the Amended Formal Charges on Williams by certified mail on July 10, 2019.
- A 'Warning' statement written in multiple languages indicating that important documents are enclosed.
- A document titled 'Summary of Contested Case Rights and Procedures (Civil Rights Division.'
- A document titled 'Responsive Pleadings Rule 839-050-0130,' which states, 'An Answer must be filed within Twenty (20) days after service of the Formal Charges,' and contains the text of OAR 839-050-0130.
- A document entitled 'Servicemembers Civil Relief Act (SCRA) Notification.'
- A copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445, effective July 1, 2019.

"Because Attachment 1 did not include the Notice of Hearing, the forum concludes that the Agency did not serve a copy of the actual Notice of Hearing on Williams. Accordingly, the forum must examine whether the other documents served on Williams (the documents in Exhibit A and the forum's interim order of July 10, 2019) satisfy the notice requirements of ORS 183.413, ORS 183.415 and OAR 839-050-0080(4).

"ORS 183.413(2) specifies that a notice of a contested case hearing that contains the following information should be served on each party, personally or by mail:

'(a) The time and place of the hearing.

'(b) A statement of the authority and jurisdiction under which the hearing is to be held.

'(c) A statement that generally identifies the issues to be considered at the hearing.

‘(d) A statement indicating that the party may be represented by counsel and that legal aid organizations may be able to assist a party with limited financial resources.

‘(e) A statement that the party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues.

‘(f) A statement indicating whether discovery is permitted and, if so, how discovery may be requested.

‘(g) A general description of the hearing procedure including the order of presentation of evidence, what kinds of evidence are admissible, whether objections may be made to the introduction of evidence and what kind of objections may be made and an explanation of the burdens of proof or burdens of going forward with the evidence.

‘(h) Whether a record will be made of the proceedings and the manner of making the record and its availability to the parties.

‘(i) The function of the record-making with respect to the perpetuation of the testimony and evidence and with respect to any appeal from the determination or order of the agency.

‘(j) Whether an attorney will represent the agency in the matters to be heard and whether the parties ordinarily and customarily are represented by an attorney.

‘(k) The title and function of the person presiding at the hearing with respect to the decision process, including, but not limited to, the manner in which the testimony and evidence taken by the person presiding at the hearing are reviewed, the effect of that person’s determination, who makes the final determination on behalf of the agency, whether the person presiding at the hearing is or is not an employee, officer or other representative of the agency and whether that person has the authority to make a final independent determination.

‘(l) In the event a party is not represented by an attorney, whether the party may during the course of proceedings request a recess if at that point the party determines that representation by an attorney is necessary to the protection of the party’s rights.

‘(m) Whether there exists an opportunity for an adjournment at the end of the hearing if the party then determines that additional evidence should be brought to the attention of the agency and the hearing reopened.

> ‘(n) Whether there exists an opportunity after the hearing and prior to the final determination or order of the agency to review and object to any proposed findings of fact, conclusions of law, summary of evidence or recommendations of the officer presiding at the hearing.
>
> ‘(o) A description of the appeal process from the determination or order of the agency.
>
> ‘(p) A statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act and may contact the Oregon State Bar or the Oregon Military Department for more information. The statement must include the toll-free telephone numbers for the Oregon State Bar and the Oregon Military Department and the Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website.’

“ORS 183.415(3) further requires state agencies to give notice of the following:

> ‘(a) A statement of the party’s right to hearing, with a description of the procedure and time to request a hearing, or a statement of the time and place of the hearing;
>
> ‘(b) A statement of the authority and jurisdiction under which the hearing is to be held;
>
> ‘(c) A reference to the particular sections of the statutes and rules involved;
>
> ‘(d) A short and plain statement of the matters asserted or charged;
>
> ‘(e) A statement indicating whether and under what circumstances an order by default may be entered; and
>
> ‘(f) A statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act and may contact the Oregon State Bar or the Oregon Military Department for more information. The statement must include the toll-free telephone numbers for the Oregon State Bar and the Oregon Military Department and the Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website.’

“Language in BOLI’s contested case rule OAR 839-050-0080(4) substantially echoes the statutory notice of hearing requirements, stating that a notice of hearing ‘will include’ the following:

'(a) A statement of the time and place of the hearing, including the statement that the hearing will reconvene on successive business days thereafter until concluded;

'(b) A statement of the authority and jurisdiction under which the hearing is to be held;

'(c) A reference to the particular sections of the statutes and rules involved;

'(d) A short and plain statement of the matters asserted or charged;

'(e) The name of the Administrative Law Judge designated by the commissioner to preside over the contested case and whether the Administrative Law Judge is an employee of the Agency; and

'(f) A statement indicating whether the case for the Agency will be presented by the Oregon Department of Justice or by an Agency Administrative Prosecutor.'

"The forum finds that documents in Ex. ALJ1 and the forum's interim order of July 10, 2019, contained the information required by the authorities described above. Therefore, the forum concludes that Williams was served with the Amended Formal Charges on July 10, 2019, by certified mail and by email, and that service was accompanied by the required notice. Williams responded to the email on July 10, 2019, stating 'received and I will review and reply accordingly.' More than 20 days have elapsed since July 10, 2019, and Williams has not yet filed an answer to the Amended Formal Charges.

"Based on Williams's failure to file an answer by July 30, 2019, the forum **GRANTS** the Agency's motion and finds Williams in default. If Williams is not granted relief from default, Williams will not be allowed to participate in any manner in the hearing, including, but not limited to, presentation of witnesses or evidence on his behalf, examination of Agency witnesses, objection to evidence presented by the Agency, making of motions or argument, and filing exceptions to the Proposed Order. OAR 839-050-0330(4).

"**NOTICE OF DEFAULT**

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

"**IT IS SO ORDERED.**" (Exs. X34-X39)

22) 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. Part of the instructions included informing the parties that witnesses would be questioned on direct, by cross-examination and by re-direct. When Ostermiller's counsel requested permission to ask M. Doss additional questions, the ALJ denied the request because counsel had already completed cross-examination of the witness. (Hearing Record)

23) The Agency called Lynch to testify as its first witness. Respondents Ostermiller and MGC objected because he was not listed on the Agency's case summary. The ALJ found there was a satisfactory reason for not listing Lynch as a witness because Investigator Radich was out on medical leave at the time of hearing.

Respondents Ostermiller and MGC also objected to Lynch testifying about the contents of the documents in the investigation file. They argued that it would be a violation of Respondents' due process rights because they would be unable to cross examine Investigator Radich, who authored most of the documents in the file. Respondents stated that the matter should be postponed until Radich was available to testify and could be cross examined. The ALJ found that Respondents had valid arguments as to the weight of Lynch's testimony and informed Respondents that they could object to any specific question they found objectionable for this reason. The ALJ also noted that Respondents' arguments would be considered further when the Proposed Order was issued.[10] (Hearing Record)

24) Williams testified that he never received a report or heard that Contreras believed she had been discriminated against or harassed. Ostermiller's counsel then asked Williams whether he was "in tune" to people saying things that were "off color" or "not quite appropriate" because he had Hispanic family members. The Agency objected to the "in tune" question on the grounds that the question was not impeachment evidence.[11] Ostermiller's counsel argued that Williams was testifying to rebut the testimony of Contreras when she stated that she reported to Williams that Ostermiller had discriminated against her. The ALJ allowed Williams to answer the question and said that a ruling on the objection would be made in the proposed order.

Upon further review, the forum notes that Respondents were attempting to impeach the portion of Contreras's testimony in which she stated that 1) an employee named Summer Iverson ("Iverson") made a report to Williams that Ostermiller was engaging in discriminatory conduct against Contreras and 2) nothing was done in response to the report. The ALJ provided Ostermiller's counsel with the opportunity to

[10] As stated above in footnote 2, the statements of Radich in the documents she authored are not considered as substantive evidence in the record because she was not available for cross examination and the Agency did not notify Respondents prior to the hearing that Lynch would be testifying in place of Radich.

[11] Respondents were only permitted to offer impeachment evidence or rebuttal witnesses because they did not file case summaries. *See* OAR 839-050-0210(1)(a).

cite an evidentiary rule to support the position that the ethnicity of Williams's family constituted impeachment evidence, but counsel did not do so. Accordingly, it is not clear how the question about Williams being "in tune" with issues due to the ethnicity of family members impeaches Contreras's testimony. Nevertheless, the testimony will be considered as rebuttal evidence. The forum considered the Agency's objection when evaluating the weight of the evidence.

25) On April 27, 2022, the Agency filed a Notice of Change of Administrative Prosecutor, indicating that the case had transferred to Chief Prosecutor Adam Jeffries.

26) On April 12, 2023, 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 filed exceptions on April 27, 2023. No Respondents filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, MGC was an active limited liability company doing business in Oregon. MGC and S. Doss operated a business under the assumed business name of Knockers Strip Club ("Knockers") in Springfield, Oregon. Knockers featured entertainment from female exotic dancers, and also served food and alcoholic drinks.[12] (Exs. X18, A8; Testimony of Contreras)

2) M. Doss is the husband of S. Doss and assisted her in operating the Knockers business. He came to the bar almost every Thursday to discuss the operations of the bar with Williams. (Testimony of M. Doss, Ostermiller, Williams)

3) Contreras was employed by Knockers as a cook from approximately October 13, 2016, until the bar closed in March or April of 2017.[13] (Ex. A1; Testimony of Contreras, Ostermiller)

4) Contreras was hired by Travis Powell, the former kitchen manager. Powell stopped working at Knockers shortly after Contreras was hired when the kitchen manager position was eliminated. After Powell left, Williams became her direct supervisor. (Testimony of Williams)

5) Williams was the Executive Manager of Knockers when Contreras was employed there. He worked at Knockers from 2016 until it closed in 2017. Williams hired and fired employees. Employees could write down suggestions to Williams about when they wanted to work, but Williams made the final schedules. Employees could suggest food or drink menu items to Williams, but he decided what the bar would serve. Williams worked primarily in the evenings and was physically present in the bar three to four nights of the week. Although Contreras worked during the day, Williams's shifts

[12] Since many of the witnesses referred to Knockers as "the bar" in their testimony, that term will be used interchangeably with "Knockers."

[13] There was conflicting testimony as to whether Knockers closed on March 24 or April 24, 2017. (Testimony of Contreras, Ostermiller)

frequently overlapped with hers and he saw her approximately 2-3 times per week. (Testimony of Williams, Ostermiller)

6) Ostermiller worked at Knockers primarily performing bartender duties. His job title was "Shift Manager." Williams hired him in September of 2016. Ostermiller did not have the power to hire or fire employees, and he did not make work schedules. However, Ostermiller sometimes interviewed prospective employees and made recommendations to Williams. Ostermiller could prepare checks, but he did not have the authority to sign them. Ostermiller understood that if there were any disputes between employees, it should be reported to Williams. (Testimony of Ostermiller, Williams, S. Doss, M. Doss)

7) On occasion, Williams and Ostermiller either covered or assisted Contreras with her duties. For example, on one occasion, Ostermiller asked Contreras to bring cash deposits to the bank and he covered her kitchen responsibilities in her absence. (Testimony of Contreras, Ostermiller)

8) The Oregon Liquor and Cannabis Commission ("OLCC") requires businesses that serve alcohol to keep a log of incidents that occur on the premises. (Testimony of Ostermiller, Williams)

9) Ostermiller has licenses from the OLCC and the Oregon Department of Public Safety Standards and Training ("DPSST"). At the time Ostermiller was hired, the bar was subject to additional oversight from the state because a former employee had worked with an expired license. Knockers had a policy requiring customers to present two forms of identification before entering the bar. Ostermiller understood that this requirement was imposed by the OLCC and there was a sign on the wall stating that two forms of identification were required. Ostermiller refused entry to Knockers to individuals without proper identification on many occasions, including a white male, a Hispanic female and an African American male. (Testimony of Ostermiller)

10) Contreras also had an OLCC alcohol server license. She understands that licensed alcohol servers are required to verify identification. There are only certain forms of identification that Oregon law allows a server to rely upon. If an OLCC licensed server provides alcohol to someone who does not present proper identification, the server can receive a $1,500 fine and a bar can be fined $5,000. A server can also have their license revoked. Contreras agrees that reviewing proper identification is important under Oregon law. She is aware that doormen who check identification at bars must have DPSST licensing and she does not have that training. (Testimony of Contreras)

11) Contreras saw Ostermiller refuse to let two of her Hispanic friends into the bar, and she noticed that on another occasion two doormen let those same friends enter. She did not inspect the identification of her friends on either occasion to see if it met OLCC identification requirements. (Testimony of Contreras)

12) Ostermiller recalled an occasion when three Hispanic males came to Knockers. One of the men had a green permanent resident card and the other two men had identification from another country. Ostermiller turned the men away because those forms of identification are not acceptable to the OLCC. It was his understanding that If the OLCC came to inspect, both he and Knockers could be fined, and he could lose his license to work as a bartender. (Testimony of Ostermiller)

13) Contreras sometimes stayed at Knockers after her shift ended and drank alcohol. On more than one occasion, Ostermiller "cut off" Contreras and stopped serving her alcohol when he observed her displaying visible signs of intoxication, including vomiting. After Ostermiller stopped serving alcohol to Contreras, she became angry at him and told him it was not fair. Ostermiller called Williams to report this information to him. He told Williams that he was not comfortable serving alcohol to Contreras. (Testimony of Ostermiller, Williams)

14) Contreras admitted that she vomited on more than one occasion after drinking alcohol at Knockers, including one time in a restaurant booth and once in the restroom. (Testimony of Contreras)

15) Williams worked with the OLCC extensively regarding the bar's liquor service issues, and became concerned that Contreras's intoxication at the bar put the business at risk. (Testimony of Contreras, Williams)

16) Williams had a disciplinary conversation with Contreras to discuss concerns he had regarding her alcohol consumption at the bar. He told her that her behavior was not acceptable. Williams put her on probation from drinking at the bar, and told employees not to serve her alcohol. (Testimony of Contreras, Williams)

17) When Contreras arrived late to work one day, Ostermiller commented to her that she should have had enough time to call and let the staff know. (Testimony of Ostermiller)

18) On one occasion, Kitchen Manager Travis Powel suggested a "Taco Tuesday" special to increase sales. Ostermiller thought it was a good suggestion and suggested that Tecate beer would pair well with tacos. (Testimony of Ostermiller)

19) Ostermiller has two tattoos that represent his heritage. One tattoo represents his Native American ancestors from the Potawatomi tribe, and another signifies his German/Jewish heritage and is meant to honor the memory of his ancestors. Contreras once called him a "Nazi," and he assumed she misunderstood the meaning of his tattoos. Because of his Jewish ancestry and family history, this upset Ostermiller and he attempted to explain the meaning of the tattoos to Contreras. (Testimony of Ostermiller)

20) Contreras did not pay attention to Ostermiller's tattoos when he showed them to her and does not recall him telling her what the tattoos symbolized. (Testimony

of Contreras)

21) Ostermiller speaks a little Spanish. He once overheard Contreras talking to someone in Spanish on the telephone and thought he heard her call him a "God Damn White Man" in Spanish. He talked to Contreras about it, and she told him to stop listening to her telephone conversations. (Testimony of Ostermiller)

22) Knockers had "quite a bit of diversity" in its employees and patrons, including African Americans, Latinos and Native Americans. (Testimony of Contreras, Ostermiller, M. Doss)

23) There was a BOLI poster on the wall with information for employees about how to contact BOLI for assistance if someone is harassed or discriminated against.[14] (Testimony of Ostermiller)

24) No one reported to Williams, S. Doss or M. Doss that Contreras had any complaints of harassment or discrimination, or that she was not being treated appropriately at work. (Williams, S. Doss, M. Doss)

Credibility Findings

25) There were multiple inconsistencies in the testimony of Contreras that raise questions about her credibility and reliability as a witness.

First, she testified confidently on direct examination that she only spoke to Williams on two occasions and that those conversations were limited to discussing her paycheck. She further stated that Williams was never around and was not available to talk to her. However, on cross-examination, she admitted that Williams spoke to her on at least one other occasion to discuss concerns he had about her drinking alcohol excessively and vomiting at the bar after her shift ended.

Second, in the original complaint that Contreras signed and submitted to BOLI's Civil Rights Division, Contreras stated that she believed that MGC discriminated against her based on her race and national origin by reducing her work hours. She testified that she reviewed the complaint to make sure that it was accurate before she signed it. However, on cross-examination, she contradicted the statements in the original complaint and admitted that her hours "were not cut for being Latina."

Third, Contreras testified about dates when alleged events may have occurred, but then later provided different dates when the same events occurred. For example, Contreras said that Ostermiller's alleged discriminatory conduct towards her began when President Trump was elected, but at one point said it started around February of

[14] The poster was not submitted as an exhibit and there was no testimony with specifics as to what the poster said, except that it provided general information about discrimination and harassment, and included BOLI contact information.

2017. Later, she testified that harassing comments were made in April and May of 2017, but also said that she stopped working at Knockers in March of 2017 when the business closed. She stated that everything was "fine" until after she worked there for a month, then the harassment started happening. She admitted that she was "confused" about the dates. Given this testimony, there is insufficient evidence in the record for the forum to reach a conclusion as to when or how often alleged events may have occurred.

Fourth, she testified about specific and discreet acts of alleged harassment by Ostermiller. She later made generalizations indicating that the harassment was ongoing and did not stop, but provided no further details of the alleged continuing behavior.

Given the multiple inconsistencies in Contreras's testimony, the forum is unable to accept her version of the events when there is conflicting testimony from other witnesses.

26) Lynch was a credible witness, but he lacked firsthand knowledge of the investigation conducted by Investigator Radich.

27) All of Respondents' witnesses (Ostermiller, S. Doss, M. Doss and Williams) had an inherent motive to protect their financial interests in that they were either named as parties in this matter or had a financial interest with a party. Although they generally testified consistently with one another, there was no evidence that they colluded with one another or had prepared remarks. With respect to Williams, there was evidence that he was out of touch with Respondents for quite some time and did not learn of this matter until shortly prior to the hearing. Although Williams lacked legal representation and did not appear to have prepared for his testimony, his testimony was nevertheless consistent with that of the other witnesses for Respondents. As well, Respondents' witnesses were not otherwise impeached by the Agency with credible evidence. In particular, the Agency did not call any witnesses to testify who could support Contreras's version of the alleged discriminatory events or her allegation that Iverson spoke to Williams about alleged harassment. Accordingly, the testimony of Respondents' witnesses was generally credited over the testimony of Contreras when there were conflicting versions of events.

CONCLUSIONS OF LAW

1) At all times material herein, MGC and S. Doss were employers as defined in ORS 659A.001(4)(a) and employed Contreras.

2) At all times herein, Ostermiller and Williams were individuals and "person[s]" under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

3) Respondents did not subject Contreras to different terms and conditions of employment based on her race, and did not violate ORS 659A.030(1)(b) and OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(l).

4) Respondents did not subject Contreras to harassment because of her race, and did not violate ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C)(b).

5) Ostermiller and Williams did not aid and abet unlawful employment practices, and did not violate ORS 659A.030(1)(g).

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

7) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charges against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The Amended Formal Charges allege that Respondents subjected Contreras to different terms and conditions of employment and harassed her on the basis of race in violation of ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(l) and OAR 839-005-0010(4)(a)(A)(B)(C) (b). Additionally, the Agency asserts that Ostermiller and Williams aided and abetted the unlawful employment actions in violation of ORS 659A.030(1)(g). The Agency seeks emotional distress damages for Contreras.

Since Williams is in default, the Agency need only establish a prima facie case to support the allegations in order to prevail as to the charges against him. *In the Matter of Vision International Petroleum, LLC,* 37 BOLI 187, 196 (2019).

RACE DISCRIMINATION - DIFFERENT TERMS AND CONDITIONS OF EMPLOYMENT

In Paragraph 8 of the Amended Formal Charges, the Agency alleged that Respondents "subjected Complainant to different terms and conditions [of employment] because of her race" in violation of ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(l). It is an unlawful employment practice for "[a]n employer, because of an individual's * * * race * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment." ORS 659A.030(1)(b). There was reference in the testimony to the fact that, at one point, Contreras made a complaint to BOLI about a reduction of her work hours due to her race. However, Contreras admitted that her hours were not reduced "for being Latina." The remainder of the Agency's case focused on alleged racial harassment, which will be discussed below.

RACE DISCRIMINATION - HARASSMENT

Harassment by a Supervisor

The forum first examines whether there is evidence of harassment by a supervisor. Supervisors with "immediate (or successively higher) authority over the employee" are considered agents of an employer for purposes of an employer's Title VII liability. *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998).[15] Determining whether a particular individual is a supervisor "is not dependent upon job titles or formal structures within the workplace." *Dawson v. Entek Int'l.,* 630 F3d 928, 940 (9th Cir 2011), *citing McGinest v. GTE Service Corp*., 360 F3d 1103, 1119 n.13 (9th Cir 2004). Rather, for purposes of vicarious liability under Title VII a person is a supervisor "if he or she is empowered by the employer to take tangible employment actions against the victim." *Vance v. Ball State University*, 570 US 421, 424 (2013). A tangible employment action is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), OAR 839-005-0010(4)(d).

In this case, Contreras testified as to negative treatment she received from Ostermiller. However, there is insufficient evidence that Ostermiller had "immediate (or successively higher) authority over" her employment. Ostermiller could not hire or fire employees, and had to report any workplace issues to Williams to take action. Contreras claimed that Ostermiller set her schedule, but there was testimony from Ostermiller and Williams that, although Ostermiller could request to work certain hours, Williams set the work schedules. Accordingly, even if the forum had determined that Ostermiller harassed Contreras, there is insufficient evidence that he was her supervisor.

Co-Worker Harassment

A prima facie case of co-worker harassment based on race consists of the following elements: (1) respondent is a respondent as defined by statute; (2) complainant is a member of a protected class; (3) complainant was harmed by harassment directed at complainant by co-workers; (4) complainant's race was a reason for the co-worker harassment; and (5) the harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the complainant's work performance or creating an intimidating, hostile or offensive working environment. OAR 839-005-0010(4)(f); *Vision,* 37 BOLI at 198. The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the

[15] Federal law similar to Oregon's civil rights laws is not binding on the forum, but federal decisions can be instructive in construing and applying similar state law. *Bravo Event Services, Inc. and Dan Kor*, 36 BOLI 250, 265 (2018). *See also In the Matter of Murrayhill Thriftway, Inc.,* 20 BOLI 130, 149 (2000) (stating that "decisions interpreting Title VII are instructive in construing and applying the similar state law").

circumstances of the complaining individual would so perceive it. OAR 839-005-0010(4)(b).

The first two elements are not in dispute. With respect to the remaining elements, the forum analyzes each of the instances in which Contreras claimed that Ostermiller harassed her.

Contreras first described an incident when she arrived at work and Ostermiller thought she was late. Contreras said that Ostermiller told her that because Trump "put up the wall," she could not "make it over." Ostermiller testified that he did not make this comment. He said that when Contreras arrived an hour late, he asked her why she did not call to let them know.

Contreras's second example of harassment involved a discussion with Ostermiller about serving Tecate beer and tacos for a "Taco Tuesday" special. She said that Ostermiller told her that she should bring "her people" in for the special and this offended her. Ostermiller remembered discussing "Taco Tuesday" specials, but denied making the comment about Contreras's "people."

Third, Contreras testified that Ostermiller would not let her Hispanic friends into the bar and told her that they had fake identification. Contreras also testified that Ostermiller said "you know how it is" and that people can get fake identification in Santa Ana. She then said that the night security guard at Knockers let these same friends enter. In response, Ostermiller testified that he had to deny entry to three Hispanic men once because they did not have the type of identification that is allowed by the OLCC.

Fourth, Contreras said that Ostermiller argued with her about not knowing how to do her job. Ostermiller denied saying this and testified that he thought Contreras did a good job.

Finally, Contreras said that at one point she told Ostermiller that he was a racist and, in response, he tried to show her his tattoos to demonstrate that he was not racist. In contrast, Ostermiller testified that Contreras saw his tattoos and called him a "Nazi." He was offended by her comment because he had Jewish ancestors who had been persecuted. He attempted to explain the meaning of his tattoos to Contreras, which he said represented his German Jewish and Native American heritage.

In a case such as this with conflicting evidence, the forum must determine whether there is sufficient credible evidence to support the Agency's case. As stated above in the Findings of Facts – Procedural ## 25 and 27 discussing credibility, there were too many inconsistencies in Contreras's testimony for the forum to conclude that her testimony was more credible and reliable than the contrasting testimony of Respondents' witnesses. There was also evidence that Contreras was angry at Ostermiller when he cut off alcohol service to her for drinking excessively and vomiting in the bar. Although Contreras claimed that some of the alleged harassment by Ostermiller was witnessed by others, such as Iverson, the Agency did not call Iverson or

any other witness to confirm that the alleged conduct occurred. Therefore, the forum concludes that the Agency did not meet its burden of proof to establish that Ostermiller harassed Contreras because of her race.

Finally, if the forum were to conclude that Ostermiller harassed Contreras because of her race, Respondents MGC and S. Doss would be liable for harassment they "knew or should have known about," unless they "took immediate and appropriate corrective action." *Vision,* 37 BOLI at 198, *citing* OAR 839-005-0010(4)(f). Conteras's testimony demonstrated that she was aware that Williams was someone who should be notified of any alleged harassment[16] and that she tried to inform Williams about the alleged harassment. She first stated that she called Williams to report the alleged harassment, but did not leave a voicemail when he did not answer. She also testified that she could not talk to Williams in person because he was rarely present at Knockers and he only spoke to her twice to discuss her paycheck. On cross-examination she admitted she had actually spoken to him on other occasions, including the time he spoke to her with concerns about her alcohol consumption after work at Knockers. There was also testimony from multiple witnesses that Williams was at Knockers at least two to three days a week, and that M. Doss came there almost every Thursday. This rebuts Contreras's testimony that they were not available to receive complaints.

Contreras also testified that she told Iverson about the harassment and that Iverson was going to talk to Williams, but there was no evidence that Iverson was a supervisor or that Iverson relayed such a report to Williams. Williams denied having any knowledge of alleged harassment or discrimination towards Contreras. Accordingly, even if harassment occurred, there is insufficient evidence that Contreras's employer knew or should have known of the harassment.

LIABILITY OF OSTERMILLER AND WILLIAMS FOR AIDING OR ABETTING

In the Amended Formal Charges, the Agency alleges that Ostermiller and Williams "aided [or] abetted the unlawful actions." (Ex. X8) 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." A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided or abetted the corporation's unlawful employment practice. *In the Matter of Bravo Event Services, Inc. and Dan Kor*, 36 BOLI 250, 268 (2018); *see also Allison v. Dolich*, 321 Or App. 721, 725, 518 P3d 591 (2022).

In this case, since there were no unlawful actions, no one can be liable as an

[16] Respondents provided testimony about a policy against harassment that was in hiring packets provided to employees. They also testified about a BOLI poster hanging on the wall. However, they did not introduce these documents into evidence. The forum draws no conclusion as to whether the hiring packet or BOLI poster sufficiently notified employees about discrimination policies and who could receive such reports. However, Contreras acknowledged in her testimony that Williams was an appropriate person to whom she could make a report.

aider and abettor. Moreover, the Agency did not sustain its burden of proof to demonstrate that Williams had any knowledge of any unlawful actions towards Contreras. Because there is no proof of unlawful actions and there is insufficient evidence of Williams's knowledge of any alleged unlawful behavior, Ostermiller and Williams are not liable as aiders and abettors.

Exceptions to the Proposed Order

The Proposed Order was issued on April 12, 2023. Since the tenth day, April 22, 2023, fell on a Saturday, the parties had until Monday, April 24, 2023, to file any exceptions. *See* OAR 839-050-0380(4) (stating that exceptions "must" be filed "within ten days of the date of issuance of the Proposed Order" unless a party seeks an extension of time "as provided in OAR 839-050-0050.")

The Agency filed its Exceptions on April 27, 2023, and did not file a request seeking an extension of time. The Agency's Exceptions state that the Proposed Order was issued on April 18, 2023, but the Proposed Order clearly contains an issue date and service date of April 12, 2023. Accordingly, the forum rejects the Agency's Exceptions because they were not timely filed.[17] *See In the Matter of Green Thumb Landscape and Maintenance, Inc*., 32 BOLI 185, 189 (2013) (failure to follow written directions in the Proposed Order's "Exception Notice" did not constitute "good cause" for granting an extension); *see also In the Matter of Stahler*, 34 BOLI 56, 65 (2015).

ORDER

NOW, THEREFORE, the charges against all Respondents are DISMISSED.

[17] Most of the Agency's Exceptions refer to scrivener's errors and do not take exception to the conclusions in the Proposed Order. When appropriate, revisions were made in this Final Order to correct scrivener's errors.

In the Matter of
Your House LLC,
Respondent, Case No. 57-22

Final Order of Commissioner Christina Stephenson
Issued June 20, 2023

SYNOPSIS

The forum concluded that Respondent violated ORS 659A.030(1)(f) and OAR 839-006-0125(1), (2), and (3) by retaliating against Complainant for opposing an unlawful practice. The forum further concluded that Respondent violated ORS 659A.199(1) and OAR 839-010-0100(1) by retaliating against Complainant because she had in good faith reported information she believed was evidence of a violation of a state or federal law, rule, or regulation. The forum awarded Complainant $14,400 in lost wages and $30,000 in damages for mental and emotional distress.

The above-entitled case came on regularly for hearing before Caroline Holien, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held October 25-26, 2022, via the Zoom video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Theofanis Skourtis, an employee of the Agency. Complainant Olivia Maurer ("Maurer") was present throughout the hearing. Respondent Your House LLC ("Your House") was represented throughout the proceeding by Kent Hickam, Attorney at Law. Your House Owner Kip Schoning was present throughout the hearing.

The Agency called Maurer and Brittney Boggs, Senior Investigator, Civil Rights Division ("Boggs"), as witnesses. Respondent was allowed to call only Kip Schoning as a witness based upon Respondent's failure to timely file a Case Summary.

The forum received into evidence Administrative exhibits X1-X10 and Agency exhibits A1-A15 and A17-A22. The parties submitted post-hearing briefing on the admissibility of Agency exhibits A16 and A23. Neither exhibit was admitted into the record, as explained more fully in Findings of Fact – Procedural ## 10-12.

Having fully considered the entire record in this matter, I, Christina Stephenson, 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.

FINDINGS OF FACT – PROCEDURAL

1) On November 30, 2020, Maurer filed a complaint with the Agency's Civil Rights Division alleging Your House discharged her after she refused to engage in what she believed to be illegal conduct and after she filed a complaint with the Federal Bureau of Investigations ("FBI") regarding the alleged illegal conduct. (Exs. A1-A3)

2) On October 5, 2021, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found "substantial evidence of an unlawful practice based on reporting unlawful conduct and engaging in protected whistleblowing activities in that Respondent retaliated against Complainant and terminated her employment." (Ex. A9)

3) On July 12, 2022, the forum issued a Notice of Hearing to the Agency, the Complainant, and the Respondent that included notice that the hearing would begin at 9:30 a.m. on October 25, 2022, and the hearing would be held at the Offices of the Bureau of Labor & Industries, 3865 Wolverine Street NE, Bldg. E-1, Salem, OR 97305-1268. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges; a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413; a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice of Hearing; and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

4) The Formal Charges included the following allegations:

> "Respondent discharged, expelled, subjected Complainant to adverse treatment, discriminated against and/or retaliated against Complainant because Complainant opposed an unlawful practice or what Complainant reasonably believed to be an unlawful practice in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(1), (2), and (3).
>
> "Respondent discharged, demoted, suspended and/or in any manner discriminated and/or retaliated against Complainant for the reason that Complainant had in good faith, reported information that Complainant believed was evidence of a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1) and OAR 839-010-0100(1). This is an unlawful employment practice."

(Ex. X2b)

5) On July 26, 2022, the forum issued an Interim Order Requiring Case Summaries to be Filed and Setting Case Deadlines setting October 4, 2022, as the deadline for filing Case Summaries. The interim order also noted that counsel had agreed to accept filings via email. (Exs. X3, X5-X7)

6) On August 1, 2022, Your House filed Respondent's Answer denying the allegations set forth in the Formal Charges. (Ex. X4)

7) On September 8, 2022, the Agency filed the Agency's Motion to Change Place of Hearing requesting the hearing be held via video conference due to safety concerns due to the ongoing COVID-19 pandemic, as well as for the convenience of the parties. (Ex. X8)

8) On September 19, 2022, the forum issued an Interim Order Regarding the Agency's Motion to Change Location of Hearing granting the agency's motion after receiving no objection or response from Respondent. (Ex. X9)

9) On October 11, 2022, the Agency filed its Case Summary. Respondent failed to file a Case Summary. (Ex. X10, Forum File)

10) At hearing, the Agency offered Exhibits A16 and A23. Respondent objected to the admission Exhibit A16 due to illegibility of several documents included in the exhibit. Respondent also objected to the admission of Exhibit A23, which included articles detailing landlord/tenant issues involving Kip Schoning and previous corporations operated by Kip Schoning. The ALJ reserved ruling on the admissibility of the exhibits until issuance of the Proposed Order. The parties agreed to submit briefing on the admissibility of each exhibit.

11) On October 26, 2022, the forum issued an Interim Order Re Post Hearing Briefing Schedule in which the parties were directed to simultaneously file and serve briefs on the admissibility of Exhibits A16 and A23. The parties timely filed their final briefs on November 16, 2022. (Forum File)

12) Pages 1-4 of Exhibit A16 included emails between Boggs and Maurer that Boggs relied upon during the course of her investigation. Pages 1-4 of Exhibit A16 are **ADMITTED**. However, the remaining pages of Exhibit A16, pages 5-8, are illegible. Those pages were difficult to read even after they were enlarged during the course of the hearing. The hard copies of pages 5-8 are nearly impossible to read. Given the illegibility of pages 5-8, the forum finds the documents are inadmissible. Therefore, pages 5-8 of Exhibit A16 are **EXCLUDED** from the record.

13) Exhibit A23 includes newspaper articles referencing a history of landlord/tenant disputes involving Kip Schoning's properties. The Agency argues that the articles are evidence of pattern and practice by the Respondent that can be used by the forum in making a credibility determination. Respondent argues the allegations are remote in time and the retaliation alleged in the article involved a tenant and not an employee. Respondent further argues the articles are not relevant to the issue before the forum. Respondent's arguments are well taken. The articles detail business dealings that occurred in 2015 and 2017, and involve allegations regarding Kip Schoning's business dealings with tenants. The articles do not reference Your House, which is the current corporate identity of Kip Schoning's rental property management

business. The information contained in the articles is not relevant to the issue before the forum. Therefore, Exhibit A23 is hereby **EXCLUDED** from the record. The Agency's request to make an offer of proof pursuant to OAR 839-050-0260(11) is **DENIED**.

14) On January 27, 2023, the ALJ issued a proposed order dismissing the charges against Respondent and notifying the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency timely filed exceptions on February 6, 2023. Respondent did not file exceptions to the proposed order.

15) On February 16, 2023, Respondent filed Respondent's Reply to the Agency's Exceptions. On February 23, 2023, the Agency filed a motion to quash arguing the administrative rules governing the proceeding did not allow replies to be filed by the participants. Respondent did not file a response to the Agency's motion.

OAR 839-050-0380 provides that parties may file exceptions to a Proposed Order within ten days of the date of issuance of the Proposed Order. OAR 839-050-0380 makes no provision for the filing of a reply to exceptions timely filed by another participant. Therefore, the Agency's motion to quash the Respondent's reply to its exceptions is hereby **GRANTED**. The Respondent's reply to the Agency's exceptions will not be considered in the issuance of this final order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Your House was an active Domestic Limited Liability Company ("DLLC") with its principal place of business being located in Corvallis, Oregon. The Oregon Secretary of State's Business Entity Data lists Kip Schoning as Your House's Registered Agent and Manager. (Testimony of Kip Schoning; Ex. A4)

2) Kip Schoning is the sole owner of Your House. Your House typically has two employees other than Kip Schoning. One employee performs administrative work at Your House's Corvallis office, and the other employee performs maintenance for properties managed by Your House. (Testimony of Kip Schoning)

3) Your House does not hold an ownership interest in any of the roughly 100 properties it manages. The majority of properties managed by Your House are owned by Kip Schoning and his wife, Michelle Schoning, either individually or through corporations controlled by each of them. Your House did not have any mortgages at any time relevant to the matter; nor did it seek any mortgage modifications during the relevant period. (Testimony of Kip Schoning)

4) In March 2020, Your House hired Maurer to perform administrative work at the Corvallis office including filing, answering phones, interacting with tenants, making deposits, and drafting correspondence. (Testimony of Maurer, Kip Schoning)

5) Maurer was often the only person in the office. However, Maurer took direction from Michelle Schoning when she was in the office working with Maurer. Michelle Schoning assigned Maurer tasks to perform during the workday and had the apparent and actual authority to direct Maurer's performance. (Testimony of Maurer; Ex. A8)

6) Maurer did not receive a job description or any training for the position. Your House did not provide Maurer with an employee handbook or any type of policy manual. (Testimony of Maurer, Kip Schoning)

7) Maurer worked approximately 40 hours per week, with an hourly wage of $15. Maurer was paid on a weekly basis. Kip Schoning's signature was the only signature on Maurer's payroll check. (Testimony of Maurer, Kip Schoning; Ex. A18)

8) At least one of the three computers in the Corvallis office had personal information pertaining to Kip Schoning, as well as letterhead used by Michelle Schoning in her business(es). (Testimony of Maurer, Kip Schoning)

9) Kip Schoning had concerns about Maurer's job performance and did not feel Maurer was well suited for the position. However, Kip Schoning did not issue any discipline to Maurer regarding her performance or otherwise bring his concerns to Maurer's attention at any time during her employment. (Testimony of Maurer, Kip Schoning)

10) On or about April 6, 2020, Michelle Schoning directed Maurer to alter rental agreements to reflect a lower monthly rental amount than the one listed in the rental agreement signed by the tenant. Maurer understood Michelle Schoning intended to submit the altered rental agreements as part of a mortgage application. (Testimony of Maurer; Ex. A16)

11) Maurer felt uncomfortable with Michelle Schoning's direction that she alter rental agreements without the tenant's knowledge or permission. Maurer initially agreed to make the changes on at least two occasions, as directed by Michelle Schoning, but Maurer later refused to do so out of concern that she was participating in mortgage fraud, which Maurer understood to be in violation of the law. (Testimony of Maurer)

12) Maurer did not tell Kip Schoning that she had refused to continue altering rental agreements or that she was concerned that Michelle Schoning was directing her to engage in illegal activities. (Testimony of Maurer)

13) On or about April 10, 2020, Maurer reported her concerns to the Federal Bureau of Investigations ("FBI") because she felt Michelle Schoning was directing her to

act illegally. Maurer did not advise either Kip Schoning or Michelle Schoning that she had contacted the FBI to report her concerns.[2] (Testimony of Maurer)

14) On April 13, 2020, at approximately 10:12 a.m., Maurer texted her mother, "Lol Michelle hasn't spoken to me today about the mortgage modifications." Maurer's text message exchange with her mother also included:

"Maurer:	And I haven't said anything to [K]ip yet
Maurer's mother:	Have you spoken to [K]ip at all yet?
Maurer:	Yeah, he's been civil"

(Ex. A21, p. 22)

15) Maurer spoke to Kip Schoning by telephone late in the morning on April 13, regarding an issue with a tenant questioning a utility bill. Their conversation escalated and ended with Maurer telling Kip Schoning that she thought he was being rude and disrespectful toward her. (Testimony of Maurer, Kip Schoning)

16) Maurer sent a text message to her mother at approximately 12:09 p.m., on April 13, 2020, that read, "I TOLD HIM." Maurer did not intend her text message to communicate that she had voluntarily quit her employment with Your House but to inform her mother that she had stood up to Kip Schoning regarding his behavior toward her. (Testimony of Maurer; Ex. A21, p. 7 (emphasis in original))

17) A short time after Maurer's phone call with Kip Schoning ended, Michelle Schoning called Maurer and informed her that she was being terminated because she was not a good fit. Michelle Schoning directed Maurer to leave her office key in the deposit box used by tenants who dropped off their rent checks. (Testimony of Maurer; Ex. A21)

18) Maurer did not quit her employment with Your House as contended by Kip Schoning at hearing. Maurer's termination from her employment with Your House was communicated to her by Michelle Schoning on April 13, 2020. (Testimony of Maurer)

19) Maurer was upset at the loss of her employment and the security it provided while she completed her college education. Maurer relied upon the wages she earned at Your House to pay for her housing and other living expenses. Maurer was anxious and depressed following her termination, which adversely affected her relationships with her family and friends. Maurer was forced to seek financial assistance from her parents, which caused her additional distress. (Testimony of Maurer)

20) Maurer made reasonable and diligent efforts to seek other employment

[2] Kip Schoning testified at hearing that he was not aware of Maurer's report to the FBI as of April 13, 2020.

after her termination. Maurer's job search was affected by the impact of the COVID-19 pandemic. Maurer ultimately obtained subsequent employment in early October 2020. Maurer was unemployed and without income for approximately 24 weeks following her termination from Your House. Maurer lost $14,400 in wages as a consequence of her termination from Your House ($15 x 40 hours x 24 weeks). (Testimony of Maurer)

21) The forum found Boggs credible as a witness. Boggs made repeated efforts to gather information from Schoning during the investigative process. Schoning evaded Boggs' efforts and provided only vague information and general denials when he did provide a response. When given the opportunity to provide documentation that may challenge the information submitted by Maurer, Schoning avoided doing so even after being served with a subpoena. Boggs' testimony was clear and direct, and she showed no vested interest in the outcome of the case. (Testimony of Boggs; Exs. A2, A11-A14)

22) The forum generally found Maurer credible as a witness. There were discrepancies between the information Maurer presented to the Agency and her sworn testimony. For example, Maurer reported that "her employer ask [she] commit mortgage fraud and I refused" in her online complaint with the Agency. Maurer later reported to Boggs during an investigative interview that she had made the requested changes but was nervous doing so. At hearing, Maurer testified she made the requested changes but then refused to continue doing so. Despite these discrepancies, Maurer's testimony was straightforward and appeared sincere. (Testimony of Maurer; Exs. A3, A15)

23) The forum found Kip Schoning generally less credible than Maurer. Schoning's testimony was often evasive and non-responsive. Kip Schoning frequently claimed a lack of memory or lack of knowledge during cross examination, which he did not claim during direct examination by his attorney. (Testimony of Kip Schoning)

24) The forum did not give credit to Kip Schoning's testimony when it contradicted testimony from other credible witnesses.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Your House LLC was an "employer" within the meaning of ORS 659A.001(4) and OAR 839-005-0003(5). Your House LLC employs one or more persons in the state of Oregon. Your House LLC employed Complainant Olivia Maurer.

2) Olivia Maurer opposed an unlawful practice that she reasonably believed to be an unlawful practice. ORS 659A.030(1)(f) and OAR 839-005-0125(1),(2),(3)

3) Olivia Maurer, acting in good faith and while employed by Your House LLC, reported information that she reasonably believed was evidence of a violation of a statute or rule. ORS 659A.199(1) and OAR 839-010-0100(1).

4) The Agency established that Your House LLC discriminated against and/or discharged Olivia Maurer because she opposed an unlawful practice and/or because she had reported information that she reasonably believed was evidence of a violation of a state or federal law, rule or regulation. ORS 659A.030(1)(f); ORS 659A.199(1); OAR 839-010-0100(1); and OAR 839-005-0125(1),(2),(3)

5) 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.

6) 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 an award requiring training, and the award of lost wages and compensatory damages to Complainant, based on Respondent's unlawful practices. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

The Formal Charges included the following allegations:

- "Your House 'discharged, expelled, subjected Complainant to adverse treatment, discriminated against and/or retaliated against Complainant because Complainant opposed an unlawful practice or what Complainant reasonably believed to be an unlawful practice in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(1), (2), and (3)'."

- "Your House 'discharged, demoted, suspended and/or in any manner discriminated and/or retaliated against Complainant for the reason that Complainant had in good faith reported information that Complainant believed was evidence of a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1) and OAR 839-010-0100(1)'."

(Findings of Fact – Procedural #4)

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

> "(1) ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging * * * or in any manner discriminating or retaliating against 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) Your House was an employer as defined by statute; (2) Your House employed Maurer; (3) Maurer reported what she believed to be evidence of a violation of a law rule or regulation; (4) Your House subjected Maurer to adverse treatment and (5) there is a causal connection between the protected activity and the adverse treatment. *See In the Matter of Reynolds Consultation, Inc., dba Senior Helpers of Salem,* 38 BOLI ___ *(2023); In the Matter of 4R's,* 38 BOLI ___ *(2022); In the Matter of Grand Management Service, Inc.*, 38 BOLI _ (2021).

The forum set forth the burden of proof the Agency must satisfy *In the Matter of Horizontal Motorsports, Inc.,* 37 BOLI 205, 215 (2020):

> "'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.' *Id.* quoting *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993) (quoting from *State v. Jackson*, 313 Or 189, 832 P2d 443 (1992) and *Cook v. Marshall*, 214 Or 513, 527, 330 P2d 1026 (1958)."

Elements 1 and 2

There is no dispute that Your House was an employer, as defined by statute, that employed Maurer from March 2020 through April 13, 2020. The evidence shows Michelle Schoning was frequently in the office with Maurer when Kip Schoning was not physically present in the office often directed Maurer to perform certain duties, including altering rental agreements. The issue that must therefore be addressed is whether Michelle Schoning served as an agent of Your House.

Despite Kip Schoning being the only Registered Agent and Manager listed for Your House, the evidence shows Michelle Schoning had the authority to assign work to Maurer and to direct and to control Maurer's work performance on a regular basis, as evidenced by Michelle Schoning directing Maurer to alter rental agreements on more than one occasion. The evidence further shows that Michelle Schoning had at least some involvement in the decision to terminate Maurer's employment with Your House given that she was the person who notified Maurer of her termination on April 13, 2020.

The forum therefore concludes Michelle Schoning served as an agent of Your House based upon her exercise of authority in directing and controlling Maurer's performance as an employee of Your House and to act on behalf of Your House as Maurer's employer when she informed Maurer of her termination. See *Ossanna v. Nike, Inc.*, 365 Or 196, 210, 445 P3d 281, 291 (2019)("employment setting often consists of multiple layers of networks and relationships; organizational models often do not reflect a simple vertical chain of command; and bias can enter the decision-making process through formal or less formal channels.")

Element 3 (report)

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 187, 199 (2019). 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. *Id.*

The evidence shows Maurer had a reasonable belief that altering the rental agreements was a violation of a state or federal law, rule or regulation when she informed Michelle Schoning that she would not continue altering the rental agreements and when she reported her concerns to the FBI. The Agency has therefore established the first three elements of its prima facie case.

Element 4 (adverse action)

The fourth element of the Agency's prima facie case requires the Agency to show that Your House subjected Maurer to an adverse employment action. The forum finds that it is more likely than not that Michelle Schoning informed Maurer of Schoning's decision to terminate Maurer's employment as Maurer testified at hearing. (Findings of Fact – the Merits, #19). Maurer's testimony as to the sequence of events leading up to her telephone confrontation with Schoning regarding his behavior toward her and the steps she took following Michelle Schoning's phone call describes a more likely series of events than Schoning's contention at hearing that Maurer simply stopped reporting for work without explanation. The Agency has therefore established the fourth element of its prima facie case by showing that Your House subjected Maurer to an adverse employment action by terminating her employment on April 13, 2020.

Element 5 (causation)

The Agency contends that Your House discharged Maurer because of her opposition to Michelle Schoning's directive to alter the rental agreements and her subsequent report to the FBI. To show causation, the Agency "must prove that [a respondent's] unlawful motive was a substantial factor in his termination, or, in other words, that [Maurer] would have been treated differently in the absence of the unlawful motive." *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d 1170, 1174 (2016) (citing *LaCasse v. Owen*, 278 Or App. 24, 32–33, 373 P3d 1178 (2016)). See also *Ossanna,* 365 Or at 214, 445 P3d 281, 292 (recognizing that the causation standard for assessing violations of ORS 659A.199(1) is "the substantial-factor standard of causation" and approving jury instruction describing that "a substantial factor is a factor that made a difference."). *See also In the Matter of Atlas Bolt & Screw Company LLC*, 37 BOLI 57, 74 (2018) (using the "substantial factor" analysis when examining allegations of retaliation).

Proof of a causal connection may be established through circumstantial evidence. *See In the Matter of Trees*, 28 BOLI 218, 249 (2007), citing *In the Matter of Wal-Mart Stores, Inc.,* 24, BOLI 37, 61 (2002). "Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw." *In the Matter of Income Property Management*, 31 BOLI 18, 39 (2010). "[T]he absence of direct evidence of [respondent's] specific intent is not determinative because such intent may be shown by the circumstantial evidence referred to herein." *In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 296-97 (1991) (citations omitted). *See also Boynton-Burns v. University of Oregon*, 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005), quoting *DeCintio v. Westchester County Medical Center*, 821 F2d 111, 115 (2d Cir), cert. den. 484 U.S. 965, 108 S.Ct. 455, (1987) ("Proof of a causal connection can be established [1] indirectly, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct, or [2] directly, through evidence of retaliatory animus directed against a [complainant] by the [respondent]").

Additionally, the Oregon Court of Appeals held that when relying on "mere temporal proximity" between the protected action and the allegedly retaliatory employment decision to indirectly establish a causal connection, the "events must be 'very close' in time." *Id.* at 381, citing *Clark County School District v Breeden*, 532 US 268, 273 (2001).

The preponderance of the evidence shows that Michelle Schoning notified Maurer of her termination by Your House approximately three days after Maurer informed Michelle Schoning that she would no longer alter rental agreements out of concern that what she was being asked to do violated state and/or federal law. While the confrontation with Kip Schoning may have been the final event just prior to Maurer's termination, the termination following so closely after Maurer's refusal to continue altering rental agreements and Michelle Schoning being the person who informed Maurer that she was being terminated from her employment with Your House is sufficient to establish a causal connection between Maurer's refusal to continue altering rental agreements as directed by Michelle Schoning and Maurer's termination from Your House. In other words, it is more likely than not that Maurer's refusal was a factor that made a difference in the decision by Your House to terminate her employment.

Further support for finding that Maurer's refusal to continue altering rental agreements at Michelle Schoning's direction made a difference in the decision lies in the fact that Respondent offered *no evidence* in support of Kip Schoning's contention that Maurer was ill suited for the position or that Maurer voluntarily left the employment -- despite having several opportunities to do so - prior to and at the time of hearing. Further, the performance concerns Kip Schoning pointed to in his testimony were apparently so insignificant that he admitted he never addressed them with Maurer at any time during her employment. The forum concludes that the Agency has shown by a preponderance of the evidence that Maurer's refusal to continue altering rental

agreements at Michelle Schoning's direction was a substantial factor in the decision to terminate Maurer's employment with Your House. Accordingly, the Agency established a prima facie case of a violation of ORS 659A.199.

The Agency also alleges that Your House violated ORS 659A.030(1)(f) when it terminated Maurer because she opposed Michelle Schoning's directive to engage in what Maurer reasonably believed to be a violation of a state or federal law, rule or regulation. The analysis used in determining that Your House violated ORS 659A.199 applies equally to the Agency's ORS 659A.030(1)(f) claim. Accordingly, the forum's conclusion that Your House violated ORS 659A.199 necessarily leads to the conclusion that Your House also violated ORS 659A.030(1)(f) when it terminated Maurer. *See Vision*, 37 BOLI at 199.

DAMAGES

Lost Wages

Maurer is eligible for a back pay award because she was discharged in violation of ORS 659A.030(1)(f) and ORS 659A.199. ORS 659A.850. The purpose of a back pay ward in an employment discrimination case is to compensate a complainant for the lost wages he would have received but for the unlawful employment practice. *In the Matter of Oregon Truck Painting, LLC, On Time Painting, Inc., Richard Bowman, Individually, and Amanda M. Marin, Individually*, 37 BOLI 87, 114 (2018). Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the unlawful termination. *Id.*

Maurer earned approximately $600 per week based upon working approximately 40 hours per week with an hourly wage of $15. Maurer was unemployed for approximately 24 weeks until she was able to obtain subsequent employment. The forum concludes that Complainant is entitled to $14,400 in lost wages ($600 x 24 weeks).

Emotional Distress Damages

The Agency seeks damages on behalf of Maurer in the amount of "at least" $60,000 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. *Oregon Truck Painting, LLC,* 37 BOLI at 115. 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 termination from her employment with Your House negatively impacted Maurer, who testified that her relationships with family and friends were adversely affected by her feelings of anxiety and depression caused by her termination. Maurer experienced difficulties finding other employment and had to rely upon her savings and her parents for financial support. Accordingly, based on the record in this case, the forum concludes that $30,000 is an appropriate award of emotional distress damages.

OTHER REQUESTED RELIEF

In its Formal Charges, the Agency asked the forum to issue a cease and desist order against Respondents, requiring them to immediately stop all of the unlawful employment practices alleged in the Amended Formal Charges. 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 that the Agency's requested cease and desist order to be appropriate relief in this case.

EXCEPTIONS TO THE PROPOSED ORDER

The Agency timely filed exceptions to the proposed order on February 6, 2023. Respondent did not file any exceptions. *See* Findings of Fact– Procedural ## 14-15

The Agency's exceptions pertaining to scrivener's errors and citation corrections have been well taken and have been incorporated into the final order. The Agency's exceptions 9, 11, 14, 15, 17-21 generally take issue with the forum's conclusion that it had failed to prove by a preponderance of the evidence the final element of its prima facie case, which required the Agency to show that Maurer's termination from her employment with Your House was because of her opposition to what she reasonably believed to an unlawful practice and because she had in good faith reported information she had believed was evidence of a violation of a state or federal law, rule or regulation. Upon consideration of the Agency's arguments, the forum has made additional findings of fact and engaged in additional analysis. The forum has concluded that the

preponderance of the evidence presented at hearing supports a conclusion that Respondent Your House LLC retaliated against Maurer because of her opposition to what she reasonably believed to be an unlawful practice and because Maurer reported information that she believed was evidence of a violation of a state or federal law, rule, or regulation in violation of ORS 659A.030(1)(f), ORS 659A.199(1), OAR 839-005-0125(1),(2),(3), and OAR 839-010-0100(1).

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(f), ORS 659A.199(1), OAR 839-005-0100(1), and OAR 839-005-0125(1),(2),(3) by **Respondent Your House LLC**, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Your House LLC** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for **Olivia Maurer** in the amount of:

1) FOURTEEN THOUSAND FOUR HUNDRED DOLLARS ($14,400), less lawful deductions, representing wages lost by Olivia Maurer as a result of Respondent's unlawful employment practices found herein; plus,

2) THIRTY THOUSAND DOLLARS ($30,000), representing compensatory damages for emotional and physical suffering experienced by Oliva Maurer as a result of Respondent's unlawful employment practices found herein; plus,

3) Interest at the legal rate on the sum of FORTY FOUR THOUSAND FOUR HUNDRED DOLLARS ($44,400), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of **Respondent Your House LLC's** unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Your House LLC** to cease and desist from discriminating against and/or retaliating against employees who have opposed an unlawful practice and/or have in good faith reported information the employee believes to be evidence of a violation of state or federal law, rule, or regulation.

C. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of **Respondent Your House LLC's** unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondent Your House LLC** to participate in training on the correct interpretation and application of the Oregon laws pertaining to retaliation by the Bureau of Labor and Industries Technical Assistance for Employers Unit or other trainer agreeable to the Agency no later than ninety (90) days from the day of this order.

In the Matter of
Henkels & McCoy, Inc,
Respondent, Case No. 17-21

Final Order of Commissioner Christina Stephenson
Issued October 12, 2023

SYNOPSIS

The Formal Charges alleged that Respondent discriminated against and terminated Complainant because he made reports of a violation of state or federal law, rule, or regulation, in violation of ORS 659A.199(1) and OAR 839-010-0100(1). The forum concluded that the Agency failed to prove the alleged violations by a preponderance of the evidence and dismissed all charges.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 6-8, 2022, via the Zoom video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Rachel Diamond-Cuneo, an employee of the Agency. Respondent Henkels & McCoy, Inc. ("HMI") was represented by its attorney, David Worley. Complainant John Mahlke ("Mahlke") was present throughout the hearing; Geraldine "Gerri" Burt ("Burt") (HMI's Head of Human Resources) and Nick Sacco (assistant to HMI's counsel) were also present throughout the hearing. Senior Civil Rights Investigator Lloyd Perez ("Perez") was also present for portions of the hearing.

The Agency called Perez, John Mahlke ("Mahlke"), Mitchell Cook ("Cook"), and Anna King ("King") as witnesses.

HMI called Gerri Burt ("Burt"), Sylvie La ("La"), Dane Richman ("Richman"), Richard "Rick" Gutshall ("Gutshall"), Kenneth Villatoro ("Villatoro"), and Nickolette Fritz ("Fritz") as witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X14, (b) Agency exhibits A1-A9 and (c) HMI exhibit R13 (for purposes of impeachment and to refresh Richman's recollection).

Having fully considered the entire record in this matter, I, Christina Stephenson, 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.

FINDINGS OF FACT – PROCEDURAL

1) Mahlke filed a verified written complaint with the Agency's Civil Rights Division on November 14, 2019, alleging that HMI engaged in unlawful employment practices based on his whistleblowing activities by retaliating against him and terminating him from employment. (Stipulation; Ex. A1)

2) Within one year of the filing of the verified written complaint, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence that HMI committed unlawful employment practices (retaliation and termination because of Mahlke's whistleblowing) in violation of ORS 659A.199. (Testimony of Perez; Ex. A9)

3) On April 1, 2021, the forum issued a Notice of Hearing to HMI, the Agency, and Complainant stating the time and place of the hearing as August 3, 2021, 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 839-050-0000 to 839-050-0445. (Ex. X2)

4) The Formal Charges alleged that HMI violated ORS 659A.199(1) and OAR 839-010-0010(1) by discharging Mahlke because he opposed an unlawful practice and evidence that he reasonably believed was a violation of state or federal law. The Formal Charges sought damages for lost wages in the amount of "at least $15,000," out-of-pocket expenses in an amount estimated to be "at least $15,000" and mental and/or emotional distress in the amount of "at least $30,000.00." The Formal Charges also asked that HMI and its managers, supervisors and human resources personnel be trained, at HMI's expense, "on workplace retaliation and whistleblowing" and that HMI be declared in violation of the applicable laws and rules, and be enjoined from violating laws. (Ex. X2b)

5) On April 20, 2021, HMI filed an answer in which HMI denied that HMI had committed the alleged violations. (Ex. X3)

6) After the Agency and HMI's counsel indicated by email that they consented to accept filings by email, the ALJ issued an interim order on April 21, 2021, stating that parties could file documents by email and containing instructions for the temporary filing procedures. (Ex. X5)

7) On April 21, 2021, the Agency moved to consolidate six cases that all involved the same respondent, HMI. HMI did not object to consolidating the cases for prehearing and discovery purposes, but objected to consolidating the cases for hearing. At the request of the ALJ, the parties filed supplemental briefing on May 14, 2021, and May 21, 2021.

The ALJ issued an interim order on August 9, 2021, which stated, in part:

"Under OAR 839-050-0190, the ALJ may consolidate two or more cases 'when the [ALJ] determines that the cases involve common questions of law or fact."

"*Questions of Law*

"Each of the six cases includes a charge that HMI violated ORS 659A.199(1) and OAR 839-010-0100(1) by retaliating against each complainant because, in good faith, they reported information they believed was evidence of a state or federal law, rule or regulation.[1] Accordingly, there appear to be some common questions of law.

"*Questions of Fact*

"While the Complainants in each case were all employed by HMI and some worked on the same projects, not all of the factual issues are the same.

"One of the Agency's primary arguments is that each of the Complainants will testify as a witness in many of the other cases. However, while it may be more convenient for the Agency and its witnesses to testify in one proceeding, that fact alone does not determine the outcome of the motion. In particular, the forum is examining whether there are common issues of admissible evidence in each case that make holding one consolidated hearing the most efficient and fair solution for resolving the cases.

"* * *

"Based on the summaries of the facts of each case provided by the parties, it appears that although there are some similarities between the cases, the actual termination decisions (the basis of the retaliation allegations) differed factually and many do not involve the same decision makers. The forum noted the following when examining a similar issue in the past:

'[A]lthough there are common questions of law and may be some common questions of fact in the two cases, there are also significant dissimilarities.

[1] Two cases (103-20 and 03-21) also include alleged violations of ORS 659A.030(1)(f) and OAR 839-050-0125(2),(3).

> These dissimilarities lead the forum to conclude that consolidation of the cases would not necessarily result in any substantial gain of efficiencies or savings of time for the participants or the forum.'
>
> *In the Matter of Labor Ready Northwest, Inc*., 22 BOLI 245, 254 (2001), *rev'd on other grounds*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). Similarly, the forum concludes that consolidating these six cases into one hearing would not result in a 'substantial gain of efficiencies' and, indeed, could potentially cause confusion in the record when attempting to keep the facts straight for each case. It is also unclear as to whether evidence that is admissible in one case would also be admissible in all of the other cases. Therefore, the Agency's motion to consolidate the cases for hearing is DENIED."

(Exs. X4-X9)

8) The forum issued an interim order on September 8, 2021, rescheduling the hearing dates of the six cases in which HMI was a respondent. The hearings were set to begin on Tuesday, November 30, 2021, and continue until December 17, 2021, and were to take place on consecutive days in the following order: 40-21, 16-21, 18-21, 17-21 and 03-21. The interim order also required case summaries in this matter to be filed on November 23, 2021. (Ex. X10)

9) On October 13, 2021, the forum issued an interim order stating that, due to ongoing COVID-19 requirements and state office closures, the hearing in this matter would be conducted by video conference. Further instructions regarding participation in a video conference hearing were attached to the interim order. (Ex. X11)

10) Following a prehearing telephone conference, on December 3, 2021, the parties filed a joint motion requesting a postponement of the hearing to allow more time to attempt to negotiate a settlement. The dates for the six cases involving HMI were set to begin on March 29, 2022, in the following order: 103-20, 40-21, 16-21, 18-21, 17-21 and 03-21. (Ex. X12)

11) The Agency and HMI filed their case summaries on March 15, 2022. HMI filed an Amended Case Summary on March 28, 2022, and submitted additional exhibits for filing on April 6, 2022. (Exs. X13-X14)

12) The Agency and HMI stipulated to the following:

a. The alleged violations are within the jurisdiction of the Bureau of Labor and Industries.
b. At all times material, HMI was subject to ORS chapter 659A and OAR chapter 839.
c. On November 14, 2019, Mahlke filed a verified written complaint in Civil Rights Division Case No. STEMWB191114-11749.
d. Mahlke is an "aggrieved person" as defined in OAR 839-003-0005(2).

e. Mahlke was an "employee" as defined in ORS 659A.001(3).
f. Mahlke was an at-will employee.
g. At all times material, Mahlke was an employee of HMI.
h. At all times material, HMI was an active foreign business corporation incorporated in Pennsylvania.
i. HMI is an "employer" within the meaning of ORS 659A.001(4) and OAR 839-005-0003(5).
j. HMI employs one or more persons in the state of Oregon.
k. On or about November 6, 2017, HMI hired Mahlke to work as a senior outside plant engineer.
l. HMI terminated Mahlke's employment on March 19, 2019.

(Ex. X13; Hearing Record)

13) On March 31, 2022, the ALJ notified the parties by email that although Attorney Sheryl Willert is designated as "*pro hac vice*" counsel, it did not appear that *pro hac vice* documents were filed in this matter. The ALJ's email further stated: "Please take note of the attached instructions. Pursuant to OAR 839-050-0110(1) and OAR 839-050-0020(13), Ms. Willert will need to submit the information described in the attached documents."

Willert replied to the ALJ's email that same day, stating:

> "Attached please find the documents that I submitted to the Agency in April, 2021. My office staff reported to me that they inquired about the Pro Hac status and they advised that they were told not necessary. That must have been a miscommunication. Here is the paperwork. The answers to the questions remain the same."

The documents attached to Willert's email were labeled with Case No. 03-21 and enclosed documentation that satisfied the requirements of OAR 839-050-0020(13) and UTCR 3.170.

At the start of the hearing in Case No. 16-21, the ALJ discussed HMI's submission with the parties. Willert confirmed the information she sent by email, and clarified that HMI wanted the forum to admit her *pro hac vice* in all of the six HMI cases, including this Case No. 17-21. HMI further stated that Attorney David Worley would serve as local counsel following the withdrawal of attorney Bryan Churchill. The Administrative Prosecutor stated that the Agency had no objection to HMI's request for *pro hac vice* admission. Based on all of this information, the ALJ granted HMI's request and admitted Attorney Sheryl Willert as *pro hac vice* attorney in all of the above-captioned cases, with Oregon attorney David Worley as local counsel. (Forum File)

14) The hearing in this matter was held on April 6-8, 2022. 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)

15) On April 12, 2022, HMI filed a Notice of Withdrawal and Substitution of Counsel, stating that Worley was withdrawing as counsel and attorney Thomas Ped was appearing in the case. (Forum File)

16) The ALJ issued an interim order on April 15, 2022, which summarized rulings made on the record during the hearing in BOLI Case No. 03-21 on April 1, 2022, regarding the representation of HMI and addressed the recently filed Notice of Withdrawal and Substitution of Counsel. The interim order stated that the forum inferred from the Notice of Withdrawal and Substitution of Counsel that HMI was seeking to have Ped serve as local counsel for Willert[2] and ruled that Willert was admitted *pro hac vice* with Ped currently serving as local counsel. (Forum File)

17) On May 3, 2022, the ALJ issued an interim order summarizing rulings made on the record at the conclusion of the hearing and permitting the Agency to submit a brief explaining its position on how the forum should analyze pattern and practice evidence on or before April 22, 2022. HMI's response to the Agency's brief was due on or before May 6, 2022, and the Agency's rebuttal brief was due on or before May 13, 2022. The Agency's brief and HMI's response were to be no longer than 10 pages, and the Agency's rebuttal brief was to be no longer than three pages.

The Agency filed its brief regarding pattern and practice evidence on April 22, 2022, and HMI submitted its response on May 6, 2022. The Agency's rebuttal brief was filed on May 13, 2022. (Forum File)

18) On August 21, 2023, 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 filed exceptions on August 30, 2023, and HMI submitted exceptions on August 31, 2023.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, HMI was an active foreign business corporation incorporated in Pennsylvania, with headquarters in Blue Bell, Pennsylvania. (Stipulation; Ex. A5, p. 1)

2) HMI was an engineering and utility construction company that was hired to work on a project to install fiber optic cable for Verizon. (Testimony of Mahlke; Ex. A5, p. 1)

[2] The interim order indicated that if the ALJ's inference was incorrect, then HMI should file a supplement to clarify the record.

Barnette's Supervision of Mahlke and Warning
(November 6, 2017 – March 1, 2018)

3) On or about November 6, 2017, HMI hired Mahlke to work as a senior outside plant engineer on the Verizon project at HMI's office in Clackamas, Oregon. Mahlke was an at-will employee. He reported to Engineering Manager Dave Barnette ("Barnette"). (Stipulation; Testimony of Mahlke; Ex. A5, p. 2)

4) HMI used database software programs called FTQ360 and JIRA to track the progress on the Verizon project. Part of Mahlke's job duties as an engineer included entering photographs and other information into these databases in a timely manner. (Testimony of Mahlke)

5) On February 16, 2018, Quality Manager Connie Hamel ("Hamel") sent a detailed email to Mahlke and other HMI employees with the subject line: "IMPORTANT: QUALITY PROCESS MUST BE FOLLOWED FOR ENGINEERING." The email began by stating:

> "I know I stated this several times yesterday, but engineering needs to follow the quality process that are in place with regards to the quality of the engineering packages. I have attached the instructions that I recently wrote to help plus instructions for the subs. It is [HMI] engineering responsibility to ensure that the subs follow the quality process we have outlined. Additionally, [HMI] engineering must follow established processes as well. I am always happy to help where I can."

The email went on to include eight bullet points with instructions explaining how to enter information into the FTQ system. (Ex. A5, pp. 10-12)

6) At 11:56 a.m., on February 20, 2018, Hamel sent an email to Barnette, with the subject line of "Confidential." The email stated:

> "This is feedback on John Mahlke.
>
> "Last Thursday, Feb 15 I held a group session to review packages from all the subs. [Mahlke] paired off [with] me, Dustin and Ron. We went through the normal [Quality Control] process of processing FTQ360 inspection record sent from the sub and the updates needed to JIRA and sharepoint. Here are my observations from that meeting. Dustin and Ron can also provide their own feedback, but Dustin has confirmed what I observed.
>
> - [Mahlke] started off the meeting by saying 'My wife is a B so I might as well be a B today.' To me, he meant Bitch. It was an odd comment to make.
> - He [*sic*] behavior was obnoxious and rude at time[s], as well as argumentative.

- As we reviewed the FTQ360 inspection record from the subs, I showed the small group how to go review the drawing and the checkpoint items. If something was not correct or needed a change, I demonstrated how to mark it as OPN and put a comment about what needed to be changed.
- [Mahlke] commented how he doesn't do this, that he just puts a description of the problem in the Notes section of the inspection record and sends the redline drawings. I said no, you cannot just do that, you must indicate which quality checkpoint item is wrong and attach the redline drawing to the inspection record. He argued that it was too much work and that he has had problems in the past with attaching drawings. I reiterated what was supposed to be done and if he ever had problems I would help him. He argued with me about, quite disrespectful in how he did it. I finally said firmly, you must do it, it is the quality process.
- I then showed the group how to take a package that was sent back to us with correction and mark the OPN checkpoint item as QC after the sub had marked the READY FOR REVIEW checkbox. I explained how critical it is for us to keep accurate quality records. We want to understand what the common quality failures are by checkpoint and to see how subs are performing.
- At one point as I was scrolling down an inspection record looking for the fiber size correct checkpoint, and [Mahlke] said "If you cannot find the fiber size, then how do you expect me to find it." That was just plain rude.
- Through the whole 4-5 hour session he continually interrupted and complained. Mentioned several times how he has been getting his ass chewed for not getting work out and he's tired of it. Also eluded to not even coming into work on Friday.
- [Mahlke] set a tone in the meeting that was hostile and not pleasant to be around him. I did my best to handle his disrespectful behavior by being understanding [*sic*] and encouraging him and firmly stating we needed to do things the quality way. It was exhausting to keep this up.
- The next day I sent out detailed quality instructions for the second time to all of engineering. I expected him to immediately make changes and follow the quality process, yet he has already not done so (see other email).
- I also want to remind you of his very disrespectful behavior exhibited to you and I in your office about a month ago when I discovered he hadn't been updating JIRA with information or moving things through the workflow. He sat there and came up with all kinds of excuses and was argumentative and I did my best to be empathetic and encouraging. I even wrote up a detailed step by step procedure on what to do in JIRA and printed it for him and emailed it to him. You said he later came to apologize for his behavior, but he never apologized to me.
- Behind closed doors he says he's getting beat up by you for production footage. I have said he may misunderstand as I believe [Barnette] wants quality footage, not footage that gets rejected by [Verizon] or [HMI's

> construction group]. He has mentioned that maybe he should got get another job. Al of this while Natalie is in the office trying to get her work out.
>
> "His behavior needs to immediately change."

(Ex. A5, pp. 14-15)

7) Hamel sent a second email to Barnette on February 20, 2018, regarding errors made by Mahlke and stated, in part, "I cannot trust any of the MGC data from [Mahlke] at this point." (Ex. A5, p. 13)

8) On February 22, 2018, at 11:45 a.m. Hamel sent an email to Barnette forwarding an email exchange between her and Mahlke in which she gave Mahlke instructions for correcting and resending an inspection record. In the email to Barnette, Hamel stated that Mahlke "is completely ignoring the quality procedures and I have sent several emails about this. Please can you get this corrected? I am having to review every single detail of this work and this is insubordination on his part." (Ex. A5, pp. 16-17)

9) At 1:16 p.m. on February 22, 2018, Mahlke sent an email to Hamel, stating that JIRA and FTQ were not working. Hamel forwarded Mahlke's email to Barnette at 2:30 p.m., and stated:

> "Dave. I just got off the phone with [Mahlke] to speak to him about what his issues were with JIRA and FTQ360. First, what is puzzling is him saying he is having problems, yet he is able to use FTQ360 to mark something at FTQ. I said, if you are there you just need to select OPN instead of FTQ.
>
> "He was very frustrated and argumentative and making excuses. I'm only trying to help him follow our process. He said he's just trying to get work out, he said he's chained to his desk, eats lunch at his desk, he said he will do whatever short cuts are needed to get the work out even if that means sending emails to subs about what is wrong and going back later to fix up the paperwork, he said he's having all kinds of problems with JIRA and FTQ360. He couldn't really elaborate. I asked him if he was using Chrome browser and he said he didn't know about that. And I said yes you do, I helped you make this change a while back, because FTQ360 doesn't run on IE and JIRA needs Chrome too. I asked him to set his default browser to Chrome and he said he would.
>
> "He said Dustin was having trouble. I asked Dustin and that was way over a month ago and that was also because he wasn't using Chrome. He is trying to divert his own failings to the process.

"I will help him in any way I can. He still doesn't believe that doing the official paperwork and quality are important. He still says he is being pushed for footage. I told him Dave isn't pushing that, he is pushing quality footage.

"His attitude is not good and he doesn't speak very respectful to me."

(Ex. A5, p. 18)

10) Hamel emailed Barnette on February 23, 2018, and forwarded an email exchange between her and Mahlke. She explained to Barnette that she helped Mahlke again with his "issues" with FTQ360 and JIRA, and reiterated that Mahlke needed to use the Chrome web browser as it is more compatible with "most modern web sites." She also told Barnette, "I also explained that quality is important and [Mahlke] needs to take the time to do it right." (Ex. A5, p. 21)

11) On March 1, 2018, Barnette delivered a document titled "Employee Written Warning" to Mahlke. The word "Oral" was handwritten on the top of the Warning. The information in the Warning was typed by La, Human Resources Specialist for HMI's Clackamas office, with input from Barnette. The "Type of Violation" was identified as "Work Quality" and "Conduct." La was also present when Barnette delivered the Warning to Mahlke. Hamel was not present.

The "Supervisor's Statement" in the Warning stated:

"Work Quality

"A written process on how to conduct the FTQ360 inspection and how to update JIRA has been drawn up and distributed to be followed. It has been observed that [Mahlke] has not followed this quality process. Therefore, work has been rejected by Verizon.

"[Mahlke] is also not managing the subcontractors assigned to him to the fullest expectation. It was told that dates with subcontractors can be negotiated, however [Mahlke] has not been following up with the subcontractors to meet the deadlines.

"Conduct

"[Mahlke] has shown to be argumentative and disrespectful to other managers, such as being rude when interrupting a conversation and making comments such as, 'If you cannot find the fiber size, then how do you expect me to find it.'

"This is an opportunity to re-evaluate your process and tasks and adjust for improvement. Below are goals to reach and actions to help you reach the goals.

"GOALS:

- To follow the procedures for FTQ360 and JIRA as instructed in the guidelines provided
- Ensure projects that move through the workflow assignment are correct
- Manage and follow-up with subcontractors more often to ensure they meet their deadlines
- Be more aware of your demeanor and attitude and adjust accordingly
- Review the Code of Conduct again

"ACTIONS TO ACHIEVE GOALS:

- Management to provide information and guides to follow process and process deficiencies
- Review progress with supervisor weekly for a month
- Code of Conduct is available online and printed with HR"

The bottom of the warning contained the following question: "Is employee receiving Disciplinary Action?" In response the question, a checkmark was placed on the line before "No." (Testimony of La; Ex. A5, pp. 23 -24)

12) The Warning had a section titled "Employee Statement," which provided the opportunity for Mahlke to mark whether he agreed or disagreed with the Supervisor's Statement. Mahlke did not place a checkmark before either the "agree" or "disagree" option, and wrote the following: "I am somewhere in between." Mahlke wrote this because he felt that the "accusations" in the Warning originated from Hamel, and that she was not qualified to make the accusations because she was not his supervisor. (Testimony of Mahlke; Ex. A5, p. 23)

13) After the statement reading "I have read this Employee Warning Notice and understand it," the Warning was signed by Mahlke, Barnette and Paul Balthuis.[3] (Ex. A5, p. 24)

14) Mahlke agrees that the requests made by management in the Warning were not unreasonable. (Testimony of Mahlke)

15) The Warning was issued before Mahlke raised any issues regarding safety, illegal dumping or worksites not being properly cleaned. (Testimony of Mahlke)

16) Mahlke believed that criticism from Hamel precipitated the warning because it happened "a day or two" after he was "curt" and "short" with Hamel in an email. He admitted that he said something similar to the quoted remarks in the Warning regarding "how do you expect me to find" the fiber size. However, he believed that

[3] Based on testimony from various witnesses, the forum infers that Balthuis was the onsite director for the Portland Verizon project and that he was located in the Clackamas office.

Hamel's criticisms of him constituted "harassment." (Testimony of Mahlke)

17) Mahlke submitted a written response to the Warning that was slightly over two pages long in which he "reject[ed] being written up." The response had a typewritten date of "Thursday, March 1, 2018," and handwriting on top of the first page reads: "Received: 3/5/18."

The first paragraph stated that he was "blind-sided" by the Warning, and that "it was both embarrassing and humiliating to [him] because the abstract nature of what I was being charged with was largely hypocritical and abstract." He also wrote that he "was being used as a scapegoat for the vastly disorganized mess that is the present state of [the Verizon] project."

Several paragraphs of the response mentioned Hamel, and included statements such as she "attack[ed] me so blatantly in her complaint today" and that Hamel's criticism is "largely unfounded." He concluded the response, stating, "I do not make the personal connection as to why it was exploded up to a level where it can be damaging to me, by employee standing, and all the other factors involved. Unfortunately I take away the feeling that this person is out to get me, despite the complexity and challenges that our work project dictates." (Ex. A5, pp, 25-27)

Mahlke Reports
Mid-March 2018 – June 2018

18) During the first or second quarter of 2018 (after he received the Warning on March 1, 2018), Mahlke spoke to Barnette about safety conditions at a job site in Beaverton. Mahlke does not know if Barnette took any action in response to the concerns Mahlke raised. (Testimony of Mahlke)

19) At some point after the March 2018 Warning, Mahlke raised concerns about a subcontractor called Empire during daily engineering meetings. Mahlke reported that he saw "unfilled bore pits" on Butner Road in Beaverton. He did not feel that his reports were taken seriously. (Testimony of Mahlke)

Performance Evaluation
April 30, 2018

20) Barnette completed a mid-year performance evaluation for Mahlke for the time period of November 2, 2017, to April 30, 2018. Barnette evaluated Mahlke on two "Mid-Year Major Job Elements." The first element was titled "Quality check designs" and Barnette wrote that Mahlke "performs this function. The engineering lead and I will redevelop a roster to equally distribute work load across all OSP engineers." For the second element, "Supplier Working Relationship," Barnette wrote that Mahlke "strives to perform his duties of managing subcontractors. There are still challenges within this job elements [*sic*] that need work, and a plan will [be] developed to facilitate growth." Mahlke provided his electronic signature at the bottom of the evaluation to acknowledge

that he received it. (Testimony of Burt; Ex. A5, pp. 29-32)

Engineering Department Restructuring
June 12, 2018 – July 2018

21) Sometime between March and August of 2018, Barnette promoted Engineer Natalie Foret ("Foret") to an Engineering Supervisor position, and she exercised some supervisory authority over Mahlke. (Testimony of Mahlke; Ex. A5, pp. 6, 25, 37)

22) In order to "become more efficient" and "increase the resources" on the Verizon project, HMI restructured the Engineering Department on June 12, 2018. This led to changes as to which manager supervised each employee. An email on this topic from Duke Horan, Senior Director – Telecom, noted that HMI was starting to miss commitment dates and that the project was "behind schedule." (Ex. A5, p. 34)

23) Hamel[4] emailed HR Specialist La on June 25, 2018, at 6:13 a.m., stating:

"Hi Sylvie,

"On Thursday June 21st around 2pm, Erica reported an incident to me that she had with John Mahlke earlier in the day. She said she went into this office to speak to him about something and he blew up at her, was very angry that she had emptied his desk out into a box. He was very rude and used unprofessional language and behavior and kicked her out of his office.

"She would have reported it to me earlier but I had back to back meetings all day. She is unwilling to work with John Mahlke anymore based on his unprofessional and rude behavior.

"Background story:

"On Friday June 8th I told John that we were putting 5 desks into this office, per Dave [Barnette], there were 3 more engineers that were going to sit in there. If he didn't have a chance to move all of his stuff into boxes, then it would be done for him. I also commented to him that he had reams and reams of paper prints and that he didn't need to store those on top of his desk anymore, that they were all scanned and attached to FTQ360 records. He said no he had to keep hard copies. As his manager, I gave him notice about the desk change.

"John returned back to work on Monday June 18th. He never once came to me to indicate that he was unhappy about the desk situation. Erica and I had unloaded his desk and his side cabinet into two big boxes. We did it as delicately as possible. Erica then built his replacement desk for him.

[4] The forum infers that Hamel had supervisory authority over Mahlke during this period of time.

> "After Erica told me about the altercation with [Mahlke], I went to Paul Bulthuis. He informed me that [Mahlke] was complaining in his office about the desk move. I informed [Bulthuis] that I had already told [Mahlke] and Ron about the change in seating.
>
> "I would like you to please do an investigation with Erica on this and [Mahlke]. It's completely unacceptable for [Mahlke] to behave that way to a fellow employee. It's a repeat of his past behavior and it's got to stop."

(Ex. A5, p. 36)

24) La investigated the move of Mahlke's office items. Mahlke stated that he was on vacation from June 11-15, 2018, and that when he returned his desk was "trashed," and that his personal items had been moved and he could not find them. Hamel said that she informed Mahlke of the office changes prior to his items being moved, but Mahlke denied that he had been informed. La had all of the managers involved speak to their employees. The issue did not come back to La's attention and she assumed it had been resolved. (Testimony of La; Ex. A, p. 35)

25) Hamel emailed La on June 25, 2018, at 6:20 a.m. The subject line read "One-on-One with John Mahlke" and the first line stated that it was "[f]or HR records." In the email, Hamel stated she "had been noticing some performance issue[s]" with Mahlke after he transferred over to her department to do field walk outs, and that she spoke to Mahlke about the following issues:

- Mahlke needed "to stay focused on his assigned tasks. * * * He was getting involved in other things that took him away from being productive on the constructability field walk outs."
- Mahlke need "to complete paperwork in the field. [Hamel] explained that he had a phone and a laptop, that he can use FTQ360 to do the inspection record" and can send the record in for resolution from the field.
- "It wasn't up to [Mahlke] to figure out how to solve the problem with the route. [Mahlke] would spend hours talking to [other employees] about jobs and how to solve them." Hamel explained that Mahlke should just make observations and send his observations to "Nate" to figure out how to resolve issues.
- Hamel explained to Mahlke "that he was a valuable member of the team and [Hamel] wanted to see him succeed in his role."

(Ex. A5, p. 33)

Events Leading up to Performance Improvement Plan with Chosa as Supervisor
July 2018 – October 12, 2018

26) In July of 2018, Mahlke was assigned to the "core" engineering group, and Engineering Manager Carl Chosa took over as Mahlke's supervisor. Chosa served as

Mahlke's supervisor until December of 2018. (Testimony of Burt)

27) Sometime in July or August of 2018, Mahlke saw a 500-foot cable that appeared to be improperly coiled in a manhole in downtown Portland, and reported this to Chosa. Mahlke thought that the amount of cable was excessive for the work on the project and that it could be evidence that someone at HMI was fraudulently misrepresenting to Verizon the amount of cable that had been laid. Mahlke did not recall if he communicated that thought to Chosa. Chosa agreed with Mahlke that the amount of cable in the manhole was highly irregular, and Chosa brought it to the attention of Project Director Eric Hart ("Hart"). Mahlke does not know what, if any, actions were taken in response to the cabling issues he raised. He did not sit in on meetings that discussed these issues, and it was not his responsibility to address the issue. However, he felt that Hart came by his office to talk with him more frequently after he reported the cabling issue. (Testimony of Mahlke)

28) On August 1, 2018, Engineering Supervisor Foret sent an email to La with documentation of a coaching session she had with Mahlke. During the coaching session, Mahlke admitted that he had a conversation with Edwards, the employee who assisted Hamel in moving items from Mahlke's desk in June. Mahlke told Edwards that he was still frustrated by the June incident because his family photos were thrown in a box, and he asked Edwards: "If your boss walked off a cliff, would you follow." Foret's email to La also contained a sentence, stating, "Side note: Carl Chosa has confirmed from his interactions with [Mahlke], [that Mahlke] will need to be release[d] from this project and/or fired." (Ex. A5, p. 37)

29) On October 3, 2018, Chosa received an email from Quality Coordinator Tanya Smith ("Smith"). Smith asked Chosa what the process was for "submitting prints to permitting." She told Chosa, "We keep getting prints back from permitting that [Mahlke] hasn't QC'ed first. Just today, permitting sent back 3 jobs that [Portland Bureau of Transportation] rejected. I feel like he ignores the correction requests * * * ." (Ex. A5, p. 52)

30) Chosa forwarded Smith's email to HR Specialist La on October 3, 2018. He told La that he was "[l]ooking to make a change in personnel, [Mahlke] has repeatedly ignored following our engineering process." Chosa's email further stated that there were "several additional complaints from staff" about Mahlke's "work not being done correctly," and that Mahlke "continually passes his task[s] to others." Chosa informed La that he would like to discuss removing Mahlke from his team. La told Chosa that she needed supporting details before action was taken. On October 9, 2018, La sent Chosa a template for a performance improvement plan ("PIP") for Chosa to complete and list action plans for Mahlke to complete. (Testimony of La; Ex. A5, p 51)

31) Chosa held a one-on-one meeting with Mahlke on October 10, 2018, to discuss JIRA database entries, notes, files and drawings. Chosa told Mahlke that he needed to (1) complete JIRA database entries, (2) stop passing off his work to others

and (3) "QC [Quality Control]" engineering prints before they are sent to the permitting department. (Testimony of La; Ex. A, p. 54)

32) Four hours after a team meeting on October 11, 2018, Mahlke came to Engineering Supervisor Foret's office and told her that he was frustrated and not receiving support. Foret told HR Specialist La that Mahlke slammed her office door when he entered the room.[5] Mahlke admitted to Foret that he had trouble keeping up with everything in the database and felt as if people talked to him like he was a child. (Testimony of La; Ex. A, p. 54)

33) La met with Chosa and Foret from 10:38 – 11:03 a.m. on October 12, 2018, to discuss their concerns with Mahlke's performance. During the meeting, Chosa and Foret told La about their communications with Mahlke on the previous two days. Chosa told La that Mahlke was "overwhelmed" and that Mahlke's faults were affecting the team because his work had to be reassigned to others to complete. During this meeting, a decision was made to place Mahlke on a PIP, to be implemented on Monday, October 15, 2018. This was the conclusion based on discussions that had been occurring overall the course of several days. (Testimony of La; Ex. A, p. 54)

Mahlke's Contact with Rick Gutshall
Approximately October 12 -15, 2018

34) The days leading up to Friday, October 12, 2018, were "terrible" and "tenuous" for Mahlke. Sometime that day, he called HMI's headquarters in Blue Bell, Pennsylvania, and told the woman who answered that he had concerns about the Verizon project. She provided him with the telephone number and email address for Rick Gutshall. (Testimony of Mahlke)

35) That afternoon, Mahlke left work at around three or four in the afternoon to attend a dental appointment. After the appointment, Mahlke started drafting an email to Gutshall. (Testimony of Mahlke)

36) Gutshall was the Senior Director of Construction for the Verizon One Project, and his office was at HMI's headquarters in Blue Bell, Pennsylvania. The Verizon project encompassed several locations, including Portland, San Diego and Detroit. As the person in charge of construction, Gutshall's responsibilities included guiding onsite management and making suggestions for the work. In October of 2018, Gutshall split his work time roughly equally between Portland, San Diego, Detroit and HMI's headquarters in Pennsylvania. (Testimony of Gutshall; Ex. A5, p. 2)

37) Mahlke sent the email to Gutshall at 3:28 p.m. on Sunday, October 14, 2018. The subject line read: "Information from John Mahlke, OSP Eng., One Fiber

[5] Mahlke denied slamming Foret's office door, but admitted that the door "pick[ed] up steam" from a breeze when he closed it. (Testimony of Mahlke)

Project, Portland, OR," and included the following statements:[6]

> "I premise this missive with a phone call I placed Friday * * * with the woman * * * at the Blue Bell desk. * * * I mentioned my concern for this project and she gave me your phone number and e-mail address to correspond.
>
> "First and foremost I do not want to seem as though I am assaulting the [HMI] family. I feel firmly a part of it, enjoy the way me and my family have been treated, and have great respect for the safety/integrity first culture that I myself try to add to, and espouse, each and every day. I truly like the company a lot!
>
> "* * *
>
> "* * * At the time I was hired the project was seven months old and only 7 miles of fiber had been signed off by Verizon as approved. Thats [*sic*] 1 mile of fiber per month. We were in trouble at that point in time.
>
> "* * * To date the actual fiber that is in the ground is around 20 miles. We were to have several hundred miles by this time by project design. * * * I questioned when [Foret] continued to allow a company called Vantage Point to not include any underground utilities on their drawings. They never did include those (as the others did), and to date all of their drawings are unable to be permitted. They are useless and wasted money. It could be to the tune of several hundred thousand dollars. Vantage Point it no longer a resource for [HMI].
>
> "Over all [*sic*] I am not happy the way that Dave Barnette ended up treating me. I will tell you first hand that he never yelled at me but he also never included me in on the on boarding meeting for new subcontractors or more direct meetings with Verizon. His actions were not directly malicious, but rather denied me to be the type of stakeholder that I am on this project.
>
> "The political and managerial infighting around here was legendary. Paul Balthus was the director, David Barnette was the engineering manager, Ken Murray was the Project Manager, and Connie Hamel was the Quality Control Manager. Each of these people did not like each other and it was abundantly clear. * * * There was a lot of yelling and very foul language publicly. I had never worked in an office like that before, particularly with a big time entity such as [HMI].
>
> "* * *
>
> "I find it painfully hard to work for Carl Chosa. He is actively demeaning to his employees, explosive and derisive in engineering meetings without any regard or direct knowledge of personal workloads or the true time economics involved with

[6] For the sake of brevity, the entire four-and-a-half-page email is not included in this Order. Repetitive statements and background information that is not relevant to this proceeding have been omitted.

each part of the project. He thinks that being threatening is the way that problems get solved. His knowledge of the softwares [sic] and systems that we use, 'being down in the weeds,' is not what he focuses on so the hearsay that he gets from others is what drives his decisions. He does not like me at all. I discovered this several weeks ago when I made a small meeting with him * * *. He spent the whole time being negative to any suggestions that I had and summarily treated me like a 12 year old. * * * My mother taught me and I learned through life that when people single you out to always be nasty to you (as is the case with Mr. Chosa) that they want to basically fight you. He has singled me out to pick on, and that is a battle I fight every day. It is readily apparent in engineering meetings where he belittles me before the entire engineering staff. I do not understand this. I am kind of losing my will to want to go to work and it is debilitating with who I am and what I would like to accomplish. A couple of weeks ago I met with our client, Verizon, * * * and asked them if I could come to work for them on the client side. I am still investigating that potential * * *.

"Probably my best friend at [HMI] * * * was Henry 'Hank' Lawrence. He was fired two weeks ago because he probably went overboard giving a subcontractor boring crew a hard time for not properly covering bore pits with cold patch nightly, but also dumping spoils in a Verizon yard (subject to fine). We had already gotten shut down in Washington County Oregon, on another occasion, for leaving a bad mess. Hank's style was cowboy and crass but he was THE most knowledgeable person on this entire build. * * * We went out at night on a couple of occasions to interact with the subs doing our fiber pulls downtown, and to properly represent our company in a professional and inquisitive manner.

"* * *

"We are losing employees right now at the rate of one employee/week. Morale is very low and several people have told me that they are actively looking for other work. I share that sentiment.

"* * *

"Presently my boss, Carl Chosa who is the new engineering manager, has threatened to write me up on one occasion and on another occasion to fire me. Both occasions have happened in the last week. I have consistently asked for help for my workload which as time goes on appears to me to be a way to scapegoat the performance we have put in at this point. If I am let go then that is yet another experienced person 'driven' from the project. I wish the newcomers a lot of luck because it is an unholy mess. * * *

"[An engineer who was leaving employment told me] that he has never worked for such a 'S**t show' of a project.

> "I am sorry for the strange flow of all this information but I needed to leave record with you. * * * It is very important for me to put this in front of you because I can not and will not be run off this project just because someone is out to get me. That is the feeling of this place right now. I really need to talk with you or other people in our organization because Verizon is an excellent client and we are not doing our best. This hurts to say we are not doing our best. I would not be writing this if I did not care 100%.
>
> "Thank you and at your service,
> Jon Mahlke."

(Ex. A5, pp. 5-9)

38) Mahlke wrote the email to Gutshall as a "vehicle" to "get a result" and to "bring Gutshall to the table by any means necessary." He admitted that some of his comments were "knee jerk." For example, although he used the words "crass" and "cowboy" to describe Lawrence, Mahlke did not believe that to be true. (Testimony of Mahlke)

39) After receiving the email, Gutshall contacted Mahlke, and let him know he was coming to town and would like to meet with him. Gutshall took Mahlke to dinner approximately two weeks after the email was sent, and they discussed the "majority" of the topics raised in Mahlke's email. (Testimony of Gutshall, Mahlke)

40) Gutshall spoke to Project Manager Gil Cheves ("Cheves") the next business day to investigate the issues Mahlke raised in the email. Gutshall felt that if the content in the email was true, then there were "major issues" to be addressed. Like Gutshall, Cheves traveled among the cities with Verizon project sites during that time period. Cheves is the only person Gutshall spoke to directly about Mahlke's email. Cheves may have followed up with higher "up the food chain" executives about the email, but he would not have "taken it down" to other employees because Gutshall was the person tasked with following up with Mahlke and others. (Testimony of Gutshall)

41) After his dinner meeting with Mahlke, Gutshall spoke to other team members to gather more information. Gutshall talked to Construction Manager Clarence Haley, Quality Manager Hamel, Safety Manager Parsons and Project Manager Cheves. He also spoke to other supervisors about parts of the email because it was everyone's job to have safety at the forefront of their work. (Testimony of Gutshall)

42) Gutshall was not involved in the decision to place Mahlke on a PIP or to terminate his employment, and he did not have direct knowledge of the reasons for these actions. (Testimony of Gutshall)

43) Gutshall does not remember ever speaking to Project Director Hart about Mahlke's email and does not believe he would have done so. (Testimony of Gutshall)

Performance Improvement Plan and Tracking Meetings with Chosa
(October 15, 2018 – December 14, 2018)

44) Chosa presented Mahlke with a written PIP on Monday, October 15, 2018. HR Specialist La was present when Chosa delivered the PIP to Mahlke. Mahlke signed it in her presence.

The PIP stated that "it has become evident" that Mahlke had "not been performing to the standards expected." It noted that on March 3, 2018, he was given a verbal warning for issues related to performance, that Chosa had counseled Mahlke "multiple times on performance" and "[t]o date, there has not been an acceptable level of improvement."

The PIP further stated that the plan would be in place from October 15 – December 15, 2018, and that Chosa and Mahlke would meet every other week to review Mahlke's progress and "ensure" his success.

Under the section labeled "Specific Areas of Required Improvement," the PIP stated that Mahlke needed to do the following to meet the expectations of the plan:

> "1. Maintain professional communications both oral and written with co-workers, supervision and customers.
> 2. Complete all assigned project work in a thorough and detailed manner on time including but not limited to:
> - Entering complete and accurate information into JIRA
> - Reviewing prints for quality assurance/control prior to sending them to others
> 3. Be held accountable for assigned work and not delegate it to others. If help is needed, notify Carl Chosa and/or Natalie Foret to reassign workload
> 4. Arrive on time and/or advise if not working."

The "Consequences" section stated that if significant improvement was not made, "disciplinary action up to and including termination may occur." (Testimony of La; Ex. A5, p. 56)

45) Chosa's bi-weekly PIP meetings with Mahlke were to be held on the same day of the week and time unless the employee was told otherwise. Chosa held PIP meetings with Mahlke on the following dates: October 26, 2018; November 12 and 30, 2018; and December 7 and 14, 2018. La was present at each PIP meeting. She took notes and completed typewritten PIP tracking forms for each meeting. When necessary, she revised the tracking forms after she typed them for clarification.

The tracking form La completed on November 30, 2018, indicates, "Due to the error in quality control, meetings will now be weekly until the plan is scheduled to end on 12/15/2018."

Mahlke refused to sign the tracking form for the December 7, 2018, meeting. He told La that he did not agree with the PIP.

The tracking form with a meeting date of December 14, 2018, includes "Closing Comments" which state: "Carl: We have a better understanding of how things are done and have improved our process. I know that [Mahlke] gets overwhelmed and he just needs to reach out and ask for help." Under the signature line, there is a typewritten note indicating that Mahlke was presented with a copy of the final plan on December 18, 2018, but he "refused to sign and doesn't feel that the plan no longer applies to him [*sic*]" since Chosa is no longer working for HMI. (Testimony of La; Ex. A5, pp. 57-68)

46) Mahlke received his 2018 Year End Performance Evaluation sometime during the last two weeks of November 2020. Mahlke's manager, Chosa, was a contract employee and, thus, did not have access to HMI's personnel records system. Accordingly, Hart completed the evaluation with input from Chosa.[7] The bottom of the evaluation indicates that Mahlke provided "[e]lectronic signature confirmation" at the end beneath the Employee Acknowledgement section. (Testimony of Burt: Ex. A5, pp. 38-44)

47) Prior to the manager's evaluation, Mahlke had an opportunity to rate his own performance. He rated his performance as "5 – Fully Exceeds" for the Overall Rating and in each specific category. (Testimony of Burt; Ex. A5, pp. 38-44)

48) In the Overall Rating category, Hart rated Mahlke as "2 – Needs improvement" and wrote that Mahlke "has issues with highly stress[ed] workload and completely grasping the technology we are currently using (JIRA). Need to assess if [Mahlke] is in the right position to be successful."

Hart rated Mahlke as "3 – Fully meets" in the categories of "Instructions & Safety Commitment," "Quality check designs" and "Team Player."

Hart gave Mahlke a rating of "2 – Needs improvement" in the categories of "Supplier Working Relationship," "Competencies," "Action Oriented," "Decision Quality," "Perseverance, "Problem Solving/Critical Thinking" and "Technical Learning." For each of these categories Hart also included a written explanation for the rating. (Testimony of Burt; Ex. A5, pp. 38-44)

49) HMI employees have the opportunity to enter information into the "Employee Acknowledgement" portion of the evaluation after they receive it. Mahlke provided the following input in that section:

[7] The first page of the evaluation lists Dane Richman as Mahlke's manager, which was not correct. Burt credibly testified that Richman's name is on the document because he was the manager at the time the evaluation was printed.

> "Firstly I do not even know who did my review. The overall tone is highly negative and it depicts me as an individual that is not the least bit tuned into the project, and the complexities of its planning and execution.
>
> "It pays no attention to the training/on-boarding assistance I have provided to new people coming into engineering * * *. I have taken pride in trying to help people, so when I see a misinformed review that is covered in the six (6) sections."

(Testimony of Burt; Ex. A5, pp. 38-44)

50) In early December of 2018, Mahlke contacted Gerri Burt, HMI's Director of Human Resources and Payroll for the West Region, by telephone and "unloaded" on her about his performance evaluation. Mahlke spoke in a loud and aggressive tone, and told Burt that he did not agree with the evaluation. Burt told him that he could access his review on the computer, and make comments in response to it. Mahlke responded that he would like to talk to her in person, and Burt set up an in-person meeting with him at the Clackamas office. Mahlke accepted the electronic meeting invitation Burt sent him. Burt's office was in California, and she travelled to the Portland area to meet Mahlke in the Clackamas office. When Burt arrived at the Clackamas office on the day of the meeting, Mahlke was in the building. Mahlke left the office 30 minutes before the start of the meeting and did not appear at the scheduled time. Burt emailed Mahlke asking where he was, and told him that she would be in the Clackamas office for another day if he wanted to talk. Mahlke did not respond to Burt's email and did not explain why he missed the meeting. (Testimony of Burt; Ex. A7, p. 1)

Hart's Supervision of Mahlke and Continuation of the PIP
(December 28, 2018 – January 18, 2019)

51) Project Director Hart met with Mahlke on December 28, 2018, to let Mahlke know that he would now be the evaluator for Mahlke's PIP plan. La was also present at this meeting and took notes.

During the meeting Mahlke expressed frustration, and said he did not think he should be under the plan and he thought that the time period of the PIP had ended. Mahlke also mentioned that he had spoken to Gutshall because he felt like no one was listening to him, and that Chosa had acted "cowboyed and stupid" towards him. Mahlke did not elaborate on what he had discussed with Gutshall.

Hart told Mahlke that he intended to be fair and, if there were no issues, then the PIP meetings would be simple. He expressed that he felt that Mahlke was accomplishing something at HMI, and that Mahlke could talk to him if he needed anything. (Testimony of La; Ex. A, pp. 69-70)

52) Hart held PIP meetings with Mahlke on January 11 and 18, 2019. La attended these meetings, took notes and prepared typewritten PIP tracking forms for

each meeting. Hart and Mahlke signed the tracking forms for both meetings on January 18, 2019. During the meeting held on January 11, 2019, Hart asked Mahlke "to write a list of things that he is working on to go over next week." Mahlke did not have the list and, at the next week's meeting, was told that he did not meet that expectation. (Testimony of La; Ex. A5, pp. 71-74)

Richman's Supervision of Mahlke and Termination
(January 25, 2019 – March 19, 2019)

53) Dane Richman was hired by HMI on January 17, 2019, and began supervising Mahlke's work on or about January 25, 2019. Richman's supervision of Mahlke included evaluating Mahlke's progress on the PIP. (Testimony of La, Richman; Ex. A5, p. 75)

54) Richman held PIP meetings with Mahlke on January 25, 2019, February 1, 8 and 19, 2019, and March 4, 2019. La attended each of these meetings, took notes and prepared typewritten PIP tracking forms for each meeting. (Testimony of La; Ex. A5, pp. 75-82)

55) During one of the PIP meetings, Mahlke raised his voice to La and asked her, "Why are you even here?" (Testimony of La)

56) During the PIP meeting held on February 1, 2019, Mahlke told Richman that he "still feels disciplined for something that a previous manager had against him. HR doesn't do anything about his performance review. He was singled out for JIRA records that were not updated when everyone else's wasn't either." In response, Richman "reiterated that his goal is to move forward and work on priorities." (Testimony of Richman; Ex. A, p. 77)

57) During the PIP meeting on February 8, 2019, Richman spoke to Mahlke about an incident in which Mahlke said he was "going out to the parking lot with someone." Mahlke told Richman that "he was only joking and will apologize if someone took it out of context." Richman also told Mahlke that he did not meet an expectation on the spreadsheet that Richman mentioned the previous week. Mahlke told Richman about "the investigation about [Hamel] when she destroyed his desk" in June, and that he thinks "we are making him be seen as an aggressive person and people are in danger being around him." Mahlke also told Richman that the PIP meetings were "pissing [him] off every week." He felt he was being "discriminated against" and "harassed," and that he was "going to take the 5th" at the next meeting and asked if he needed a lawyer. Richman "reiterate[d] that the meeting should be a positive mentality. But [Mahlke] repeats that he will just keep his mouth shut." Mahlke did not tell Richman that he believed he was being retaliated against for making safety complaints or that he was a whistleblower. (Testimony of La, Richman; Ex. A5, pp. 78-79)

58) On Saturday, February 9, 2019, Mahlke sent an email to Paul Henkels, Jr., an HMI corporate executive in Blue Bell, Pennsylvania. The email stated:

"I am pretty sure you would not remember who I am, but here goes:

"I am writing you here this Saturday morning after another lousy night of sleep with my morale probably at the very lowest point it has been since I got on the Fiber One project here in Portland, Oregon. It is affecting the life with my family, my weekends, and now everything. I think the level of low morale is prevalent throughout the entire office and the common terminology for this whole scenario from everyone is a 'sh*t show.' In my midst, in the last year, I have seen 20 people (conservatively speaking) leave or be let go.

"I have been on the project solidly since Oct/Nov 2017. I have endured multiple management changes and tried to roll with these changes as best I can, but I am at the end of my rope now.

"I want to sit down and talk with you for an hour. That is simply all that I ask. If you want to fire me after that hour – that is fine. I am a grown up originated Upstate New Yorker. I have lived (home owner/property owner) and working in the Portland, Oregon/Vancouver, WA metro area for 22 years. That includes a huge array of business contacts and relationships. [KM] was hired the same day I was and he had that job that I wanted and knew I would excel at.

"Currently I am building relationships with ODOT, the Portland & Western Railroad, Trimet, and Northwest Natural Gas.

"These out of town people don't know my town and don't have my relationships. I am fully astonished how much time and energy and MONEY we have wasted to prop up a few stubborn egos (within our own office) who have led us on a terrible path. This culture is still alive today and is pretty much following the same sad path.

"I have a lot to discuss and am very, very serious in my intention, my nature, my application and my transparency to others.

"I need to be able to sleep at night and be a good father to my [children]. I think my wife would like to have one night where I am not wearing this place home. Please let me know when we can talk, as it is truly my last resort."

(Ex. A8, p. 11)

59) Mahlke felt that the email to Henkels mirrored the email he sent to Gutshall in 2018 in that it was a means to get Henkels to respond to him. He did not want to "go for broke" in the email and wanted "the real punches" to come out in the discussion. (Testimony of Mahlke)

60) Henkels responded to Mahlke's email on Monday, February 11, 2019, stating, "I'm travelling today and tomorrow but plan to attend the Clackamas staff meeting on Wednesday morning. Maybe we can find some time after the meeting." (Ex. A8, p. 11)

61) Mahlke "tried to" discuss the email with Henkels when Henkels was at the Clackamas office, but Mahlke felt that Henkels was "dismissive" and the meeting did not last long. (Testimony of Mahlke)

62) La noted the following on the February 19, 2019, PIP form, in the "maintain professional communications" category:

> "Last week [Mahlke] was seen as abrupt and frustrated, so much that it surprised others. Saying that he wanted to take it outside. [Mahlke] was joking by acting like someone from New York. [Mahlke] stated that people don't know how to take me. [Mahlke] understands that things may be misunderstood.
>
> "When asked by [Richman] who he contacted in construction regarding when he had gotten information from, he said that he could not give a contact because [of] tension in the yard. [Mahlke] admitted that he did not handle that right.
>
> "When asked if [Mahlke] followed up on an email chain * * *, he said it is a function of management, with no further details. He did not communicate who it was with, and why it is with them, or respond * * * other than he was working on it. He said he was not able to explain what he was doing with it from when he was working on it to the time it was a function of management. It is management's issue is not a proper response [and] it should be discussed further.
>
> "This week [Mahlke] did not meet the expectations for communication."

During the February 19 meeting, Mahlke explained to Richman "that he's burnt [*sic*] out and can't do red line drawings every day, however, that is part of his job." The PIP form also noted that Mahlke "took his name out of JIRA, unassigning himself" to a task and that Mahlke assigned work to a subcontractor that HMI is no longer giving work to. (Testimony of La; Ex. A5, pp. 79-80)

63) On March 8, 2019, Richman approved a change to the PIP review process to meet every other week. (Ex. A5, p. 84)

64) Mahlke was scheduled for a PIP meeting with Richman on Friday, March 15, 2019, but did not appear. Both Richman and La were present at the meeting, and they expected Mahlke to be there. Richman called Mahlke to find out where he was. Mahlke did not answer the call and Richman left a message. La was present when Richman called Mahlke. Mahlke did not return Richman's call and did not talk to

Richman about why he missed the meeting.[8] Richman informed La that on Monday, March 18, 2019, Mahlke did not talk to Richman about why he missed the meeting. Richman told La that he wanted to end Mahlke's employment because he was not meeting expectations. On March 19, 2019, La completed a PIP tracking form with information provided to her by Richman, which stated:

Expectation: [9]	**Status/Results**
1. Continue to maintain professional communications both oral and written with co-workers, supervis[ors] and customers	[Mahlke] does not meet the expectation for communication as he does not answer questions. If asked a question, he talks in circles and does not give an answer.
2. Complete all assigned work in a thorough and detailed manner on time • JIRA – required to make daily entries. If changes are made to be made [*sic*] in JIRA it must be updated. • Quality control – continue to check work before sending it to others • To take ownership of responsibilities [Mahlke] is responsible to manage his time and workload to get all his work complete, not to focus on only one task but able to work on all. Reiterated the [Mahlke] does not have the authority to approve invoices but can let people know it is cleared to be invoiced.	Continuing from our last meeting (3/1/2019), [Richman] expected [Mahlke] to uphold the same expectations to complete work assignments, however, since our last meeting there have been several occasions that [Mahlke] did not meet his expectations, listed below: • Manage HR Green, using JIRA/FTQ360/Sharepoint ○ He has very poor follow through on getting answers for requests on statuses or dates from the subcontractors he manages. ○ He continues to work on things not assigned to him or HR Green • Update JIRA records ○ He is still not updating his assignments in JIRA ○ He unassigned all JIRA entries from his name if the subcontractor was no longer active • Work on getting priorities done first ○ He continually focuses on nonpriority routes after numerous requests to stay on track • Keep [Richman] in the loop on anything that he needs ○ Did not follow up with [Richman] on

[8] As discussed in further detail in Finding of Fact # 76, the forum did not find Mahlke's testimony explaining why he missed the meeting to be credible.

[9] The text in the table is a direct quote from the March 19, 2019, PIP tracking form, unless otherwise indicated by brackets.

	why he missed his PIP meeting on 3/15/19
	• Follow protocol
	  ○ He does not follow protocol when doing reroutes
	  ○ He went directly to Wendy from Verizon instead of going through Nickolette
	  ○ He sent prints directly to Permitting without doing the QC process

3. Do not delegate work to others and ask for help
 	
Continue to use Tony as a resource for help. When working on each project, ensure all records are up to date
 	
[Mahlke] can go to [Richman] and [Hart] to ask for help
	[Mahlke] did not meet his expectation to not delegate work to others
	
	• [Mahlke] assigned the Shute site design to MGC a subcontractor
	  ○ MGC is no longer on the books doing new work for us as of Q2/Q3 2018
	  ○ Shute was a new site, added in Q4 2018
	• [Mahlke] told the Scheduling team to reassign a work package to a new subcontractor because he could not find the prints, numerous times

4. Arrive on time	7am-4pm 3/15/19: [Mahlke] missed the scheduled PIP meeting. He was out in the field and [Richman] called and left a message, however did not hear back from him. On Monday (3/18/19), he did not say anything about it to [Richman]. By not attending the meeting, he did not meet the expectation.
5. Meetings will be weekly until [Richman] says otherwise.	3/8/19: [Richman] decided to meet every other week. However, within the 2 weeks that we did not meet, he showed that he does not maintain his expectations.

(Testimony of Richman, Burt; Ex. A5, pp. 85-86)

65) Richman did not find Mahlke to be capable and adept at telecommunications work. He also observed Mahlke act in a belittling and condescending manner toward La during PIP meetings. (Testimony of Richman)

66) Richman contacted Burt regarding severing Mahlke's employment. Richman told Burt that Mahlke's performance was not improving, that Mahlke did not

seem to care about the PIP and that Mahlke did not show up for his last PIP meeting. Burt told Richman that she supported the decision to terminate Mahlke. (Testimony of Burt)

67) HMI terminated Mahlke's employment at HMI on March 19, 2019. (Stipulation)

68) Hart informed Mahlke of the decision to terminate his employment. (Testimony of Mahlke)

69) At the time of Mahlke's termination, his annual salary was $72,000. (Testimony of Mahlke)

Post-Termination

70) After his termination, Mahlke immediately started looking for a new position. He worked on a six-month contract for PGE from April to October, 2019, making $35,000 during that time. At the time of the hearing, he was working for a company he described as "wonderful." He started that position in February of 2020, and his rate of pay is higher than what he made when he worked at HMI. (Testimony of Mahlke)

71) Mahlke felt depressed after his termination, and "really messed up." He continues to feel the effects and feels "jaded." (Testimony of Mahlke)

Co-Workers' Reports of Safety Concerns

72) Mitchell Cook worked as a General Foreman on the Verizon project in HMI's Construction group from April to December 2018. Cook had many concerns regarding the work done by Empire, a subcontractor. His concerns included Empire performing work without a permit, Empire not properly locating utilities before performing boring work, laying pipes deeper than called for in construction plans, traffic control setups and Empire dumping spoils into storm drains and on vacant lots. Cook reported his concerns on multiple occasions to Construction Manager Clarence Haley, Hamel, Hart, Gutshall, Safety Manager Dave Parsons and Mahlke. Cook observed that a lot of people in the company were aware of concerns with Empire. He was told that HMI was looking into the issues, but he observed that the problems continued. HMI informed Cook that his employment was ending due to a lack of work, but he disagreed that there was a lack of work. (Testimony of Cook)

73) Anna King worked as an Associate Project Manager from July 2018 to January 11, 2019, in the Construction group. Her work involved coordinating projects, developing work plans and maintaining accurate records. King and others (including Hart, Gutshall, other construction project managers, the safety supervisor and foremen) "openly talked about" safety concerns regarding Empire, a subcontractor on the Verizon project, including the dumping of construction debris or "spoils" on private property that had not been designated for that purpose. King does not know what HMI did in response to the concerns raised about Empire, but she presumed that Empire was "let go" from the project. King also spoke up in meetings about work on the project that HMI

reported to Verizon as completed, but had not yet been done. King was told that she was laid off due to lack of work,[10] but she observed that the work on the Verizon project was "ramping up" at the time her employment ended. (Testimony of King)

Credibility

74) The forum did not find Mahlke to be a credible witness due to several instances in which he contradicted his own statements. Following are examples of some of the inconsistent statements.

In the October 15, 2018, email that Mahlke wrote to Gutshall (Ex. A5, p. 8), Mahlke described the "style" of a co-worker (Hank Lawrence) as "cowboy and crass." However, during cross examination Mahlke said that he did not believe Lawrence to be "crass" or "cowboy," and that he used those words as a "vehicle" to "get a result" and to "bring Gutshall to the table by any means necessary." Mahlke also testified that he did not write anything in the document he believed to be false, but later said that the statement about Lawrence was "one of those gray matter things," "I do not believe [Lawrence] was crass" and "[t]hat's what I wrote, but I don't believe it to be the case." He also said that maybe the email was a "knee jerk" reaction.

Mahlke's testimony also conflicted with a direct quote attributed to him by Investigator Perez in Perez's notes reflected in Exhibit A7.[11] More specifically, Perez used quotation marks around the word "unloaded" when Mahlke described how he interacted with Gerri Burt. Mahlke denied that he used that word or that he "unloaded" on Burt.

Mahlke testified that Hamel gave him an oral warning in March of 2018 (A5, p. 25), stating, "Yes ma'am. It came from her." However, the oral warning was signed by Balthuis and Barnette. Hamel's signature was not on the document and Mahlke admitted that Barnette gave him the Warning document. Furthermore, Hamel was not present when Barnette gave Mahlke the Warning.

Another inconsistency relates to Mahlke's response to a question from HMI's counsel about a statement in the Warning in which the Warning indicated that Mahlke was "argumentative and disruptive to other managers." It particular, the Warning stated that Mahlke made the following comment to Hamel: "If you cannot find the fiber size, then how do you expect me to find it." When HMI's counsel asked Mahlke if he made the statement about the fiber size, Mahlke responded, "In a conversation, no ma'am." HMI's counsel then followed up and asked whether he "made the statement regardless

[10] The forum did not credit King's testimony regarding her subjective beliefs as to whether she was terminated for a different reason.

[11] The forum infers that it is more likely than not that Mahlke used the word "unloaded" because Investigator Perez used quotation marks around the word in his interview notes, and did not use quotation marks around other words in the notes. (*See* Ex. A7, p. 1). In its closing argument, the Agency asked the forum to disregard the directly quoted language. However, the Agency, not HMI, offered this exhibit into evidence and called Investigator Perez to testify.

of whether it was in writing or otherwise." In response, Mahlke admitted that he probably said a paraphrased version of the statement in an email to Hamel. (Testimony of Mahlke)

75) Additionally, there were multiple exhibits and testimony from several witnesses indicating that Mahlke was disruptive and rude to other HMI employees. There were several instances during the hearing when Mahlke displayed behavior that was consistent with the rude and disrespectful behavior described by HMI employees, which included the following:

- While another witness was testifying, Mahlke interrupted, exclaiming, "Bullshit."
- Mahlke laughed in response to a question from HMI's counsel about his performance review.
- In response to several questions during cross examination posed to him by HMI's counsel, Mahlke responded "end of statement" at the conclusion of his answers.
- Mahlke had to be cautioned more than once by the ALJ to answer the questions posed to him by the Administrative Prosecutor after he gave long answers that did not respond to the questions asked.

Mahlke's behavior during the hearing lent credibility to the testimony of HMI witnesses such as La, Richman, and Burt, all of whom described his behavior as rude and disruptive in the workplace.

76) One final key credibility determination relates to the testimony of Richman and La in regard to Mahlke missing the PIP meeting immediately prior to his termination. Mahlke testified that it was "well communicated" that he was going to be working in the field and would miss the meeting. Specifically, Mahlke testified that he spoke to Richman that morning "face-to-face" and said that he was going out in the field with another employee to inspect sites, and that he would miss the PIP meeting. Mahlke testified that Richman told him that it was alright to miss the meeting and that the work took priority. In contrast, Richman and La testified that Richman tried to reach Mahlke on his cell phone when he did not appear at the meeting, and that Mahlke did not respond to Richman's voicemail message. In his testimony, Mahlke did not explain or otherwise address why he did not return Richman's message, and why he did not address the issue with Richman when he came into the office the following Monday. Due to Mahlke's lack of explanation and the inconsistencies in other areas of Mahlke's testimony described above, the forum finds the testimony of Richman and La to be more credible than the testimony of Mahlke.

CONCLUSIONS OF LAW

1) At all times material herein, HMI was an active foreign business corporation incorporated in Pennsylvania. (Stipulation)

2) At all times material herein, HMI was an employer as defined in ORS 659A.001(4)(a) and employed Mahlke. (Stipulation)

3) Mahlke is an "aggrieved person" as defined in OAR 839-003-0005(2).

4) Mahlke, acting in good faith and while employed by HMI, reported information that he believed was evidence of violations of a state law, rules or regulations.

5) HMI did not terminate Mahlke, because of his good faith reports and did not violate ORS 659A.199(1) and OAR 839-010-0100(1).

6) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. ORS 659A.800 - ORS 659A.865. (Stipulation)

7) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charges against any respondent not found to have engaged in any unlawful practice charged.

OPINION

The Agency alleges that HMI violated ORS 659A.199(1) and OAR 839-010-0100(1) by discriminating against and terminating Mahlke because he made good faith reports of information 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, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation."

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

> "(1) ORS 659A.199 prohibits any employer with one or more employees in Oregon from discharging, demoting, suspending, or in any manner discriminating or retaliating against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information to anyone that the employee believes is evidence of a violation of any state or federal law, rule or regulation."

The "good faith" requirement in ORS 659A.199 is met when the whistleblower has a reasonable belief that the information reported has occurred and that the information, if

proven, constitutes evidence of a violation of a state or federal law, rule or regulation. *In the Matter of Horizontal Motorsports*, *Inc.*, 37 BOLI 205, 216 (2020).

The Agency's prima facie case consists of the following elements: (1) HMI was an employer as defined by statute; (2) HMI employed Mahlke; (3) Mahlke, in good faith, reported information to someone that he believed was evidence of a violation of a state rule; (4) HMI discharged Mahlke and/or discriminated against him with regard to promotion, compensation or other terms, conditions or privileges of employment; (5) HMI discharge and/or discrimination of Mahlke was because of his report(s). *Id.*; ORS 659A.199(1).

Elements 1 and 2 are not in dispute. (*See* Procedural Finding of Fact # 12 (Stipulation))

With respect to Element 3 (Good Faith Report), 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. The record included evidence of Mahlke's reports of the following:

1. In the first or second quarter of 2018,[12] Mahlke spoke to Barnette about safety concerns he had with a job site in Beaverton.
2. In July or August of 2018, Mahlke spoke to Chosa and Hart about 500 feet of fiber optic cable that he saw coiled in a manhole in downtown Portland. Because the length of the cable was highly irregular, Mahlke suspected that someone at HMI was fraudulently misrepresenting to Verizon the amount of cable that had been laid. (*See* Finding of Fact # 27)[13]
3. During daily engineering meetings, Mahlke discussed concerns he had about a subcontractor (Empire), and in particular spoke about an unfilled bore pit he saw on Butner Road. He was concerned about a collapse taking place on a major road, which would constitute a safety concern.
4. In Mahlke's email to Gutshall on October 14, 2018, and their follow-up dinner meeting, Mahlke discussed concerns about the Verizon project, including not property covering bore pits and dumping spoils in a manner that was subject to fine, and was therefore a violation of a rule, law or ordinance.
5. Mahlke's email to Paul Henkels, Jr. on February 11, 2019, and their subsequent discussion.

Reports 1 - 4 from the list above concerned various issues regarding safety and contract compliance issues on the Verizon project. Neither Mahlke nor the Agency cited to any specific laws or regulations that Mahlke believed were being violated. Nevertheless, the forum infers that Mahlke believed that the safety and compliance

[12] Mahlke testified that this report occurred sometime after the Warning he received on March 1, 2018. (*See* Finding of Fact # 18)
[13] *See also* ORS 165.080 (relating to criminal falsification of business records).

concerns he raised were unlawful under various state and local construction codes. Given his experience in the engineering and construction industry, the forum concludes that he had a reasonable belief that he was reporting unlawful activity.

With respect to Report # 5 (email and discussion with Henkels), there is no evidence in the record that Mahlke reported any construction safety or compliance issues. Rather, Mahlke appears to be discussing his own workplace dissatisfaction and his opinions of mismanagement.

To demonstrate Element 4 (causation), the Agency must prove that an unlawful motive "was a substantial factor" in HMI's decisions to (1) implement the PIP on October 15, 2018, (2) give Mahlke a negative performance evaluation in late November of 2018, (3) "reinstate" the PIP in January of 2019 and/or (4) terminate his employment on March 19, 2019. "[I]n other words," the Agency must prove that Mahlke "would have been treated differently in the absence of the unlawful motive." *In the Matter of Horizontal Motorsports*, *Inc.*, 37 BOLI at 217 (quoting *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d 1170, 1174 (2016)). *See also Crosbie v. Asante*, 322 Or App 250, 256, 519 P3d 551, 556 (2022), *rev den*, 370 Or 827 (2023) (noting that the proponent of a discrimination claim under Oregon law must prove that "the protected trait or activity was a 'substantial factor'" in the adverse decision); *Ossanna v. Nike, Inc.*, 365 Or 196, 214, 445 P3d 281, 292 (2019) (recognizing that the causation standard for assessing violations of ORS 659A.199(1) is "the substantial-factor standard of causation").

In its closing argument, the Agency argued that the forum should infer causation due to the following: the timing of the PIP following Mahlke's email to Gutshall, reinstatement of the PIP and the termination after months of reports. The Agency also contended that there was a pattern of retaliation and pointed to the testimony of Cook and King who testified that they were informed that they were terminated due to lack of work after they made reports of safety concerns.

In contrast, HMI questioned Mahlke's credibility and pointed out, among other things, that Mahlke testified that the email he sent to Gutshall contained statements he did not believe to be true and that it was a piece of "marketing" to get Gutshall to meet with him.

First, with respect to the PIP issued on October 15, 2018, the record is replete with evidence that HMI had been addressing performance issues with Mahlke well in advance of that date, and that the wheels were in motion to deliver the PIP to Mahlke *prior to* his email to Gutshall and their subsequent meeting. (*See* Findings of Fact ## 28-33). Additionally, with respect to the Warning issued to Mahlke in March of 2018, Mahlke agreed that all of the requests made of him were reasonable. (*See* Findings of Fact # 14). Accordingly, the forum concludes that there is insufficient evidence to establish that Mahlke's reports were a substantial factor in the issuance to the performance improvement plan.

Second, with respect to the November 2018 performance evaluation and

continuation of the PIP in January of 2019, the record includes voluminous documentation of efforts made to work with Mahlke to improve his performance, as well as reports HMI received about Mahlke's conduct from other employees. The reports about his conduct included raising his voice at other employees, slamming Foret's office door and joking about taking someone outside to the parking lot when they disagreed. Mahlke's own testimony and emails demonstrate that he was frustrated with his work environment for reasons that do not include safety issues. Moreover, throughout the course of his employment, he was evaluated or supervised by at least five different managers and supervisors who documented similar issues with his performance relating to the inability to correctly use HMI's databases, being disrespectful[14] to other HMI employees and not completing work in a timely manner.

Finally, the record shows that Mahlke's supervisor at the time of his termination (Richman) had been working with him on many of the same issues that had been noted by previous supervisors when Mahlke failed to attend a scheduled PIP meeting. Mahlke did not return Richman's voicemail asking where he was and did not otherwise explain his absence to Richman.

While there is evidence that Mahlke reported some safety issues throughout his employment, when there is such a high volume of documentation of Mahlke's performance issues, the forum is unable to draw the conclusion that any of Mahlke's reports influenced HMI's decisions regarding his employment.

The testimony of Cook and King regarding the ending of their employment after their reports of safety concerns did not assist Mahlke's case. Cook and King testified that they were told their positions ended due to lack of work, and there is no evidence that any of the same people who made decisions about Mahlke were involved in the ending of their positions. Also, unlike Cook and King, after Mahlke reported safety concerns, he was not terminated due to lack of work. To the contrary, his supervisors worked with him for many months to attempt to improve his performance. In addition, Mahlke's performance issues were extensively documented, and his first Warning issued on March 1, 2018, preceded any complaints of safety violations. (*See* Finding of Fact # 18)

Accordingly, the forum concludes that the Agency did not meet its burden of proof to establish that Mahlke was disciplined or terminated because he made reports of unlawful activity.

Exceptions to the Proposed Order

Most of the Agency's Exceptions request that the forum make corrections to scrivener's errors in the Proposed Order. The exceptions that accurately reflect the evidence at hearing are GRANTED as reflected in this Final Order. The Agency's exceptions which state that Case No. 03-21 is not against HMI are DENIED as the

[14] As explained in Finding of Fact # 75, Mahlke displayed disruptive behavior during the hearing in this matter.

Agency issued Formal Charges in Case No. 03-21 against HMI and entered into a settlement agreement with HMI in that case.

HMI filed one exception in response to the Agency's Exception No. 16 regarding the testimony of Cook and King. The reference to the testimony of Cook and King was amended in this Final Order to reflect that Cook and King testified that they were "informed" that they were terminated due to lack of work. No additional changes were made in response to these exceptions.

ORDER

NOW, THEREFORE, the charges against all Respondent Henkels & McCoy Inc. are DISMISSED.

In the Matter of
Stephen G. Barton & Marlene E. P. Hayes,
dba The Royal Clothiers,
Respondents, Case No. 02-20

Final Order of Commissioner Christina Stephenson
Issued December 8, 2023

SYNOPSIS

The forum concluded that Respondents violated ORS 659A.030(1)(f), ORS 659A.199(1), and OAR 839-005-0125(1)-(3) and OAR 839-010-0100(1) when they terminated the Complainant because of her protected whistleblower activities. The forum awarded Complainant $3,490 in lost wages and $10,000 in emotional and mental suffering damages.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 6-7, 2021, via the GoToMeeting video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Rachel Diamond-Cuneo, an employee of the Agency. Respondents were represented by their attorney, John Raschko. Complainant Peggy Case ("Case") was present throughout the hearing; Stephen G. Barton ("Barton") and Marlene E.P. Hayes ("Hayes") were present throughout the hearing, on behalf of Respondents.

The Agency called Senior Civil Rights Investigator Stacy McKerlie ("McKerlie"), Department of Human Services Investigator Bud Walker ("Walker") and Case as witnesses.

Respondents called Barton, Hayes and Susan Rhyne ("Rhyne") as witnesses.

The forum received into evidence: (a) Administrative exhibits X1 through X15, (b) Agency exhibits A1-A8 and (c) Respondents' exhibits R6, R9-R10, R16, R19, R23,[15] R28 and R29.

Having fully considered the entire record in this matter, I, Christina Stephenson, 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.

[15] The portion of Ex. R23 above the line "On Wednesday * * *" was not received into evidence.

FINDINGS OF FACT – PROCEDURAL

1) Case filed a complaint with the Agency's Civil Rights Division on April 5, 2018, alleging that Respondents engaged in unlawful employment practices based on her whistleblowing activities by harassing her and terminating her from employment. (Testimony of McKerlie; Ex. A1)

2) On April 5, 2019, the Agency's Civil Rights Division issued a Notice of Substantial Evidence Determination ("SED") in which it found substantial evidence that Respondents committed unlawful employment practices (retaliation and termination because of Case's whistleblowing) in violation of ORS 659A.199. (Testimony of McKerlie; Ex. A8)

3) On July 23, 2020, the forum issued a Notice of Hearing to Respondents, the Agency, and Complainant stating the time and place of the hearing as January 26, 2021, beginning at 9:30 a.m., at the Worksource Oregon Employment Department, 1901 Adams Ave., La Grande 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 839-050-0000 to 839-050-0445. (Ex. X2)

4) The Formal Charges alleged that Respondents violated ORS 659A.030(1)(f); ORS 659A.199(1); OAR 839-005-0125(1)-(3) and OAR 839-010-0010(1) by discharging Case because she opposed an unlawful practice and evidence that she reasonably believed was a violation of state or federal law. The Formal Charges sought damages for lost wages in the amount of "at least $12,500," and mental and/or emotional distress in the amount of "at least $10,000.00." The Formal Charges also asked that Respondents be trained, at their expense, "on whistleblower protections under Oregon law" and that Respondents be enjoined from violating laws. In addition, the Formal Charges asked that Respondents be required to provide training to its managers, supervisors and human resources personnel on whistleblower protections under Oregon law. (Ex. X2a)

5) On August 11, 2020, Respondents filed an answer in which Respondents denied that Respondents had committed the alleged violations. (Ex. X3)

6) On August 18, 2020, the forum issued an Interim Order Requiring Case Summaries, which set May 19, 2021, as the deadline for filing Case Summaries. (Ex. X5)

7) Attorney John Raschko filed a Notice of Appearance on August 24, 2020, stating that he represented Respondents in this matter and was counsel of record on their behalf. (Ex. X6)

8) After the Agency and Respondents' counsel indicated by email that they consented to accept filings by email, the ALJ issued an interim order stating that parties could file documents by email and containing instructions for the temporary filing procedures. (Ex. X7)

9) On December 1, 2020, the forum issued an interim order informing the parties of the potential for a video conference hearing due to rising COVID-19 case numbers in Oregon and current state office closures. The interim order also provided the parties with the opportunity to file objections, and required parties who did not file objections to inform the ALJ by email that objections would not be filed. Respondents timely filed objections on December 9, 2020. On December10, 2020, the ALJ issued an interim order which stated, in pertinent part:

> "Respondents' [objections to a video hearing] essentially fall into three categories. First, Respondents argue that Respondent Marlene Hayes and Respondents' counsel would be forced to place themselves at risk of contracting the COVID-19 virus because Respondents' counsel will need to travel from his office to meet with his clients and witnesses. Second, Respondents argue that the applicable statutes and rules do not allow for video hearings. Finally, Respondents expressed concerns about the video hearing format, including the opportunity to confront and cross examine witnesses, and the inability to see what is going on around the person testifying. Each of these three categories of objections is addressed below.[16]
>
> "Respondents first express safety concerns about the potential for contracting COVID-19. Respondents' counsel represents that he would need to travel from Kennewick, Washington, to the location of his clients in LaGrande, Oregon or, alternatively, his clients would need to travel to his location. He cites various health concerns for both himself and Respondent Hayes regarding the potential contraction of COVID-19, which are legitimate concerns. However, notably, the forum's reasoning for holding a video conference hearing is to *avoid* the very type of travel risks mentioned in Respondents' objections. The objections do not address why counsel cannot meet with clients and witnesses via video conference or by telephone. Additionally, the forum takes official notice of the expansion of the use of video conference communications among government agencies, courts, schools, businesses and private citizens since the beginning of the COVID-19 pandemic.[17] Accordingly, Respondents' argument of the need to travel for in-person meetings is not persuasive.

[16] Respondents also asked for a continuance of the hearing to a later date when it can be held in person. The forum need not address this request because Respondents did not file a written motion to postpone pursuant to OAR 839-050-0150(5). Moreover, it is unclear when pandemic conditions or public health guidelines will change to allow for a safe in-person hearing.

[17] *See*, *e.g.* https://union-county.org/commission-meetings (providing that citizens may participate in Union County commission meetings by video conference due to COVID-19); https://www.oregon.gov/wcb/Pages/index.aspx (Oregon Workers' Compensation Board hearings are being held by telephone or video due to COVID-19); https://www.oregon.gov/dsl/About/Pages/Public-

"Second, Respondents argue that ORS 183.310 provides for a contested case hearing in which parties are 'entitled to appear and be heard,' and that statutes and rules do not allow for video conference hearings. However, BOLI's Contested Case rules do provide that the ALJ has the discretion to hold a hearing by telephone. *See* OAR 839-050-0255(2); *see also* OAR 839-050-0240(1)(d) (the scheduling of hearings is within the purview of the ALJ). A 'telephone hearing' is defined as 'one in which at least one participant is not physically present at the hearing but participates by telephone *or other two-way communication device*.' OAR 839-050-0225(1)(Emphasis added.) Accordingly, BOLI's Contested Case rules provide the ALJ with the authority to decide to hold a hearing using a 'two-way communication device' such as a video conference application.

"Finally, Respondents raise the following concerns regarding video hearings:

> 'The ability to confront and cross-examine a live witness is a hallmark of these hearings. While there is little doubt that the [ALJ] will be able to make credibility determinations based on video, I think everyone would recognize that the ability to do so in person provides the ideal situation. The inability to see what is going on around the persons testifying is an obvious concern as the appearance in this matter already requires the witness to be on a computer and there is no way to know what is on their screen or who else is in the room. While this is not to suggest that a party or witness will engage in nefarious actions, live testimony negates that possibility.'

"Respondents' argument that an in-person hearing is 'ideal' is well taken. Nevertheless, given the uncertainty of the ongoing pandemic, the forum will not be able to operate under 'ideal' circumstances for an unknown length of time. To address Respondents' concerns outlined above, all witnesses will be asked, under oath, whether they are viewing any documents on their screen and to confirm that there are no additional persons in the room while they are testifying. Moreover, while telephone witnesses are allowed, the parties should attempt to present all key witnesses by video conference so that credibility can be assessed, if needed.

"For all the foregoing reasons, Respondents' objections are DENIED and this hearing will be held by video conference at the date and time set forth in the Notice of Hearing (**Tuesday, January 26, 2021, at 9:30 a.m.**). Instructions for participating in the hearing follow on the next page.

Meetings-and-Engagement.aspx (providing that all Oregon Department of State Lands public meetings "are being held remotely" by video conference); https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem (containing various resources for attorneys for remote working due to COVID-19).

"**IT IS SO ORDERED.**"

(Exs. X8-X10)

10) On January 11, 2021, Respondents filed a motion for postponement because an emergency health issue arose for Hayes. The declaration supporting the motion contained a record regarding the medical issue and an email indicating that the Agency did not oppose the postponement request.

In an interim ordered dated January 12, 2021, the ALJ granted Respondents' motion. The interim order further stated that the hearing date and the case summary deadline were canceled, and will be reset during a prehearing telephone conference. (Ex. X11-X12)

11) A prehearing telephone conference was held on Tuesday, January 26, 2021, at 9:30 a.m. Administrative Prosecutor Rachel Diamond-Cuneo appeared on behalf of the Agency. Respondents' counsel John Raschko appeared on behalf of Respondents. Based on the availability of the forum and the parties, the forum issued an interim order rescheduling the hearing and case summary deadlines as follows:

New Hearing Date: April 6, 2021, at 9:30 a.m.
New Case Summary Deadline: March 23, 2021

The interim order also including a GoToMeeting link, access code and telephone number for participation in the virtual hearing. (Ex. X13)

12) The Agency and Respondents filed their case summaries on May 19, 2021. (Exs. X6-X7)

13) 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)

14) On September 18, 2023, 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 the forum granted Respondents' request for an extension of time until November 17, 2023, to file exceptions, no exceptions were filed.

FINDINGS OF FACT – THE MERITS

Case's Relationship with RC

1) Barton and Hayes are a couple in a long-term relationship. They operated a consignment clothing store under the assumed business name of "The Royal Clothiers" ("RC") in LaGrande, Oregon. (Testimony of McKerlie, Barton; Exs. A2, A3)

2) RC needed help when Hayes was experiencing some health issues, and Case began working as a sales clerk in the store on March 16, 2017. (Testimony of Case, Hayes)

3) When Case began working at RC, Hayes and Barton did not know the rules regarding whether they could allow unpaid volunteers to work in the store. (Testimony of Barton, Hayes)

4) Case provided services to RC. (Testimony of Barton, Hayes)

5) Case had experience working in the retail clothing business and generally "knew what to do" in the store. Barton set her schedule and sometimes asked her to perform specific tasks. Barton paid Case in cash at the end of each week. She earned $5 per hour. She worked 15-20 hours some weeks or 15-30 hours other weeks, depending on RC's needs. (Testimony of Case)

6) One day when both Hayes and Case were working in the store, Hayes noticed that Case brought a man upstairs to try on clothes in the women's fitting room. Hayes approached Case and told her not to do that again because it might make some women uncomfortable to have a man next to them in the changing room. (Testimony of Hayes)

Case's Report to DHS and the Subsequent Investigation

7) In 2017, Barton and Hayes also owned Tudor Holdings LLC ("Tudor"). Tudor owned and operated rental properties, including a property that was rented to one of RC's employees. (Testimony of Barton, Hayes)

8) While working at RC, Case overheard the co-worker who lived in the home owned by Barton's company talking about several things she was cooking and buying. Case knew that the co-worker received food stamps and was on the Oregon Health Plan. The co-worker also had low-income housing assistance that she used to rent a home from Barton's company. Case had witnessed the co-worker being paid by RC, and felt it was dishonest and wrong for her to receive low-income benefits when she was working for RC. (Testimony of Case)

9) Barton and Hayes were aware that Case had been watching and noticing the actions of the employee who rented the home from their company. Barton and Hayes thought that Case "was after" the employee. Case told Hayes and others in the store that the employee "had hundreds of dollars in her handbag." Hayes thought Case was "stalking" the employee and that the employee's activities were "none of [Case's] business." (Testimony of Hayes)

10) Walker is a criminal fraud investigator for the Oregon Department of Human Services ("DHS"). He investigates allegations of fraud in obtaining public assistance benefits. On July 25, 2017, Walker received an email from Case in which

Case said that she was concerned that someone she worked with was receiving benefits she was not entitled to receive. (Testimony of Walker)

11) Case's email prompted Walker to conduct an investigation. Walker made site visits to RC during his investigation. During his initial site visits, he did not make himself known but eventually disclosed his identity. (Testimony of Walker)

12) Part of Walker's investigation involved examining whether Barton, as the landlord for RC's employee who received public assistance benefits, had facilitated a DHS client's ability to misrepresent her income and employment status. (Testimony of Walker)

13) Walker met Barton in person on August 24, 2017. Barton later provided a typed clarification statement. (Testimony of Walker, Barton)

14) Case was one of seven witnesses, but she was not the primary witness in Walker's investigation. Walker made his best efforts to not disclose the names of the witnesses to anyone. (Testimony of Walker)

15) When Barton was in Walker's office during the course of the investigation, Barton saw a photograph that he thought showed his business accounts and it bothered him. When Barton returned to RC, it still was bothering him that someone had taken and submitted the photograph. He wanted to try to find out who did that. Barton approached a group of employees, including Case, and told them about the DHS investigation. He told them that he was "going to get to the bottom of this." He believed that it was normal for a business to want to know who the "traitor" was. He felt like "someone is against us" and that RC "[didn't] need them around." (Testimony of Barton)

16) In early September of 2017, Barton told Case that her services were no longer needed.[18] (Testimony of Case, Barton)

Post-Termination

17) After RC terminated Case, she was shocked and did not understand why RC discharged her. She felt sad and had a hard time sleeping. (Testimony of Case)

18) Case earned income from housecleaning work after her termination In January of 2018. She was paid $15 per hour and worked approximately 3.5[19] hours per week. In 2018, Case opened her own coffee shop and vintage clothing store with a business partner. On January 18, 2018, Case and her business partner began working

[18] Case and Barton disagree as to whether this conversation took place before or after Case went on vacation. It is not necessary for the forum to resolve this dispute given that both Case and Barton agree that the conversation took place in early September after Barton's conversation about "getting to the bottom" of the DHS investigation.

[19] This number is an approximation based on Case's testimony that she worked 2-5 hours per week cleaning houses for a realtor, and that the hours differed based on the needs of the realtor.

at the new business site to make the space ready to operate their business. Case and her partner started paying rent on the location on May 1, 2018, and the shop opened its doors to customers on June 3, 2018. (Testimony of Case)

19) The RC business closed in March of 2020. At the time of the hearing, the business was for sale. (Testimony of Barton)

Credibility

20) There were some minor differences between the dates Case provided in her testimony and dates contained in documents. For example, Case testified that she filed a complaint with DHS in August of 2017, but Walker testified that he received an email with a complaint from Case on July 25, 2017. The forum credited the dates in the actual documents if they differed from Case's testimony. Given the relatively minor nature of the date discrepancies and that over three years had passed since some of the events, the forum concludes these minor date discrepancies did not negatively impact Case's credibility.

21) Portions of the testimony of Case, Barton, Hayes and Rhyne involved relaying impressions and characterizations of events and people's personalities, such as the tone of voice used by someone or how they viewed the person's role in the local community. Unless it was relevant, the forum focused on testimony about the facts of what occurred, rather than these types of characterizations.

22) The credibility of Barton was negatively impacted in that he often provided answers that were not responsive to questions and added additional editorial comments. As well, Barton's testimony that he did not know who complained to DHS was undermined by Hayes's testimony that Case had been talking to Barton and Hayes their tenant who was an RC employee, and described Case's behavior as "stalking" the other employee.

CONCLUSIONS OF LAW

1) At all times material herein, Respondents Barton and Hayes owned and operated a consignment clothing store in LaGrande, Oregon, as a partnership under the assumed business name of The Royal Clothiers.

2) At all times material herein, Barton and Hayes were employers as defined in ORS 659A.001 (4)(a) and employed Case.

3) The actions of Barton and Hayes, taken through Barton, of discharging Case from employment violated ORS 659A.030(1)(f), and OAR 839-005-0125(1)-(3).

4) Case, acting in good faith and while employed by Barton and Hayes, reported information that she believed was evidence of a violation of a state law.

5) RC, acting through Barton, terminated Case, because of her good faith reports about potential public assistance fraud, thereby violating ORS 659A.199(1) and OAR 839-010-0100(1).

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

7) Pursuant to ORS 659A.850(4)(a)(B), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an award requiring training, and the award of lost wages and compensatory damages to Complainant, based on Respondents' unlawful practices. The sum of money awarded and the other actions required of Respondents in the Order below are an appropriate exercise of that authority.

OPINION

The Agency's Formal Charges include the following two alleged violations:

1. Respondents discharged Case because she opposed an unlawful practice, in violation of 659A.030(1)(f), OAR 839-005-0125(1)-(3).

2. Respondents terminated Case because of her good faith reports about information that she believed was a violation of a state or federal law, rule or regulation, thereby violating ORS 659A.199(1) and OAR 839-010-0100(1).

The Agency seeks lost wages and emotional distress damages for Case and requests an order requiring Respondents to undergo training on whistleblower protections under Oregon law.

TERMINATION FOR OPPOSING UNLAWFUL PRACTICE

The Agency alleges in its Formal Charges that Respondents violated ORS 659A.030(1)(f) by terminating Case's employment, because she opposed what she reasonably believed to be an unlawful practice (assisting an employee with fraudulently obtaining public benefits). The Agency's prima facie case consists of the following elements: (1) Barton and Hayes were employers as defined by statute; (2) Barton and Hayes employed Case; (3) Case explicitly or implicitly opposed an unlawful practice or what she reasonably believed to be an unlawful practice; (4) Barton and Hayes subjected Case 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 Sis-Q Cellular*, LLC, 38 BOLI _ (2022); *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).

The forum first addresses Elements 1 and 2. RC contends that Case was a

volunteer who was not employed by Respondents and, thus, is not subject to the protections of the statutes at issue in this case. ORS 659A.001(4)(a) defines an "Employer" as "any person who in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed." The Oregon Court of Appeals has identified "four nonexclusive factors for consideration in assessing the right to control: '(1) direct evidence of the right to, or the exercise of, control; (2) the method of payment; (3) the furnishing of equipment; and (4) the right to fire.'" *McClusky v. City of N. Bend*, 308 Or App 138, 142–43, 481 P3d 431(2020), *rev den*, 368 Or 37 (2021) (citing *Oregon Country Fair v. Natl. Council on Comp. Ins*., 129 Or App 73, 78, 877 P.2d 1207 (1994)). The forum finds that these factors were satisfied in this matter. First, there was direct evidence of the exercise of the right to control in that Barton set Case's work hours and gave her work tasks. As well, on at least one occasion, Hayes gave directions to Case about who could use the upstairs changing room. Second, the "method of payment" was cash paid to Case at the end of each week. Third, RC furnished the equipment in the RC store for Case to use. Fourth, Barton demonstrated the "right to fire" when he told Case that her services were no longer needed. Therefore, the forum concludes that Barton and Hayes were employers who employed Case.

As to Element 3 (report), the evidence is undisputed that Case made a report to the DHS on July 25, 2017. In the report, she stated that one of RC's employees was receiving public assistance benefits that she was not entitled to receive.

With respect to Element 4 (adverse action), the record is undisputed that Barton told Case that her services were no longer needed in September of 2017.

Finally, as to Element 5 (causation), the Agency must prove that an unlawful motive "was a substantial factor" in the decision to terminate Case's employment. "[I]n other words," the Agency must prove that Case "would have been treated differently in the absence of the unlawful motive." *In the Matter of Horizontal Motorsports*, *Inc.*, 37 BOLI at 217 (quoting *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d 1170, 1174 (2016)). *See also Crosbie v. Asante*, 322 Or App 250, 256, 519 P3d 551, 556 (2022), *rev den*, 370 Or 827 (2023) (noting that the proponent of a discrimination claim under Oregon law must prove that "the protected trait or activity was a 'substantial factor'" in the adverse decision); *Ossanna v. Nike, Inc.*, 365 Or 196, 214, 445 P3d 281, 292 (2019) (recognizing that the causation standard for assessing violations of ORS 659A.199(1) is "the substantial-factor standard of causation").

As well, proof of a causal connection between protected conduct and a materially adverse action can be established "[1] *indirectly*, by showing that the protected activity was followed closely by discriminatory treatment or through other evidence such as disparate treatment of fellow employees who engaged in similar conduct or [2] *directly*, through evidence of retaliatory animus directed against a [complainant] by the [respondent]." *Boynton-Burns v. University of Oregon*, 197 Or App 373, 380, 105 P3d 893 (2005) (emphases in original; internal quotation marks omitted).

RC argues that Barton told Case that her services were no longer needed because Hayes had recovered from her illness and returned to work in the RC store. However, Barton told Case that she was terminated in early September 2017, within a couple of weeks after Barton learned of the DHS investigation. This timing is indirect evidence of causation.

Additionally, after Barton was contacted by the DHS, he admitted that he was "bothered" when he saw a photo taken of RC's accounts in the folder of the DHS investigator. Barton came back to RC and spoke to his employees, including Case, about the DHS investigation. He told them that he wanted to "get to the bottom" of it. Barton admitted that he thought the person who made the report was a "traitor" and that he felt like "someone is against us" and that RC "[didn't] need them around." Hayes's testimony confirmed that Barton and Hayes were aware that Case had been watching the employee who received DHS benefits and that Case had commented on the amount of cash in the employee's purse. Hayes also testified that she and Barton felt that Case was commenting on something that was "none of her business." These facts, taken together, lead to an inference that Barton and Hayes were aware of the fact that Case was the person who made the report to DHS and that Barton considered that person to be a traitor that he did not want around. This provides evidence of retaliatory animus. Accordingly, the Agency satisfied its burden to establish that Case's report to DHS was a substantial factor in the decision to end her employment.

TERMINATION DUE TO REPORT OF UNLAWFUL PRACTICE

The Agency also alleges that RC violated ORS 659A.199 when it terminated Case. The analysis used in determining that Case violated ORS 659A.030(1)(f) applies equally to the Agency's ORS 659A.199 claim. The forum also notes that the Agency established that Case made a good faith report of information she believed was evidence of a violation of state law (fraudulently receiving low income assistance benefits). Accordingly, the forum's conclusion that RC violated 659A.030(1)(f) also leads to the conclusion that RC violated ORS 659A.199(1) when it terminated her employment after her report of a violation of state law. *See Vision International,* 37 BOLI at 199; *In the Matter of Grand Management Services, Inc*., 38 BOLI _ (2022).

DAMAGES

Lost Wages

The Formal Charges sought lost wages of "at least $12,600." The purpose of a back pay ward in an employment discrimination case is to compensate a complainant for the lost wages she would have received but for the unlawful employment practice. *Vision International*, 37 BOLI at 200. Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the unlawful termination. *Id.*

"In order to recover damages for lost wages, the aggrieved person will generally be required to mitigate damages by seeking employment." OAR 839-003-0090(4). "Earned income from employment may be deducted from lost wage damages." OAR 839-003-0090(4)(a). A complainant who is seeking damages for back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). The burden of proof of showing the failure to mitigate damages lies with Respondents. *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

In the Agency's closing argument, it requested damages on behalf of Case from the date of her termination until she opened her own business in 2018. The forum concludes that it would be appropriate to award Case lost wages from the date of her termination (September 17, 2017) until Case's new business opened to customers on June 3, 2018. Had she continued to remain employed by RC during this time, she would have earned $3,700 in wages ($5/hour x 20[20] hours/week x 37 weeks).

Case earned income from housecleaning work after her termination in January of 2018 in the approximate amount of $210 ($15/hour x 3.5 hours/week x 4 weeks).

Accordingly, her total lost income minus the income she earned from other work is $3,490.

Emotional Distress Damages

The Agency seeks damages on behalf of Complainant in the amount of "at least $10,000" for physical, mental and emotional suffering. Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority to award money damages for emotional, mental, and physical suffering sustained. *Oregon Truck Painting, LLC, On Time Painting, Inc., Richard Bowman, and Amanda M. Marin*, 37 BOLI 87, 1154-15 (2018). The commissioner has the authority to fashion a remedy adequate to eliminate the effects of unlawful employment practices. *Id.* at 115.

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).

Case testified that she felt uncomfortable when Barton spoke to her about being investigated. After RC terminated her, Case was shocked and did not understand why RC discharged her. She felt sad and had a hard time sleeping.

[20] This number is an approximation based on Case's testimony that she worked 15-20 hours some weeks, or 15-30 hours other weeks, depending on RC's needs. (*See* Finding of Fact #5)

A review of past emotional distress damage awards in similar cases is instructive when determining an appropriate emotional distress damages award. The evidence in this case supports an award of $10,000. *See In the Matter of 4Rs Associates, LLC,* 38 BOLI _ (2022) (awarding $10,000 to a complainant who felt devastated and depressed after being fired after he asked his employer for wages owed to him); *In the Matter of Insight Global, LLC*, 37 BOLI 229, 242 (2020) (awarding complainant $15,000 in emotional distress damages to a complainant who felt horrible and dejected when unlawfully asked about a criminal conviction). *See also In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 239 (2015) (awarding $20,000 to a complainant who felt "confused," "angry" and "sad" after he was unlawfully discharged for whistleblowing); *In the Matter of Hey Beautiful Enterprises, Ltd*., 34 BOLI 80, 101 (2015) (awarding $10,000 to a complainant who felt angry and emotionally distraught after being discharged for complaining about unpaid wages).

OTHER REQUESTED RELIEF

In its Formal Charges, the Agency asked that Respondents and Respondents' managers and supervisors be trained, at Respondents' expense, "on whistleblower protections under Oregon law" by "the Bureau of Labor and Industries Technical Assistance Unit,[21] 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 gives the Commissioner the authority to require Respondents and Respondents' managers and supervisors to undergo training of the type sought in the Formal Charges. The forum finds that this requirement is appropriate in this case.

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(f), ORS 659A.199(1), OAR 839-010-0100(1) and OAR 839-005-0125(1)-(3) by Respondents

[21] This unit is now called the "Employer Assistance Unit."

Stephen G. Barton and Marlene E. P. Hayes, dba The Royal Clothiers, and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Stephen G. Barton and Marlene E. P. Hayes, dba The Royal Clothiers** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1800 SW 1st Ave, Suite 500, Portland, Oregon 97201-5322, a certified check payable to the Bureau of Labor and Industries in trust for **Peggy Case** in the amount of:

1) THREE THOUSAND FOUR HUNDRED AND NINETY DOLLARS ($3,490), less lawful deductions, representing wages lost by Peggy Case as a result of Respondents' unlawful employment practices found herein; plus,

2) TEN THOUSAND DOLLARS ($10,000), representing compensatory damages for emotional and physical suffering experienced by Peggy Case as a result of Respondents' unlawful employment practices found herein; plus,

2) Interest at the legal rate on the sum of THIRTEEN THOUSAND FOUR HUNDRED AND NINETY DOLLARS ($13,490), 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 **Stephen G. Barton and Marlene E. P. Hayes, dba The Royal Clothiers** to participate in training on the correct interpretation and application of the Oregon laws pertaining to whistleblower protections by the Bureau of Labor and Industries Employer Assistance Unit or another trainer agreeable to the Agency. This training shall be completed no later than June 30, 2024.

In the Matter of
Frehoo, Inc. dba Stars Cabaret & Steak House, and
Pamela Colburn, Lisa Heinzman-Myers, Jon Herkenrath,
Randy Kaiser, Todd Mitchell, and Jeff Struhar, individually,
under ORS 659A.030(1)(g),
Respondents, Case No. 37-16

Amended Final Order of
Deputy Commissioner Jessica Giannettino Villatoro
Issued January 25, 2024

SYNOPSIS

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

Following issuance of the Final Order in this matter, the order was appealed to the Oregon Court of Appeals. The Court of Appeals affirmed in part. The Court of Appeals reversed and remanded as to BOLI's conclusion that Respondents Randy Kaiser, Todd Mitchell and Jeff Struhar aided and abetted the unlawful sexual harassment of the aggrieved person and were joint and severally liable for the unlawful employment practice. *Frehoo, Inc., dba Stars Cabaret & Steak House, v. BOLI*, 319 Or App 548, 564-65, 510 P3d 888, 898 (2022) rev den 370 Or 789, 524 P3d 957 (2023). On remand, the forum addressed the issues identified by the court.

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

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

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 9-10, 14-18, 29-30, December 1-2, 5-7, 2016, in Conference Rooms A and B of the Oregon Employment Department, WorkSource Tualatin Office, 7995 SW Mohawk Street, Tualatin, Oregon. Closing arguments were held on December 21, 2016, at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, which was then located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Chief Administrative Prosecutor Jenn Gaddis and Administrative Prosecutor Cristin Casey, employees of the Agency. Anthony Reiner, Joel Shapiro and Janis Puracal, attorneys for the Aggrieved Persons, were present throughout the hearing. Respondents were represented by Courtney Angeli and Angela Ferrer, attorneys at law. Respondents Jon Herkenrath, Randy Kaiser, Todd Mitchell and Jeff Struhar were present for the majority of the hearing, but Herkenrath and Struhar were not present on some hearing dates due to illness.

The Agency called the following witnesses[1] to testify in person: Maria Perez, Rafael Colin, Chad Opitz (direct), Chris Lynch, Madelyn Brown, Jessica Ponaman, Dr. Jon Conte, AP1, and AP2. The Agency called the following witnesses to testify by telephone: Steven Toth, Cynthia Herring, Amy, Ashley, Melanie, Davey, Chad Opitz (rebuttal).

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

The forum received into evidence:

a) Administrative exhibits X1 through X157 (submitted or generated prior to hearing), and X158 through X193 (submitted or generated during or after hearing);

b) Agency exhibits A1-A19, A21-A32, A33a, A34a, A37-A49, portions of A50 (pp. 1, 4, 16 only), portions of A50a (pp. 5, 6, 7 only), A51-A52, A55, A57-A58, A60-A63, A67, A71-A75, A86-A87, and A90-A93;

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

c) Respondents' exhibits R6-R8, R9, R13-R14, R18-R19, R22-R30, R32, R38, R39-R40, R44, portions of R45 (pp. 18, 109-112, 130-134 only), R46-R48, R49-R58 (for the limited purpose of identifying them as records that Dr. McGovern reviewed), R59, R61, R63-R64, R66-R69, R74-R75, portions of R76 (pp. 144-148, 162 only), R81, R85, R87-R93, R96, R99, R105, R107, portions of R109 (pp. 3 and 4 only), R110-R111, R113-R114, R116, R117, R120, R126 (for the limited purpose of showing that it was part of the Agency's investigation), R131-R132, R134-R135, R137, R142, R143, R147, R148 (p. 1 only), R149-R151 and R156 (for impeachment purposes only).

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

FINDINGS OF FACT – THE MERITS

Description of Respondents

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

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

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

---

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

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

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

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

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

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

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

Description of Frehoo Club Operations

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

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

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

- Danced on stage for two songs at a time in a rotation set by the DJ. Dancers were expected to remove the clothing from either their top or bottom by the end of the first song, and had to be fully nude at the conclusion of the second song.

- Performed private dances for customers in the VIP lounge area while partially nude or topless.

- If over the age of 21, drank alcoholic drinks, including shots of alcohol, purchased for them by customers.

- Sat down and conversed with customers.

- Entertainers could also be "bought off the floor," meaning that a customer would pay for a dancer to be removed from the stage dancing rotation to spend the rest of her shift with the customer.

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

11) There was a separate area for "VIP" (private) dances in which a customer could pay to have an entertainer perform a private dance. In the VIP dance area, there were several chairs separated by black sheer curtains. Lighting in the VIP area was dimmer than in the rest of the club. There was a podium next to the entrance of the VIP

area where a security person was usually stationed. The charges for VIP dances were posted on a sign outside the VIP area. (Ex. A50, p. 1; Testimony of Herkenrath, AP2)

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

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

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

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

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

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

"Stars Cabaret

"COMPANY POLICY
REGARDING
SEXUAL HARASSMENT

"'<u>Stars Cabaret does not tolerate any form of discrimination or harassment of its personnel due to race, color, religion, sex, national origin or marital status.'</u>

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

"The manner to report such offenses is as follows:

"1. Write a letter and mail to PO Box 2249, Beaverton, OR 97075
"2. Telephone one of the following owners:

a. Randy Kaiser - XXX-XXX-XXXX
b. Todd Mitchell - XXX-XXX-XXXX
c. Jeff Struhar - XXX-XXX-XXXX

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

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

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

DATE ISSUED: JULY 25, 2002"

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

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

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

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

[5]A Finding of Fact #20 was inadvertently omitted in the original Final Order. This Amended Final Order has kept the original numbering of the Findings of Fact due to the parties' referencing specific Findings of Fact in the parties' exceptions to the Proposed Order.

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

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

24) On July 7, 2014, an OLCC inspector received a complaint that a minor entertainer was walking around freely throughout Frehoo when she was not performing. On August 19, 2014, undercover OLCC inspectors observed a 19-year-old minor entertainer sit out in the open inside the club for approximately three to four minutes and noticed that she was allowed to be in a prohibited area when she was not performing. The 19-year-old was issued a citation for being a minor in a prohibited area. Frehoo received a notice of warning for allowing a minor entertainer to be in a prohibited area. (Ex. A91; Testimony of Herkenrath)

Prostitution Involving Frehoo's Former Manager, Steve Toth

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

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

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

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

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

30) After Toth's misconduct was discovered, Frehoo implemented a policy requiring two managers or employees to examine a new dancer's ID and "sign off" that they had done that so there would be "more than one person's word on that." This new policy was not consistently followed. (Ex. R64; Testimony of Kaiser, Herkenrath)

AP2's Experience at Frehoo

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

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

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

- The photo of AP2 was on the left side of the ID card, but should have been on the right side.
- There should have been a red border around the photo, but there was not.
- There should have been language in a red border around the photo stating that she was "under 21 until" followed by the date on which she was to turn 21.
- There was no space after the comma that followed her last name.
- There was no comma between the name of the city and state.
- It lacked a reflective surface that varied in color when viewed from different angles or with a black light.

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

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

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

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

37) Before auditioning, AP2 first called Frehoo to ask about the audition process. When she entered the club, there was no one at the door and she walked over to talk to the bartender. The bartender directed her to a manager named "Jon." She presented herself to the club as an experienced dancer. AP2 changed into dancing clothes in the dancer dressing room and then auditioned on stage. She removed her

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

clothing on both the top and the bottom, and was fully nude at the end of the audition. She understood from Curry and her prior dancing experiences that she had to be fully nude at the end of two songs. Customers left tips for AP2 during her audition. (Testimony of AP2)

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

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

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

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

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

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

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

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

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

47) During her shifts, AP2 also "worked the floor" in the main table area by meeting with customers to get them to buy her a drink and to get them to pay for a VIP dance. One customer, a man in his 60's, gave her $50 to sit on his lap. She did this for about one minute and was uncomfortable. She told him, "No, let me just sit next to you." On different occasions, this same man gave her money for just being close to him. When she received tips while working on the floor, she put the money in her bra or underwear. (Testimony of AP2)

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

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

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

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

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

Discovery that AP2 was a Missing Child

53) Shortly after AP2 began working at Frehoo, a bartender named Amy noticed a missing child posting on Facebook. Amy recognized the missing child as the dancer "Isis" and felt sick to her stomach. When Amy came into work that day, she immediately showed the Facebook posting to her manager, Dave, and to Melanie, who agreed that the missing child was Isis. Amy also called Mitchell. (Testimony of Amy)

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

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

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

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

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

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

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

Stars' Involvement with the COAST organization

61) Sex trafficking[7] is a growing problem in the United States. (Testimony of Spencer)

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

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

In an email dated December 12, 2013, discussing Toth's arrest, Spencer asked Kaiser "what type of age verification procedures did you have in place?" Kaiser did not answer this question when he responded to the email. In an email from Spencer dated

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

September 10, 2014, following the discovery of AP2, Spencer suggested that Frehoo "move forward * * * with age verification in your clubs * * * and work toward cleaning up this mess with a good plan." (Ex. A75; Testimony of Kaiser; Spencer)

Credibility Findings[8]

64) AP2 was generally a credible witness. She was attentive when listening to questions and was forthcoming about the difficulties she has encountered in her life, as well as emotionally difficult situations she experienced before and after working at Frehoo. Aside from appearing nervous at times, her demeanor did not change significantly when she was cross examined by Respondents' counsel.

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

65) The forum found the following witnesses to be credible: Perez (BOLI Wage and Hour Compliance Specialist), Colin (BOLI Civil Rights Investigator[9]), Herring (Beaverton police detective), Lynch (Portland Operations Manager for BOLI's Civil Rights Division), Brown (Beaverton police detective), Ponaman (Intake Manager for BOLI's Civil Rights Division), Karen (Frehoo cocktail waitress), Coni (former owner of costume business), Leslie (owner of costume business), Taylor (dancer), and Struhar (Frehoo owner). However, numerous witnesses testified that they did not think it was possible that criminal activities could have occurred on the premises. This testimony was credited as opinion testimony and was considered by the forum. However, the opinion testimony was often outweighed by credible testimony from witnesses who observed or experienced the criminal conduct. For example, testimony from witnesses

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

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

who did not believe prostitution could have taken place in the FE room was outweighed by credible evidence that it in fact occurred. (Testimony of Opitz, AP1, Toth)

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

67) Witness Ashley testified by telephone on behalf of the Agency. Beginning in 2012, she worked at Stars as a dancer on two different occasions. Ashley had an obvious bias against Frehoo because she was terminated by Jon Herkenrath. Additionally, the details in her testimony (such as mentioning a manager named "Jay") were at odds with information provided by other credible witnesses. As well, she testified about a woman who danced with the name of "Jazmyn" before AP1 worked there and used the name "Jazmyn." Accordingly, it is not clear which performer named "Jazmyn" Ashley was describing in her testimony. Based on the inconsistencies between the testimony of Ashley when compared to testimony from more credible witnesses, the forum concludes that her testimony had little evidentiary value. (Testimony of Ashley)

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

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

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

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

72) Casey was generally credible, but he had a tendency to exaggerate details in favor of Respondents. At the time of the hearing, he was employed at the

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

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

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

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

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

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

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

footage would have been more useful to a police investigation than the poor quality photograph he provided to the police.

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

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

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

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

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

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

Additionally, Marquardt was hired by Respondents to testify on their behalf, giving him an inherent bias to provide testimony that supported their case. His

expertise was further called into question when he could not articulate what to look for to determine if an ID was forged during his cross examination. Based on the foregoing reasons, his testimony was not credited when it conflicted with more credible evidence. (Testimony of Marquardt)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

92) Witness Jennifer (dancer name Tru) was not a credible witness. At the hearing, she contradicted prior statements she made to Det. Opitz regarding a dancer

named Jewell and sexual acts she claimed to have witnessed other dancers performing in exchange for money. Additionally, with respect to the incident when Jennifer left Frehoo's premises with Wheeler, every witness described the incident differently. The forum concludes that there is no credible version of what actually occurred with the exception of the following facts which are generally agreed upon by all witnesses to the incident:

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

(Testimony of Jennifer, Opitz, Mitchell, Toth)

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

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

statements made by Wheeler were not credited unless they were consistent with other credible evidence. (Ex. A28; Testimony of Mitchell)

CONCLUSIONS OF LAW

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

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

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

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

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

6) Pursuant to ORS 659A.850 and ORS 659A.855, the Deputy Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to issue an appropriate cease and desist order. The orders to cease and desist continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace are an appropriate exercise of that authority. Additionally, the Deputy Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award compensatory damages to the aggrieved persons resulting from Respondents' unlawful practices. The sum of money awarded assessed against Respondents in the Order below is an appropriate exercise of that authority.

OPINION

INTRODUCTION

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

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

SEXUAL HARASSMENT

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

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

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

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

Employment Status of AP2

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

Because of Sex

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

Unwelcome Conduct

AP2 was a minor at the time she performed at Frehoo. Under Oregon law, a person under the age of 18 is "incapable of consenting to a sexual act." ORS 163.315(1)(a). Also, it is illegal to use a person who is less than 18 years of age in a display of sexually explicit conduct. ORS 163.670(1); 163.665(1). The definition of "sexually explicit conduct" includes "actual or simulated * * * [l]ewd exhibit of sexual or other intimate parts." ORS 163.665 (3)(f). Oregon also prohibits exhibiting an obscene

performance to a minor. ORS 167.075(1). Therefore, as a matter of law, AP2 was incapable of consenting to the sexual acts and exotic dancing she performed for Frehoo's customers. Furthermore, AP2 credibly testified that this conduct was unwelcome. (*See* Findings of Fact – The Merits, ##43, 45-49) Accordingly, the Agency sustained its burden of proving that the conduct was unwelcome.

Sufficiently Severe or Pervasive

The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is "whether a reasonable person in the circumstances of the complaining individual would so perceive it." OAR 839-005-0030(2); *In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 276 (2013). Under this standard, the forum examines the conduct AP2 experienced from the perspective of a reasonable 15-year-old girl in those circumstances. The forum concludes that a reasonable young woman of that age would have found the performance of nude dancing for older men to be sufficiently severe to create a hostile, intimidating and offensive working environment, and AP2 credibly testified that she perceived it in that manner. In particular, she credibly testified about the hostility and intimidation she experienced when she had to perform nude on stage and during private dances for men. She also explained how she was intimidated, humiliated and demeaned when the men touched her without her consent during private dances.

Harm to AP2

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

Conclusion

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

LIABILITY OF FREHOO FOR HARASSMENT OF AP2

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

[11] *See* Procedural Finding of Fact # 63.

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

A. Harassment by Non-Employees

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

Knew or Should Have Known

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

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

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

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

At the time AP2 auditioned to dance as an entertainer for Frehoo in August of 2014, at least one of the owners (Kaiser) knew of the prevalence of sex trafficking in the United States through his interactions with Spencer of COAST, an organization affiliated with owners of adult entertainment clubs. Posters with warnings about human trafficking were hanging on the walls throughout the club. Frehoo also had knowledge

that its former manager, Toth, had arranged for a 13-year-old girl to perform acts of prostitution on Frehoo's premises with its customers.

In this case, AP2 used a false last name and the fake ID given to her by Curry to apply to work at Frehoo. AP2's fake ID had many markings on it that were different from what would appear on a proper Oregon identification card. For example, although the birthdate and issue date reflected that the ID was issued to a minor, the placement of the photo, background color and omission of "under 21" language were inconsistent with an ID issued to an Oregon minor. There were also problems with the spacing between words, and the ID lacked the reflective surface that appears on legitimate Oregon IDs. Dante, a former security guard and manager, testified that there were "definitely little things" on AP2's fake ID that he would have questioned. Moreover, the use of an authenticating machine would have also exposed that the fake ID was not real.[13] Significantly, when AP2 used the fake ID at one club, a bouncer tried to "scan" it and it did not "go through." Had Frehoo's employees reviewed the ID carefully or if Frehoo used an authentication machine, it would have been clear that AP2 could not prove that she was at least 18 years old. In other words, "upon reasonably diligent inquiry," Frehoo "should have known" that AP2 could not consent to the sexual conduct she experienced at Frehoo. Frehoo's entertainers were subjected to conduct that in most workplaces would be unwelcome sexual harassment, yet it did not take necessary steps to make sure that it was hiring women who were old enough to consent to such conduct. Therefore, the forum concludes that Frehoo "should have known" of the sexual harassment of AP2.

Corrective Action to Prevent Harassment of Underage Dancers Such as AP2

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

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

appropriate corrective action" following the discovery that Toth had subjected 13-year-old AP1 to acts of prostitution on Frehoo's premises.

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

- Entertainers were expected to tell customers who touched them inappropriately that the customer should stop doing so.

- The written policy was issued on July 25, 2002, and was never updated.

- There was no evidence that Frehoo provided sexual harassment training to its managers, employees and entertainers. *See, e.g. Madray v. Publix Supermarkets, Inc.*, 208 F3d 1290, 1298 (11th Cir 2000). ("A policy is 'defective' if those responsible for its enforcement lack training and knowledge sufficient to recognize, prevent and correct workplace discrimination."); *Clark v. United Parcel Serv., Inc.*, 400 F3d 341, 350 (6th Cir 2005) (an effective policy includes training regarding the policy).[14]

- The written policy directed individuals to make complaints to a post office box, Frehoo's owners (none of whom were regularly onsite[15]) and Frehoo's former attorney (deceased since 2010). In addition, although the cell phone numbers of Kaiser, Mitchell and Struhar were listed on the policy, the policy stated that individuals reporting harassment "should not leave messages and assume that the problem has been communicated." *See, e.g. Madray v. Publix Supermarkets, Inc.,* 208 F3d 1290, 1298 (11th Cir. 2000) (finding a policy adequate in part because "designated, appropriate company representatives were accessible to * * * store employees"); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 (10th Cir 1998) (policy inadequate when employees were directed to make complaints to an official who was "located in a separate facility" and was not available at night or on weekends).

- Given that Respondents had never received a complaint of sexual harassment, there is no evidence that the written policy was actually effective in "promptly correcting" any harassment which may have occurred.

Moreover, Frehoo cannot avoid liability due to AP2's lack of a complaint. Notably, a teenager does not have the same abilities or confidence as an adult to make

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

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

a complaint of sexual harassment. *See, e.g. E.E.O.C. v. V & J Foods, Inc*., 507 F3d 575, 578 (7th Cir 2007) (recognizing the difference between experienced adult employees and the "understanding of the average teenager"); *E.E.O.C. v. KarenKim, Inc.,* 698 F3d 92, 101 n.3 (2d Cir 2012). Given that AP2 was 15 years old at the time she worked at Frehoo, it was not unreasonable for her to fail to make a complaint under Frehoo's harassment policy.

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

B. Harassment by a Supervisor

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

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

> "(A) That [Frehoo] exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and
>
> "(B) That [AP2] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm."

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

LIABILITY OF INDIVIDUAL RESPONDENTS FOR AIDING AND ABETTING

ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or any person, whether an employer or employee, to aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to attempt to do so."

When an individual assists a business entity in violating a provision of ORS chapter 659A, the individual can be liable under ORS 659A.030(1)(g). The legislature enacted the provision that is now in ORS 659A.030(1)(g) in 1949. Or Laws 1949, ch 221, § 5. At that time, "aid and abet" meant to "[h]elp, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing it about, or encourage, counsel or incite as to its commission." *Black's Law Dictionary* 91 (4th ed 1951); *see Allison v. Dolich,* 321 Or App 721, 726, 518 P 3d 591, 595 (2022) (explaining that "[o]ne who aids and abets is one who assists another to commit an act" and concluding the owner and member in that case could be liable because they "assisted the LLCs by making the decisions that enabled the violations")[16]. Specifically, the legislature intended to impose liability on key decision-makers for a business entity, who make decisions that result in the business violating a person's rights under ORS chapter 659A. *Allison*, 321 Or App at 726 ("the legislature's intention was that the persons directing the business-entity employer's unlawful conduct can be held individually liable under ORS 659A.030(1)(g)"). Consistent with that approach, the forum has found that corporate officers and owners who commit acts rendering the corporation liable for an unlawful employment practice may be found to have aided or abetted the corporation's unlawful employment practice. *In the Matter of Hey Beautiful Enterprises, Ltd., and Kimberly Schoene*, 34 BOLI 80, 97 (2015). See also *In the Matter of Crystal Springs Landscapes, Inc.,* 32 BOLI 144, 166437 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC,* 32 BOLI 94, 137 (2012); *Cyber Center; Inc.,* 32 BOLI at 35.

Colburn and Heinzman-Myers

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

Kaiser, Struhar and Mitchell

The Oregon Court of Appeals remanded to the forum on Kaiser, Struhar, and Mitchell's liability under ORS 659A.030(1)(g). For the reasons set forth below, the forum finds that neither Kaiser nor Struhar aided and/or abetted the sexual harassment of AP2. However, the forum finds that the preponderance of the evidence establishes that Mitchell aided and/or abetted the sexual harassment of AP2.

[16] In *Allison*, the court did not define the entire universe of what is actionable under ORS 659A.030(1)(g). It held that a person can be liable for assisting another to violate one of the statutes in ORS chapter 659A.

Kaiser and Struhar

Kaiser and Struhar were uniformly referred to as "owners" of Frehoo at hearing. Both, together with Mitchell, made policies for the business. Kaiser also performed administrative and accounting functions for Frehoo and addressed legal issues as they arose. Kaiser oversaw the operations of the Bend Stars club. Struhar was Frehoo's corporate president and tended to technical issues and facility issues for Frehoo. Struhar was also responsible for overseeing the operations at the Salem Stars club. Neither Kaiser nor Struhar had a regular presence at Frehoo.

The preponderance of the evidence does not show that either Kaiser or Struhar were aware of AP2's employment as a dancer or were in a position to direct or to control the operations of Frehoo during the period of AP2's employment. Because the evidence failed to show that Kaiser or Struhar assisted Frehoo's sexual harassment of AP2, the Agency has not sustained its burden in proving that either Kaiser or Struhar aided and/or abetted the sexual harassment of AP2.

Mitchell

Witnesses also referred to Mitchell as an "owner" of Frehoo. Mitchell oversaw the operations and management at Frehoo. He also served as Frehoo's corporate secretary.

Mitchell has significant experience in the adult entertainment industry and previously managed large adult entertainment clubs. He was involved in developing policies for Frehoo. Mitchell was regularly onsite at Frehoo. He delegated the supervision of Frehoo's daily operations to Herkenrath. However, Mitchell maintained control over the club as a whole. For example, when a bartender recognized AP2 as the child listed as missing in a Facebook post, she contacted Mitchell. Mitchell then contacted Herkenrath and directed him on what steps to take.

Because Mitchell participated in developing policies for Frehoo, he would have been aware of the age-verification policy adopted after the owners learned that Toth had arranged for AP1, a 13-year-old girl, to perform sexual acts for Frehoo's customers in exchange for money at Frehoo. Despite the seriousness of those prior crimes by a Frehoo manager at Frehoo and despite Mitchell's oversight and presence at Frehoo, he did virtually nothing to ensure that key Frehoo policies were followed by the managers.

In particular, Mitchell chose not to take specific steps to ensure that Frehoo managers were following Frehoo's age verification policy. As a result, no manager reviewed AP2's identification prior to her audition, during which she danced on stage and removed her clothing until she was fully nude. One manager asked for AP2's identification after her audition and made a copy. However, that manager failed to note the obvious flaws with AP2's ID that should have led to him question the ID's authenticity. Further, there was no "sign off" on AP2's hiring paperwork showing that AP2's ID was examined by Herkenrath or any other Frehoo employee before AP2

began working as a dancer. Mitchell's decision not to ensure that age-verification steps were followed—under the circumstances of this case—assisted Frehoo's violations.

Despite the past crimes at Frehoo, Mitchell also did not require that Frehoo have a sufficient sexual harassment policy or ensure that rules about customer's not touching dancers were enforced. Mitchell must have known about the no-touching rule. And because Mitchell was at Frehoo regularly, he knew how the VIP room was setup. The lighting was dim, there were curtains, and security was at the entrance not inside the room. AP2 was regularly subjected to unwanted suggestive comments by Frehoo customers, as well as unwanted touching. No member of management or security ever intervened. By allowing the VIP room to be setup as it was and not enforcing a sufficient sexual harassment policy, Mitchell assisted Frehoo's violations.

Given his experience and the recent history of AP1 at the club, Mitchell should have known of the likely consequences of failing to enforce the age-verification policy, failing to develop and implement sufficient sexual harassment policies, and failing to enforce the rules in place meant to protect against sexual harassment. In these circumstances, Mitchell's failure to ensure that Frehoo's policies were sufficient and being followed by Frehoo managers assisted Frehoo's violations by creating an environment in which the unlawful sexual harassment experienced by AP2 likely would and, in fact, did occur. Therefore, the Agency has sustained its burden to prove that Mitchell aided and/or abetted the sexual harassment of AP2 by Frehoo's customers.

Herkenrath[17]

Herkenrath was physically present on Frehoo's premises when AP2 came in to audition and during other shifts that she worked. At that time, he served as the general manager of the club and admitted that general managers were responsible for anything that happened in the club. Despite this responsibility, he never once checked AP2's ID nor confirmed that any other person carefully reviewed her ID. Given the nature of Respondents' business, verifying the age of a prospective nude dancer is essentially the only means of making sure a woman is capable of consenting to engage in public sexual conduct. Accordingly, as Frehoo's general manager responsible for the club's operations, Herkenrath made it "easier" and "less difficult" for the harassment of AP2 to occur and, thus, he facilitated unlawful sexual harassment.[18] Accordingly, the Agency sustained its burden to prove that Herkenrath aided and abetted the harassment of AP2 by Frehoo's customers.

[17] Herkenrath did not seek review of the original BOLI decision and so the forum has not revisited this section.

[18] The conclusion that Herkenrath aided and abetted the sexual harassment of AP2 was not part of the remand order of the Oregon Court of Appeals. As such, the conclusion that Herkenrath is jointly and severally liable for the damages resulting from the unlawful employment practice by Frehoo remains the same in this Amended Final Order.

DAMAGES

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

In determining an award for emotional and physical suffering, the forum considers the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the aggrieved persons. An aggrieved person's testimony, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 141(2012), *citing In the Matter of From the Wilderness*, 30 BOLI 227, 290 (2009).

Through AP2's credible testimony, the Agency proved that AP2 experienced emotional and mental suffering as a result of the sexual harassment by Frehoo's customers. During the time AP2 was performing at Frehoo, she was only 15 years old. While she danced fully nude on stage, she believed that the customers were thinking disgusting, sexual things about her. She felt awkward and uncomfortable interacting with the staff and did not want to be there. While performing private dances, she had to defend herself from inappropriate touching by older men who were under the influence of alcohol. Some of the men tried to get their hands inside her underwear and wanted her to touch them inside of their pants. She found it necessary to consume marijuana and alcohol to help push aside her emotions and get through the experience. She felt like a "sex robot."

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

In determining the appropriate amount of mental and physical suffering damages, "this forum has long held that Respondents must take Complainants 'as they find them.'" *In the Matter of Kara Johnson dba Duck Stop Market*, 34 BOLI 2, 37 (2014), *appeal pending*. The actual amount depends on the facts presented by each aggrieved person. *See, e.g., In the Matter of Melissa and Aaron Klein dba Sweetcakes by*

Melissa, 34 BOLI 102, 127-28 (2015), *appeal pending* (one Complainant awarded $60,000 and second Complainant awarded $75,000 for public accommodation discrimination based on their sexual orientation); *In the Matter of Andrew W. Engel, DMD*, 32 BOLI 94 (2012) (Complainant subjected to harassment based on her religious belief suffered anxiety, stress, insomnia, gastrointestinal problems and weight loss requiring medical treatment awarded $350,000); *In the Matter of From The Wilderness, Inc*., 30 BOLI 227 (2009) (Complainant subjected to verbal and physical sexual harassment for two months before being fired and then retaliated against after termination suffered panic attacks requiring medical treatment awarded $125,000); *In the Matter of Maltby Biocontrol, Inc.,* 33 BOLI 121 (2014) (Complainants subjected to racially hostile environment including assault, threats with a firearm, racial epithets and retaliation for reports to police suffered fear, sleeplessness and physical injuries requiring medical treatment awarded $50,000 and $100,000 each); *In the Matter of Charles Edward Minor*, 31 BOLI 88, 105 (2010) (Complainant subjected to verbal and physical sexual harassment including respondent striking her in the head with his fist suffered anxiety, reclusiveness and fear awarded $50,000).

Although AP2 was not harassed at Frehoo over a number of months or years, the forum finds that the harm suffered by AP2 is more severe than in any previous case presented to this forum due to her young age and the public, sexually explicit, and exploitative nature of the harassment. The Agency and Respondents submitted briefing showing a wide range of amounts awarded to sexual harassment victims, including awards spanning from a couple hundred thousand dollars to $1 million. (*See* Procedural Finding of Fact #65). The Agency's briefing also discussed amounts awarded to individuals who were sexually abused as children which exceeded $1,000,000. *Id.*

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

ADDITIONAL RELIEF REQUESTED BY THE AGENCY

In its Amended Formal Charges, the Agency asked that Respondents be ordered to cease and desist from continuing to violate laws pertaining to discrimination because of sex and sexual harassment in the workplace. The Agency also requested that Respondents be enjoined from violating sex discrimination and sexual harassment laws. BOLI's Deputy Commissioner is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4). Among other things, that may include requiring a respondent to:

> "(a) Perform an act or series of acts designated in the order that are reasonably calculated to:

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

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

EXCEPTIONS TO THE PROPOSED ORDER

AGENCY'S EXCEPTIONS

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

Agency Exceptions to Proposed Findings of Fact – The Merits

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

A. Additional Findings of Fact[19] Requested by the Agency

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

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

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

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

4. The forum declines to add the Agency's requested language regarding the testimony of Amy, the bartender. Amy's testimony did not demonstrate that she was

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

certain about the timing of some events. For example, when Amy was asked when she saw the missing child Facebook posting, she responded, "It was within -- it was within a day or two. I mean, she was in there. I feel like it was within a day or two of AP2 being in there." The forum declines to make a finding based on this equivocal testimony.

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

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

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

8. Some of the information the Agency requests in this bullet point is contained in Finding of Fact # 75. For the sake of completeness, continuity and context, Finding of Fact # 28 is amended to note that when Herkenrath saw AP1 in the club with Toth, he was comfortable with her being there and assumed that Toth either knew her age or had checked her ID.

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

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

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

B. <u>The Agency's Exceptions to Proposed Findings of Fact</u>

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

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

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

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

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

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

The Agency's Exceptions to Credibility Findings

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

The Agency's Exceptions to the Proposed Opinion

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

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

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

RESPONDENTS' EXCEPTIONS

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

Respondents' Exceptions to Proposed Findings of Fact – The Merits

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I.Q. The forum denies Respondents' Exception I.Q. AP2 credibly testified: "And I knew that there wouldn't be anyone to really help me. It was, like, my battle to

fight* * * I just didn't see -- I didn't find any purpose on telling it because I didn't feel like it would be any -- any help or any different." Respondents misunderstand the forum's credibility finding (Finding of Fact # 64) regarding the inconsistency between the interrogatory response and hearing testimony. Finding of Fact # 64 described AP2's inconsistent statements as to whether someone intervened to help her when a customer touched her inappropriately; that Finding did not address why AP2 did not make a complaint.

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

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

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

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

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

Respondents' Exceptions to Proposed Conclusions of Law/Proposed Opinion

The forum denies all of Respondents' exceptions to the Proposed Conclusions of Law and Proposed Opinion for the reasons discussed in the Opinion section above, with one exception. The phrase "the sex trafficking and harassment of AP1" has been removed and replaced with the words: "that Toth had subjected 13-year-old AP1 to acts of prostitution on Frehoo's premises."

Respondents' Exceptions to Proposed Credibility Findings

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

Respondents' Exceptions to Proposed Damages and Additional Relief

A. Manner of Payment

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

B. Allocation of Damages

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

C. Cease and Desist Order Against Frehoo

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

D. Cease and Desist Order Against Herkenrath

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

E. BOLI's Authority to Award Emotional Distress Damages

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

First, Respondents' argument is inconsistent with a plain reading of the statute, which does not differentiate between employment discrimination and housing

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

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

Although the overall purpose of the statutory revisions was to reorganize the civil rights statutes without changing the substance, there were some changes of substance made. For example, the statute prohibiting discrimination against workers applying for workers' compensation benefits was amended to indicate that the "section applies only to employers who employ six or more persons." *Compare* ORS 659.410 (1999) to 659A.040(1),(2) (2001). However, there is no indication in the legislative history that the legislature intended to change the statute involving remedies to remove the ability to award actual damages. It has long been understood that BOLI's Commissioner has the authority to award damages to a person who has been aggrieved by an unlawful employment practice. *Williams v. Joyce*, 4 Or App 482, 504, 479 P2d 513, 524 (1971) (concluding that former ORS 659.010(2)[20] gave BOLI's Commissioner the right to award

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

damages for mental suffering); *Fred Meyer, Inc.*, 39 Or App at 260 (upholding *Williams* and noting that the legislature had amended the statute after the *Williams* decision but did not exclude emotional distress damages as a permissible remedy). *See also Gaudry v. Bureau of Labor and Industries*, 48 Or App 589, 617 P2d 668 (1980) (affirming award of damages for mental anguish, humiliation and frustration); *Schipporeit v. Roberts*, 93 Or App 12, 15 (1988) (confirming that BOLI's Commissioner had the authority to award damages, including damages for mental distress); *aff'd*, 308 Or 199, 778 P2d 953 (1989). Therefore, this exception is denied.

F. Respondents' Right to a Jury Trial

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

G. Amount of Damages

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

ORDER

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(b), ORS 659A.030(1)(g), OAR 839-005-0021, OAR 839-005-0030(1)(a)(A), OAR 839-005-0030(1)(b), OAR 839-005-0030(5) and OAR 839-005-0030(7) by Respondents **Frehoo, Inc., Jon Herkenrath, and Todd Mitchell** and as payment of the damages awarded, the Deputy Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Frehoo, Inc., Jon Herkenrath, and Todd MItchell** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1800 SW First Avenue, Suite 500, Portland, Oregon 97201, a certified check payable to the Bureau of Labor and Industries in trust for AP2 in the amount of:

"(2) 'Cease and desist order' means an order * * * issued to eliminate the effects of any unlawful practice found, addressed to a respondent requiring him to:
"(a) Perform an act * * * reasonably calculated to carry out the purposes of ORS 659.010 to 659.110, eliminate the effects of an unlawful practice found, and protect the rights of the complainant and other persons similarly situated * * *."

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

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

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

C. The charges of aiding and abetting against Respondents Pamela Colburn Lisa Heinzman-Myers, Randy Kaiser, and Jeff Struhar are hereby dismissed.

APPENDIX A

FINDINGS OF FACT – PROCEDURAL

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

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

High Life, LLC

IHAT, Inc.

JMS Holdings, Inc.

NIMBY, LLC

MJ10, Inc.

NPC Concepts, LLC

NPC Properties, LLC

RGK Holdings, Inc. fka Phoenix Holdings, Inc.

SCS2, Inc. DBA Stars Cabaret … At The Capitol

SCTO, Inc. DBA Stars Cabaret ..Bridgeport

SHM Holdings, Inc.

Weston Court Properties, LLC

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

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

Pamela Colburn

Lisa Heinzman-Myers

Jonathan Herkenrath

Randy Kaiser

Todd Mitchell

Jeff Struhar

(Ex. A3)

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

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

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

The Formal Charges alleged that Respondents discriminated against both aggrieved persons[21] in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former* and *current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030. The Formal Charges also alleged that all of the individual Respondents "aided, abetted, incited, compelled and/or coerced acts forbidden under ORS chapter 659A, specifically the unlawful practices alleged here, and [are] individually liable for violations alleged herein as an aider and abettor pursuant to ORS 659A.030(1)(g)." The Formal Charges sought "[d]amages for emotional and physical suffering for each aggrieved person in the amount of at least $4,000,000." The Formal Charges did not include the names of the individuals for whom damages were being sought. (Ex. X2)

6) On March 31, 2016, the forum issued a Notice of Hearing stating the time and place of the hearing as August 2, 2016, beginning at 9:30 a.m., at BOLI's Portland, Oregon office. Together with the Notice of Hearing, the forum sent a copy of the Formal Charges, a multi-language warning notice, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearing rules, OAR 839-050-000 to 839-050-0445. (Ex. X2, X2a-X2f)

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

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

- The Agency's Motion for Protective Order should be granted, and the definition of PII contained in footnote 1 of the Agency's motion was appropriate.

- The sample form of protective order emailed by Respondents' attorney on April 11, 2016, was acceptable, subject to appropriate revisions to adapt the order to this forum and to the specifics of this case.

- Should Respondents' counsel need to disclose the aggrieved persons' PII, pursuant to a factual investigation and/or discovery process in this case, Respondents' counsel will retain written acknowledgements signed by each and every individual to whom a disclosure of said personal identifying information was made. The written acknowledgment will reflect that the individual has read the protective order and agrees to abide by its terms.

- A draft of the Protective Order was provided to the parties. The Agency requested revisions to the document. After the Agency conferred with Respondents' attorney, a revised document was emailed to the ALJ and the requested changes were incorporated into a Protective Order.

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

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

(Exs. X3, X5, X9)

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

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

"* * * * *

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

"* * * * *

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

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

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

"* * * * *

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

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

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

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

(Ex. X7)

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

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

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

- Answer and Defenses to Formal Charges and Notice of Hearing;

and

- Motion to Dismiss.

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

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

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

Bureau of Labor and Industries

ATTN: Contested Case Coordinator

1045 State Office Building,

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

IT IS SO ORDERED"

(Ex. X10)

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

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

"The envelope containing the Answer was sent to the correct street address and included the name of the assigned ALJ (a person who is included

in the definition of the 'Forum'), but did not include the words 'Contested Case Coordinator.' Nevertheless, the envelope containing the Answer was stamped:

'RECEIVED BY

CONTESTED CASE

COORDINATOR

April 20, 2016

BUREAU OF LABOR

AND INDUSTRIES'

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

(Exs. X8, X13, X14)

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

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

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

- Respondents' Motion to Dismiss.

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

(Ex. X15)

13) On May 6, 2016, the ALJ issued an Interim Order explaining the requirements for filing motions and other documents, which notified the parties that all documents needed to be submitted in writing to BOLI's Contested Case Coordinator. The ALJ also issued an Interim Order requiring the parties to file case summaries which identified witnesses and exhibits two weeks in advance of the date set for hearing. (Exs. X19, X20)

14) The Agency filed a request for clarification of the ALJ's Interim Order re Agency's Motion for Default on May 4, 2016. Respondents submitted a filing in opposition to the request for clarification on May 5, 2016. On May 10, 2016, an interim order was issued which stated, in pertinent part:

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

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

"1. <u>The Ruling in *Green Thumb* Has Not Been Overruled and Remains Good Law, But it Does Not Apply to the Facts at Issue in the Agency's Motion for Default.</u>

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

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

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

"Third, the Agency attempted to file the document in *Green Thumb* by mail, but it was (1) marked with insufficient postage, (2) 'not mailed to the

address where exceptions must be mailed,' and (3) not received by the Contested Case Coordinator on the due date. By contrast, Respondents' Answer in this case was submitted by hand delivery and (1) arrived at the correct physical address on the due date, (2) was addressed to the ALJ, who is included in the definition of the 'Forum,' and (3) a stamp on the envelope and on the document itself stated that it was 'received' by the Contested Case Coordinator on the due date. Additionally, the envelope containing the Acceptance of Service was marked in the same manner as the envelope containing the Answer, and it was previously accepted for filing. The combination of these unique factors[22] demonstrated that the Answer was filed on time with the Forum in accordance with the requirements of OAR 839-050-0040 and OAR 839-050-0020(15).

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

"Put simply, *Green Thumb* involved a different type of document, different administrative rules[23] and different facts than those at issue in the Agency's Motion for Default. Thus, although the ruling in *Green* Thumb remains good law, it does not apply to the situation in this case and, therefore, the motion for default was denied.

---

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

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

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

"The ruling on the Agency's Motion for Default applied the relevant legal authority to the specific facts at issue in that motion. The Agency's Request for Clarification raises a number of questions that do not apply to the facts of this case, and seem to be hypothetical situations that may or may not arise in the future.[24] It is understandable that the Agency would like clarity on those matters. However, the ALJ's role is limited to the 'consideration of all issues *properly before the presiding officer in the case and the correct application of law to those facts*.' ORS 183.417(8) (emphasis added). Therefore, the ALJ is unable to issue a ruling on matters not at issue in this case.

"**Conclusion**

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

(Exs. X16, X17, X21)

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

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

- Unless a different time period is provided below or in a subsequent interim order, all parties shall have 14 days to respond to all motions. This includes any motions currently pending at this time.

- All discovery must be exchanged and any discovery motions must be filed by **July 29, 2016**. The parties are encouraged to file motions earlier than this date if it becomes clear that they are unable to reach an agreement on particular issues.

- All dispositive motions, including motions for summary judgment and/or motions to dismiss, must be filed no later than **September 16, 2016**.

- Responses to dispositive motions must be filed by **October 7, 2016**.

- Case summaries must be filed by **October 25, 2016**.

- The hearing in this matter is set to begin on **Tuesday, November 8, 2016 at**

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

9:00 a.m. The hearing will be in recess on Friday, November 11, 2016, due to the Veteran's Day holiday, and will resume **Monday, November 14, 2016**, until it concludes.

- The hearing will be held at the **Office of Administrative Hearings, located at 7995 S.W. Mohawk Street, Entrance B, Tualatin, Oregon**. Additionally, the forum will use a court reporter to make the official record of the hearing.[25]"

(Exs. X11, X23)

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

"INTRODUCTION

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

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

"DISCUSSION

"The matters raised in Respondents' motions all revolve around concerns that there should be an unbiased decision maker and that there are inadequate procedural due process protections. Procedural due process requires a decision maker to be free of actual bias; Respondents have the burden of demonstrating an actual bias. *See Teledyne Wah Chang v. Energy Facility Siting Council,* 298 Or

[25] The ALJ may also make an electronic recording of the hearing, but the court reporter's transcript will be the official record.

240, 262 (1985), *citing Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980).

"Most of Respondents' arguments expressed concern about the fairness of the Commissioner acting as both the Complainant and the person who would be issuing the Final Order in this matter. In response, the Agency states that the Deputy Commissioner, not Commissioner Avakian, issues Final Orders when a Commissioner's Complaint has been filed. (Ex. 1 to Agency's Resp.); *In the Matter of Blachana*, LLC, 32 BOLI 211 (2012) (BOLI's Commissioner filed the complaint under ORS 659A.825(1)(b), then delegated the ultimate decision-making authority in the case to the Deputy Commissioner, who signed and issued the Final Order). There is no evidence on the record to suggest that the Deputy Commissioner has an actual bias towards Respondents.

"Respondents also argue that BOLI's prosecutorial and adjudicative roles were not adequately separated when the Contested Case Coordinator signed a declaration in support of the Agency's Motion for Default, which was ultimately denied in an interim order.[26] Respondents express concerns that the Contested Case Coordinator 'strongly *and misleadingly* implied that [she] had never personally received Respondent's Answer, when in reality, *she had*.'[27] (Respondent's Motion, p. 5, emphasis in original) Regardless of whether Respondents' characterization of the Contested Case Coordinator's actions is correct or not, there is no evidence that she acted with an actual bias towards Respondents when signing the declaration. Moreover, the Contested Case Coordinator is not a decision maker in this matter.

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

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

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

18) On June 23, 2016, Respondents filed a Motion for 60-Day Hearing Set Over because one of their attorneys had a trial date that conflicted with the hearing and

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

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

due to the need for more time to review the volume of discovery that was produced to Respondents by the Agency. The Agency timely filed an objection to the motion on July 5, 2016, asserting that Respondents' stated reasons did not constitute "good cause" for a postponement. Respondents filed a "supplemental motion" on July 6, 2016, arguing that the Agency's discovery responses were inadequate. On July 7, 2016, the ALJ issued an interim order ruling on Respondents' motion which stated, in pertinent part:

"INTRODUCTION

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

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

"* * *

"DISCUSSION

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

(A) Whether previous postponements have been granted;

(B) The timeliness of the request;

(C) Whether a participant has previously indicated it was prepared to proceed;

(D) Whether there is a reasonable alternative to postponement; for example, submitting a sworn statement of a witness; and

(E) The date the hearing was originally scheduled to commence.

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

> "The forum applies the above-referenced factors to this case as follows:
>
> (A) The hearing in this matter was previously postponed once.
>
> (B) The current postponement request is being made several months in advance of the November 8, 2016, hearing date.
>
> (C) Everyone who attended the prehearing conference held on May 12, 2016 -- including counsel for Respondents -- stated that they were prepared to proceed with a hearing on November 8, 2016.
>
> (D) There may be reasonable alternatives to address Respondents' concerns about discovery short of postponing the hearing, e.g. extending the current discovery deadline. It is unclear whether the parties have thoroughly explored other options.
>
> (E) The hearing was originally scheduled for August 2, 2016. Respondents' request that the hearing be postponed until January 2017 is five months after the original hearing date.

The following ruling takes these considerations into account.

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

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

in showing that there is 'good cause' to reset the hearing due to an 'excusable mistake' or new circumstances 'over which [Respondents] had no control.'

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

Respondents' motion and supplemental motion are DENIED."

(Exs. X32 – X35)

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

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

"DISCUSSION AND RULING

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

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

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

"OBSERVATIONS AND SUGGESTIONS

"In order to assist the parties in moving forward with discovery, it appears that the parties could benefit from some observations, which are made solely for the purpose of assisting the parties and do not constitute an order to provide discovery.

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

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

- The parties should begin with the assumption that 138 interrogatories were issued in Respondents' first and second informal requests. The first interrogatory in the third request appears to be the 139th interrogatory. (Unless briefing on a future motion to compel persuasively demonstrates that 138 is the incorrect number of interrogatories in the first and second informal request, the forum will assume that the third informal request began with interrogatory 139.)

- At any time prior to the discovery motion deadline, Respondents may file a motion to compel the Agency to respond if they believe they have not received adequate responses. If necessary, Respondents may also file a motion requesting permission to issue additional interrogatories.

- In responding to a motion to compel filed by Respondents, the Agency should be prepared to offer an explanation as to why Respondents' calculations as to the number of interrogatories are incorrect. The Agency should also offer its own alternative calculation so that the forum has a more specific understanding as to why the Agency disagrees with Respondents' version.

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

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

(Exs. X37, X38, X44, X47)

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

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

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

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

"DISCUSSION

"* * * * *

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

"Respondents also move to dismiss all of the individuals named as aiders and abettors, arguing that the Formal Charges do not allege facts which indicate how those Respondents aided or abetted the alleged harassment of the aggrieved persons. In support of their argument, Respondents rely on cases interpreting Oregon's Rules of Civil Procedure, which do not apply to this administrative proceeding. Instead, OAR 839-050-0060(1)(b) contains the standard for the sufficiency of a charging document and requires that a charging document contain a 'short and concise statement of the matters that constitute the violation.' *See also* ORS 183.415(3)(d) (adequate notice of an agency action must include a 'short and plain statement of the matters asserted or charged'). Respondents have not argued that the allegations in the Formal Charges fail to meet the applicable standard.[28]

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

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

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

24) On August 8, 2016, an interim order was issued granting the Agency's Motion for Protective Order Concerning Confidential Oregon Employment Department Records, filed July 22, 2016, asserting that it intended to disclose documents Bates numbered 019547-019830 ("OED Documents"). The Agency asserted that the documents were confidential and exempt from disclosure pursuant to ORS 657.665(1).

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

Respondents did not oppose the motion. The ALJ's interim order stated, in pertinent part:

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

(Exs. X41, X54)

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

> "Although the Agency's time for responding to these motions has not passed, it appears that it will be beneficial to the parties to have a ruling issued on this matter now so that documents can be served and filed. The Agency may still file responses to these motions and this ruling may be revisited, if necessary.
>
> "The forum finds that Respondents' description of the information in the motions filed by Respondents on August 9, 2016, appears to be Personal Identifying Information as defined in the forum's Interim Protective Order issued April 27, 2016. Accordingly, Respondents have permission to file these documents under seal and serve the same on the Agency subject to the Interim Protective Order.
>
> "**Any documents submitted for filing under seal should be placed in a separate envelope with a label that prominently states: CONFIDENTIAL – TO BE FILED UNDER SEAL.**
>
> "Respondents' motion is GRANTED."

(Ex. X63)

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

> "In a BOLI Contested Case proceeding, the ALJ's authority to issue an interim order allowing depositions is limited and is not as extensive as that provided in civil rules of procedure governing trial court proceedings. *See, e.g.,* ORCP 39A ('any party may take the testimony of any person, including a party, by deposition upon oral examination'); FRCP 30(a)(1) ('A party may, by oral questions, depose any person, including a party, without leave of court,' subject to certain exceptions). BOLI's administrative rule, OAR 839-050-0200(3), provides:
>
> > 'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'
>
> "Respondents assert that they would suffer substantial prejudice if they are unable to depose Det. Opitz because (1) he was 'deeply involved in the investigations related to both of the Aggrieved Persons'; (2) Respondents expect that he will testify at the hearing; and (3) Respondents will not have the opportunity to question him prior to the hearing and, because he is not a party, 'Respondents are unable to discover this information through interrogatories or requests for admission.' [They] also assert that they 'must have an adequate opportunity before hearing to thoroughly question him about his recollection of the events, much of which will not appear in documents subject to subpoena.'
>
> "In response to the interim order of August 8, 2016, Respondents indicated that several efforts were made to speak to Det. Opitz informally. Although Det. Opitz appeared to be willing to speak to Respondents informally, the Beaverton City Attorney's office said that they would rather have any discussion with Det. Opitz take place pursuant to a subpoena and a deposition.
>
> "In response to the interim order of August 8, 2016, the Agency provided the following regarding Det. Opitz:
>
> - Police reports authored by Det. Opitz re Aggrieved Person # 1 (Bates Nos. 017115-017144, 017251-017253, 017279-017285, 017292-017297)
> - Police reports authored by Det. Opitz re Aggrieved Person # 2 (Bates Nos. 017173-017181)
> - Police reports authored by others describing Det. Opitz's investigation activities

- Transcript of Trial Testimony of Det. Opitz in Moreno-Hernandez Trial (re Aggrieved Person # 1) (Bates Nos. 017769-017931)

- Courtroom Log for the Trial of Moreno-Hernandez (re Aggrieved Person # 1), reflecting that Det. Opitz testified under oath as follows:

    - From 10:57 a.m. – 11:59 a.m. on September 11, 2014 (Bates No. 000050)

    - From 1:23 p.m. – 1:46 p.m. on September 11, 2014 (Bates Nos. 000050-000051)

    - From 1:53 p.m. – 3:07 p.m. on September 11, 2014 (Bates Nos. 000051-000053)

    - From 3:19 p.m. - 3:35 p.m. on September 11, 2014 (Bates No. 000053)

- Audio Recording of Det. Opitz's testimony in the trial of Moreno-Hernandez (re Aggrieved Person # 1) (Bates Nos. . 000281-000323)

- Transcript of Trial Testimony of Det. Opitz in Anthony Curry Trial (re Aggrieved Person # 2) (Bates Nos. 018314-018377)

- Courtroom Log for the Trial of Anthony Curry (re Aggrieved Person # 2), reflecting that Det. Opitz testified under oath as follows:

    - From 10:16 a.m. - 11:23 a.m. on June 2, 2015 (Bates No. 000394)

    - From 3:30 [p.m.] - 4:55 p.m. on June 4, 2013 (Bates Nos. 000388-000389)

    - From 9:23 a.m. - 10:38 a.m. on June 5, 2015 (Bates Nos. 000391-000392)

- Audio Recording of Det. Opitz's testimony in the trial of Anthony Curry (re Aggrieved Person # 2) (Bates Nos. . 415-429, 597-615, 623-639)

- There are also references to videotaped interviews that Opitz participated in, although it is not clear if Respondents were provided with a copy of those interviews.

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

> '* * * Respondents are typically provided with notes from investigative interviews of witnesses. Neither the Agency nor Respondents have provided information as to whether that occurred in this case. However, unless Respondents did not receive the usual investigative notes of the Agency's interview with Cheryl McPherson or no such notes exist because McPherson was never interviewed, I deny Respondents' request to take her deposition.'

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

> "As illustrated above, the information provided to Respondents in this case (police reports and sworn testimony of Det. Opitz regarding both Aggrieved Persons) was extensive and likely significantly more detailed than the 'usual investigative notes' discussed in *Sweetcakes*. Respondents have not articulated any specific information that is missing from the police reports and trial testimony that they need to obtain from Det. Opitz. Given the policy set forth in OAR 839-050-0200(3) disfavoring depositions and the precedent set in the *Sweetcakes* case, the forum is unable to conclude that Respondents will be 'substantially prejudiced' if they cannot depose Det. Opitz.
>
> "Respondents' motion is DENIED."

(Exs. X46, X52, X53, X70)

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

> "In a BOLI contested case proceeding, the ALJ's authority to issue an interim order allowing depositions is limited and is not as extensive as that provided in civil rules of procedure governing trial court proceedings. *See, e.g.,* ORCP 39A ('any party may take the testimony of any person, including a party, by deposition upon oral examination'); FRCP 30(a)(1) ('A party may, by oral questions, depose any person, including a party, without leave of court,' subject to certain exceptions). BOLI's administrative rule, OAR 839-050-0200(3), provides:
>
> > 'Depositions are strongly disfavored and will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of the motion to depose a particular witness.'
>
> "Respondents assert that they would suffer substantial prejudice if they are unable to depose the Aggrieved Persons because the amount of damages

requested for each Aggrieved Person ($4 million) 'necessarily implies the existence of harm that goes far beyond that suffered by most victims of employment discrimination.' Respondents describe the information they would need to obtain as follows:

> 'Respondents must have an adequate opportunity before hearing to fully ascertain not only the nature of the Aggrieved Persons' alleged experiences at Stars Cabaret & Steak House, but also how those experiences might have interacted with other contributing sources of physical and emotional harm that may have been present in their lives. To do this effectively, Respondents must have the opportunity to thoroughly question each Aggrieved Person about not only the events alleged in the Formal Charges, but also other potential events that may have affected the Aggrieved Person' physical and emotional state, whether by contributing to the alleged harm they suffered or by mitigating the damages they incurred. Such events may have occurred not only during the time periods alleged in the Formal Charges, but also before and after those periods, and Respondents will be unable to fully assess the nature of the Aggrieved Persons' damages without such an opportunity.'

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

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

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

- Police reports authored by Det. Opitz re Aggrieved Person # 1 (Bates Nos. 017115-017144, 017251-017253, 017279-017285, 017292-017297)

- Police reports authored by others describing Det. Opitz's investigation activities

- Transcript of Testimony of Aggrieved Person # 1 in Moreno-Hernandez Trial (Bates Nos. 017561-017608)

- Courtroom Log for the Trial of Moreno-Hernandez reflecting that Aggrieved Person # 1 testified under oath as follows:

    - From 1:49 p.m. – 2:11 p.m. on September 10, 2014 (Bates No. 000044)

    - From 2:27 p.m. – 2:59 p.m. on September 10, 2014 (Bates Nos. 000045)

- Audio Recording of the testimony [of] Aggrieved Person # 1 in the trial of Moreno-Hernandez (Bates Nos. 000232-000244)

- Police reports authored by Det. Opitz re Aggrieved Person # 2 (Bates Nos. 017173-017181)

- Transcript of Trial Testimony of re Aggrieved Person # 2 in Anthony Curry Trial (Bates Nos. 018912-019035)

- Courtroom Log for the Trial of Anthony Curry reflecting that Aggrieved Person # 2 testified under oath as follows:

    - From 10:09 a.m. – 10:58 a.m. on June 4, 2015 (Bates No. 000385)

    - From 11:12 a.m. – 11:57 a.m. on June 4, 2015 (Bates Nos. . 000385-000386)

    - From 1:45 p.m. – 2:36 p.m. on June 4, 2015 (Bates Nos. 000386-000387)

- Audio Recording of the testimony of Aggrieved Person # 2 in the trial of Anthony Curry (Bates Nos. 000556-000576, 000578-000587)

- There are also references a videotaped REDACTED interview of

Aggrieved Person # 2, although it is not clear if Respondents were provided with a copy of that interview.

- The documents also suggest that Respondents were provided with copies of medical records of the Aggrieved Persons.

"The information provided by the Agency is quite extensive and includes testimony and statements from both of the Aggrieved Persons about events that took place at the Beaverton Stars which are the subject of the Formal Charges. These documents also contain detailed, descriptive statements from each Aggrieved Party about their whereabouts and activities during the time period immediately before and after they were at the Beaverton Stars location. The amount of information provided in these documents is more detailed than what is usually exchanged in a BOLI civil rights case. Nevertheless, the forum recognizes that Respondents likely have a need for additional relevant information that was not covered in the criminal investigations and trials. Of the discovery requested by Respondents on the issue of damages, the Agency provided substantive answers (either in written narrative responses or by referring to documents produced in discovery) to Interrogatory Nos. 21, 22, 31-35, 37-41, and 43-51, but objected on the grounds of 'overbreadth and relevance' to Interrogatory Nos. 36 and 42, and objected to Interrogatory No57 on the basis of relevance.[29] The Agency also objected to Interrogatory Nos. 47, 52 and 135 on the grounds that they were 'overbroad,' along with other objections. The Agency answered Request for Admission Nos. 1, 22, 46 and 83, and indicated that it had provided all information within its possession in response to Requests for Production Nos. 17 and 18.

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

"**ANALYSIS OF THE AGENCY'S LEVEL OF COOPERATION**

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

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

'Interrogatory[30] 36: With respect to each condition of Aggrieved Person #1 state any other causes of emotional distress in the Aggrieved Person's life.**'**

'*The Agency objects to this interrogatory, on the basis of overbreadth and relevance.*'

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

'*The Agency objects to this interrogatory, on the basis of overbreadth and relevance.*'

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

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

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

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

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

is finalized, ordered to be provided to a case summary, the Agency will provide its witness list.'

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

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

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

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

> '*(a) Aggrieved Person #1: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant to the factual matters alleged in this case. The agency objects to this request to the extent it requests information subject to work-product and/or attorney-client information.*
>
> '(b) *Aggrieved Person #2: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant to the factual matters alleged in this case. The agency objects to this request to the extent it requests information subject to work-product and/or attorney-client information.*'

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

"Interrogatory Nos. 36 and 42 request information about other causes of emotional distress. The forum has previously found that medical records close in time to the events in the case 'contained information generally relevant to the issue of Complainant's entitlement to damages for emotional, mental, and physical suffering.' *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 97 (2012). Accordingly, Respondents are entitled to information about other potential causes of emotional distress in the time period near the events in this

case. For purposes of this case and due to the ages of the Aggrieved Persons, the forum finds that Respondents are entitled to responses within the time period of one year prior to the events in the Formal Charges up until present day.

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

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

"The Agency's objections to Interrogatory No. 135 are consistent with the forum's precedent establishing that communications with the Agency's staff about the prosecution of a case are privileged. *See In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 265 (2013) (notes made by the case presenter[31] were privileged under the work product doctrine); *In the Matter of Logan International, Ltd.*, 26 BOLI 254, 257-58 (2005) (the Agency did not have to produce interviews specifically conducted by the case presenter). Thus, Respondents are not entitled to this information.

"As discussed above, Respondents were entitled to receive some information that the Agency refused to provide. **Accordingly, the Agency is instructed to provide responses to Interrogatory Nos. 36, 42,[32] 47 and 52 no later than August 30, 2016.** If the Agency fails to provide those responses, Respondents may request a telephone conference to address the matter and, if necessary, this ruling will be revisited.

"ANALYSIS OF WHETHER THERE IS SUBSTANTIAL PREJUDICE

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

[31] Currently, administrative prosecutors perform the duties that used to be carried out by case presenters.
[32] Answers to Interrogatories 36 and 42 can be restricted to the time period of one year prior to the events described in the Formal Charges up until the present day.

> 'I have reviewed prior BOLI Final Orders in which damages were awarded for emotional and mental suffering and find that *this case stands well apart from all its predecessors in the exhaustive list of harms alleged by Complainants for which the Agency seeks damages. No other case comes even remotely close.* In defending themselves, Respondents have a right to inquire into each type of harm alleged by Complainants to determine the extent of the harm and whether Complainants' physical, mental, and emotional suffering was caused, at least in part, if not in whole, by events and circumstances that were unrelated to Aaron Klein's ORS 659A.403 violation. *Based on the sheer number and variety of types of alleged harm, there is no practical way Respondents can accomplish an effective inquiry using interrogatories.* I find that Respondents will be substantially prejudiced if they are not allowed to depose Complainants.'

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

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

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

(Exs. X45, X52, X53, X73)

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

"**MOTION NO. 1 RE INTERIM ORDER ISSUED AUGUST 1, 2016**

"Respondents first assert that the interim order of August 1, 2016, incorrectly cites to a portion of the case of *OR-OSHA v. CBI Servs., Inc.*, 356 Or 577, 341 P3d 701 (2014), which discusses the interpretation of a delegative

statutory term, not an inexact term. On August 22, 2016, the forum issued an Amended Interim Order replacing the *OR-OSHA* citations with references to *Bergerson v. Salem-Keizer Sch. Dist.*, 341 Or 401, 411, 144 P3d 918 (2006), which states that an agency's interpretation of inexact terms is to be reviewed 'to ensure that it is consistent with the legislature's intent.' The forum also notes that the correct standard was used and discussed in the Interim Order of August 1, 2016, as follows:

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

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

"Second, Respondents also assert that the Interim Order of August 1, 2015, is inconsistent with the Final Order in the case of *In the Matter of Maltby Biocontrol, Inc.*, 33 BOLI 121 (2014). As Respondents point out, one of the complaints in *Maltby* was filed by Oregon's Attorney General. The administrative rule at issue in this case (OAR 839-003-0100(2)) applies to complaints filed by the Commissioner, not the Attorney General. Accordingly, the forum's ruling does not conflict with the *Maltby* decision.

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

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

"Motion No. 1 is DENIED.

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

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

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

"Procedural due process requires a decision maker to be free of actual bias; Respondents have the burden of demonstrating an actual bias. *See Teledyne Wah Chang v. Energy Facility Siting Council,* 298 Or 240, 262 (1985), *citing Boughan v. Board of Engineering Examiners,* 46 Or App 287, 611 P.2d 670, *rev den* 289 Or 588 (1980). The forwarded news articles indicate that some of the criminal conduct occurred at one of Respondents' establishments, but do not discuss further details related to the Formal Charges. The email forwarding these articles does not establish that the Deputy Commissioner is 'personally biased against' Respondents. *See Samuel v. Bd. of Chiropractic Examiners*, 77 Or App 53, 60, 712 P2d 132, 137 (1985), *rev den*, 300 Or 704 (1986), and *rev den*, 302 Or 36 (1986).

"Accordingly, the motion is also DENIED.

"NOTICE TO THE PARTIES

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

(Exs. X62, X79, X80)

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

"MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

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

"A. ORS 659A.820(3)

"Respondents first cite to ORS 659A.820(3)(a) which states that 'a complaint may not be filed under *this section* if a civil action has been commenced in state or federal court alleging the same matters.' (Emphasis added). Immediately prior to the subpart cited by Respondents, the statute makes clear that it pertains to '[a]ny person claiming to be aggrieved by an alleged unlawful practice.' ORS 659A.820(2). It does not apply to complaints filed by the Commissioner, which are governed separately by ORS 659A.825. Accordingly, because the complainant in this case is the Commissioner, ORS 659A.820 does not apply and this argument requires no further analysis.[33]

"B. ORS 659A.870(1)

"Respondents next assert that ORS 659A.820(3)(a) should be extended to apply to Commissioner's complaints, relying on ORS 659A.870(1). That statute specifically refers to 'the right of the person to file a complaint with the Commissioner * * * under ORS 659A.820 with respect to the matters alleged in the civil action.' ORS 659A.870(1). The statute specifically mentions ORS 659A.820 (BOLI complaints filed by aggrieved persons) without reference to ORS 659A.825 (BOLI complaints filed by the Commissioner). Notably, when the legislature wanted to refer to both ORS 659A.820 and 659.825 together, it did so. *See*, *e.g.*, ORS 659A.835(1) ('after the filing of any complaint under ORS 659A.820 or 659A.825, the Commissioner * * * may investigate the complaint'); ORS 659A.835(2) ('The Commissioner shall commence an investigation of any complaint filed under ORS 659A.820 or 659A.825 * * *'); ORS 659A.855(2)(a) (if a complaint 'is filed under ORS 659A.820 or 659A.825' alleging housing law violations, the commissioner may assess specified civil penalties). The forum will

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

not insert ORS 659A.825 into 659A.830(1) when the legislature omitted it. ORS 174.010.

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

"C. ORS 659A.830(1)

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

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

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

"D. Legislative Policy of ORS Chapter 659A

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

"E. 'Public Policy and a Host of Legal Doctrines'

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

basis for the motion, the theories discussed in Respondents' motion do not support dismissal for the reasons described below.

"1. Res Judicata

"'[C]laim preclusion" as that term is typically used, formerly known as *res judicata*, prohibits a party from relitigating a cause of action against the same defendant involving the same factual transaction as was litigated in the previous adjudication, *if there has been a final judgment in the first action*.' *Krisor v. Lake Cty. Fair Bd*., 256 Or App 190, 193, 302 P3d 455, 457 (2013), *rev den*, 354 Or 61 (2013) (emphasis added), quoting *Drews v. EBI Companies*, 310 Or 134, 139-40, 795 P2d 531 (1990). Because no final judgment has been entered involving the parties in this case, this doctrine does not apply.[34]

"2. Election of Remedies

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

> '* * * The doctrine of election between inconsistent remedies does not require an election before the entry of judgment. A party need only choose between or among inconsistent remedies, not inconsistent claims or theories of recovery. ORCP 16 C; *see also Colonial Leasing Co. v. Tracy*, 276 Or 1193, 1196–97, 557 P.2d 639 (1976) ("Ordinarily an election is not made until a judicial proceeding has gone to judgment on the merits."). Accordingly, subject to the limiting principles discussed above, when it comes to an election of remedies, *the choice is for the claimant to make, not the defendant or the court*.'

Evergreen W. Bus. Ctr., LLC v. Emmert, 354 Or 790, 805–06, 323 P3d 250 (2014) (emphasis added). Since the doctrine only applies to a choice a claimant may need to make *before* judgment has been entered, it does not bar the current case from proceeding.[35]

"3. Prohibition Against Multiple Recoveries

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

---

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

[35] Because the doctrine does not apply, it is not necessary to examine the Agency's argument that the Formal Charges and the July 2016 lawsuit "involve neither the same parties, nor the same claims."

"4. Another Action Pending

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

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

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

"5. Avoiding Inconsistent Judgments

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

"6. Exhaustion of Administrative Remedies

"The Oregon Supreme Court has recently described this legal theory as follows: 'The doctrine of exhaustion of administrative remedies generally

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

"7. Conclusion

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

"MOTION TO ABATE

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

"Accordingly, this motion is also DENIED.

"MOTION TO SUBSTITUTE PARTIES

"Respondents also request that the forum remove the Commissioner as the complainant in this case and add the Aggrieved Persons pursuant to OAR 839-050-0170(1) and (5). In support of this argument, Respondents point to various legal theories, such as 'real parties in interest' and the right to due process, but provide no legal briefing to show how those theories might require the forum to substitute parties.

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

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

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

the Oregon Constitution was adopted in 1857, then a person filing the same cause of action in court today also has a right to a jury trial.

"However, there is no constitutional entitlement to a jury trial as to the claims under ORS chapter 659A alleged in the Formal Charges, as there was not a right to a jury trial for such claims in 1857. *See, e.g., Wincer v. Ind. Paper Stock Co.*, 48 Or App 859, 863, 618 P.2d 15 (1980). *See also In the Matter of Emerald Steel Fabricators, Inc.,* 27 BOLI 242, 245 (2006),[36] citing *Cornelison v. Seabold*, 254 Or 401, 404-05 (1969); *Williams v. Joyce*, 4 Or App 482, 501 (1971); *Fred Meyer, Inc. v. Bureau of Labor of Labor and Industries*, 39 Or App 253 (1979); *City of Portland v. Bureau of Labor and Industries*, 61 Or App 182, 193 (1982).

"Accordingly the motion to substitute is also DENIED.

"MOTION TO POSTPONE

"Respondents also move to postpone the case, essentially relying on most of the arguments made in support of their other motions.

"For the same reason discussed in ruling on the motions above, the motion to postpone is also DENIED."

(Exs. X50, X71, X81)

30) The Agency filed a Motion to Compel discovery on August 15, 2016. Respondents responded to the motion on August 22, 2016. On September 7, 2016, an interim order was issued ruling on the motion which stated, in pertinent part:

"LEGAL STANDARD

'Any discovery request must be reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7). In determining whether a request is 'reasonably likely to produce information that is generally relevant to the case,' it is important to take note of the claims and defenses in the case.

"*Discrimination/Sexual Harassment*

"The Formal Charges allege that 'Respondents' discriminated against both Aggrieved Persons in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former* and *current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030. ORS 659A.030(1)(b) states, in pertinent part, that it is an unlawful employment practice '[f]or an employer, because of an individual's * * * sex * * * to

[36] This Final Order was reversed on other grounds in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*, 348 Or 159, 230 P3d 518 (2010).

discriminate against the individual in compensation or in terms, conditions or privileges of employment.' OAR 839-005-0021 states:

> '(1) Employers are not required to treat all employees exactly the same, but are prohibited from using sex as the basis for employment decisions with regard to hiring, promotion or discharge; or in terms, conditions or privileges of employment such as benefits and compensation.
>
> '(2) Discrimination because of sex includes sexual harassment, discrimination based on pregnancy, childbirth and medical conditions and occurrences related to pregnancy and childbirth.'

OAR 839-005-0030 states:

> 'Sexual Harassment in Employment
>
> '(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:
>
> '(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:
>
> '(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
>
> '(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.
>
> '(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.
>
> '(2) The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.
>
> '(3) Employer proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer.

‘(4) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against that individual. A tangible employment action includes but is not limited to the following:

‘(a) Terminating employment, including constructive discharge;

‘(b) Failing to hire;

‘(c) Failing to promote; or

‘(d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.

‘(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

‘(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

‘(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

‘(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

‘(B) That the aggrieved person unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

‘(6) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by the employer's employees or agents who do not have immediate or successively higher authority over the aggrieved person when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

‘(7) Harassment by Non-Employees: An employer is liable for sexual harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases the division will consider the extent of the employer's control

and any legal responsibility the employer may have with respect to the conduct of such non-employees.

'(8) Withdrawn Consent: An employer is liable for sexual harassment of an individual by the employer's supervisory or non-supervisory employees, agents or non-employees, even if the acts complained of were of a kind previously consented to by the aggrieved person, if the employer knew or should have known that the aggrieved person had withdrawn consent to the offensive conduct.

'(9) When employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, the employer is liable for unlawful sex discrimination against other individuals who were qualified for but denied that opportunity or benefit.'

"*Aiding and Abetting*

"The Formal Charges allege that all of the individual Respondents 'aided, abetted, incited, compelled and/or coerced acts forbidden under ORS chapter 659A, specifically the unlawful practices alleged here, and [are] individually liable for violations alleged herein as an aider and abettor pursuant to ORS 659A.030(1)(g).'

"ORS 659A.030(1)(g) provides that it is an unlawful employment practice '[f]or any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under this chapter or to attempt to do so.' 'Person' includes 'individuals.' ORS 659A.001(9)(a). 'Aiding and abetting, in the context of an unlawful employment practice, means to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.' *In the Matter of Maltby Biocontrol, Inc*, 33 BOLI 121, 151 (2014) (internal citations omitted).

"ANALYSIS OF THE AGENCY'S MOTION

"***Agency's First Informal Request for Discovery***

"<u>INTERROGATORIES FOR RESPONDENT FREHOO, INC.</u>

"Discovery Requested and Objection:

'INTERROGATORY NO. 3: Describe any and all circumstances in which a person under the age of 18 was or may have been on any premises, owned or operated by Respondents, between 2012 and the present.

> 'RESPONSE: Frehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information about the presence of underage individuals at properties or business other than the one (Stars Cabaret & Steak House) in which BOLI claims Aggrieved Person #1 or #2 worked, it is not reasonably likely to produce information that is generally relevant to the case. Second, the request calls for Frehoo to speculate about how a minor "may have been" on the premises of Stars Cabaret & Steak House, which is not reasonably likely to produce information that is generally relevant to the case. Third, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevance to the case. Subject to and without waiving these objections, Frehoo incorporates by reference its responses to Interrogatory No. 2, above, and Interrogatory No. 9, below.'

"*Analysis and Ruling:*

"In its motion, the Agency asserts that this information is relevant because any minors present at or employed in 'Respondents' places of business' may have also been subjected to sexual harassment in the workplace. Respondents make two primary arguments in response. First, they assert that discovery regarding 'minors' and age-related questions are irrelevant to the allegations of sex discrimination. Second, they object to discovery about any Stars-related entities other than Freehoo/Beaverton,[37] which is the only corporate Respondent named in the case.

"The Aggrieved Persons were minors at the time of the events alleged in the Formal Charges, and their status as minors is a focus of the Agency's allegations. Accordingly, this question is relevant for that reason. However, the interrogatory was directed only to Freehoo and there are no other corporate entities or establishments named in this case. Accordingly, Freehoo/Beaverton is directed to answer this interrogatory, but may limit its response to Freehoo/Beaverton.

"B. <u>INTERROGATORIES FOR RESPONDENT PAMELA COLBURN</u>

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?

[37] In this document, "Freehoo/Beaverton" refers to Respondent Freehoo, Inc. dba Stars Cabaret & Steak House, Inc., which conducted business in Beaverton, Oregon.

> 'RESPONSE: Respondent Colburn objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Colburn who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further.'

"*Analysis and Ruling:*

"Colburn is identified in the Formal Charges as an owner of Freehoo/Beaverton. More specifically, the Agency indicates in its motion that Colburn owns shares of corporations that own Freehoo/Beaverton. With the exception of Herkenrath, who is identified as a 'manager' at Freehoo/Beaverton and Stars-Bridgeport, it appears that the other individual Respondents are also owners of either Freehoo/Beaverton or another Stars-branded entity.

"Respondents argue that this request seeks highly personal, irrelevant information. The Agency asserts that this information is relevant to show a systematic practice of sexual harassment in the workplace and because there has been evidence of 'Respondent-owners having romantic relationships with employees.' Since all of the named individual Respondents are either owners or a manager, it is not clear how a romantic or sexual relationship between these individuals is pertinent to this case, which involves alleged harassment of the Aggrieved Persons, who performed as dancers. Accordingly, the Agency's request for this information is DENIED.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.
>
> 'RESPONSE: Respondent Colburn objects to this request as overbroad, failing to describe the information sought without sufficient specificity to allow for a meaningful response, and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. Respondent Colburn has never met Aggrieved Person #1 or #2, and there is no allegation that she had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Colburn—who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further.'

"*Analysis and Ruling:*

"Respondents' objection that the request is overbroad is well taken. However, if an individual Respondent had a sexual relationship with a dancer at Freehoo/Beaverton during the time periods of the events in the case, that may be evidence of the workplace culture at Freehoo/Beaverton. Thus, it is reasonably likely to produce information that is generally relevant to the allegations of aiding and abetting in that it may show if a Respondent 'helped, assisted, or facilitated the commission of an unlawful employment practice, promoted the accomplishment thereof, helped in advancing or bringing it about, or encouraging, counsel or inciting as to its commission.' *Maltby*, 33 BOLI at 151.

"Accordingly, Colburn[38] is directed to answer whether she had a romantic or sexual relationship with an employee or independent contractor at Freehoo in the years 2012-2014.

"C. INTERROGATORIES FOR RESPONDENT LISA HEINZMAN-MYERS

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?
>
> 'RESPONSE: Respondent Heinzman-Myers objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further. Subject to these objections, Respondent Heinzman-Myers states that she has never been employed by Stars Cabaret & Steak House and has never had any active role in its operation.'

"*Analysis and Ruling:*

"See Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of

[38] As indicated below, this ruling applies to each Interrogatory No. 6 directed to the individual Respondents.

the individual, the dates of the relationship, and the individual's role in Respondents' business.

'RESPONSE: Respondent Heinzman-Myers objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. Respondent Heinzman-Myers has never met Aggrieved Person #1 or #2, and there is no allegation that she had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Heinzman-Myers—who does not participate in any manner in the operation of Stars Cabaret & Steak House—will consider responding further. Without waiving and subject to these objections, Respondent Heinzman-Myers states that she has never been employed by Stars Cabaret & Steak House and has never had any active role in its operation.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"D. <u>INTERROGATORIES FOR RESPONDENT JON HERKENRATH</u>

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual.

'RESPONSE: Respondent Herkenrath objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the specific allegations and claims regarding the alleged employment of Aggrieved Person #1 or Aggrieved Person #2 at Stars Cabaret & Steak House, Mr. Herkenrath will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety."

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or

independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

'RESPONSE: Respondent Herkenrath objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. There is no allegation that Mr. Herkenrath had or attempted to have a romantic or sexual relationship with either Aggrieved Person #1 or #2; the allegations about Aggrieved Person #2's interactions with Mr. Herkenrath as described in Mr. Lynch's notes of her interview (Bates Nos. 001032-1041) do not describe him having behaved inappropriately towards her or anyone else. She does not describe, for example, him using his management authority coercively (Q: Did you tell him what times you wanted to work? A: Yes. She would ask him if she could come in and Jon would say yes.") Aggrieved Person #2 also describes that she is not aware of any managers dating dancers. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondent Herkenrath toward Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"E. <u>INTERROGATORIES FOR RESPONDENT RANDY KAISER</u>

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 3: When did you first learn about Aggrieved Person #1's employment, or alleged employment, at Stars-Beaverton?

'RESPONSE: Prior to the Agency's charge of discrimination, Respondent Kaiser had not had any discussion in which anyone contended that Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

"*Analysis and Ruling:*

"The Agency requested that a response be provided as to Aggrieved Person #1, instead of Aggrieved Person #2. After the Agency filed its motion, Respondents amended this response to correct a typographical error. Therefore, this request is now moot.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?
>
> 'RESPONSE: Respondent Kaiser objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent Kaiser will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.
>
> 'RESPONSE: Respondent Kaiser objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. To his knowledge, Respondent Kaiser has never met Aggrieved Person #1 or #2, there is no allegation that he had or attempted to have a romantic or sexual relationship with either of them, and Aggrieved Person #1 was never, in any event, an "employee or independent contractor affiliated with Respondents." If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"F. INTERROGATORIES FOR RESPONDENT TODD MITCHELL

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 3: When did you first learn about Aggrieved Person #1's employment, or alleged employment, at Stars-Beaverton?

'RESPONSE: Prior to the Agency's charge of discrimination, Respondent Mitchell had not had any discussion in which anyone contended that Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Kaiser Interrogatory No. 3, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?

'RESPONSE: Respondent Mitchell objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent Mitchell will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.

'RESPONSE: Respondent Mitchell objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. To his knowledge, Respondent Mitchell has never met Aggrieved Person #1 or #2, and there is no allegation that he had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that

it relates to the allegations and claims regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"G. <u>INTERROGATORIES FOR RESPONDENT JEFF STRUHAR</u>

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 3: When did you first learn about Aggrieved Person #1's employment, or alleged employment, at Stars-Beaverton?

'RESPONSE: Prior to the Agency's charge of discrimination, Respondent Mitchell had not had any discussion in which anyone contended that Aggrieved Person #2 was "employed" by Stars Cabaret & Steak House.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Kaiser Interrogatory No. 3, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 5: Describe the nature of your relationship with each named respondent, including but not limited to whether the relationship was business, romantic, and/or sexual?

'RESPONSE: Respondent Struhar objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. If the Agency narrows this request so that it relates to the allegations concerning conduct by Respondents toward Aggrieved Person #1 or Aggrieved Person #2, Respondent Struhar will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 5, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 6: Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of

the individual, the dates of the relationship, and the individual's role in Respondents' business.

'RESPONSE: Respondent Struhar objects to this request as overbroad and as seeking information that is not reasonably likely to produce information that is generally relevant to this case. To his knowledge, Respondent Struhar has never met Aggrieved Person #1 or #2, and there is no allegation that he had or attempted to have a romantic or sexual relationship with either of them. If the Agency narrows this request so that it relates to the claims regarding conduct by Aggrieved Person #1 or Aggrieved Person #2, Respondent will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Colburn Interrogatory No. 6, which is incorporated herein in its entirety.

"H. REQUESTS FOR ADMISSIONS

"*Discovery Requested and Objection:*

'REQUEST NO. 2: Admit that Respondents made no changes in policy or procedure with regard to verifying the age of dancers, at any other club than the Beaverton club, after they learned of Aggrieved Person #2's abuse in the Stars-Beaverton.

'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case insofar as the request seeks age-based information; the Formal Charges allege only sex discrimination, include no claim for age discrimination or any other claim for which age is a material element, and do not allege any unlawful employment practices that occurred after they learned Aggrieved Person #2's true age. Respondents further object that Frehoo operates no clubs other than Stars Cabaret & Steak House in Beaverton, and Stars Cabaret & Steak House is the only club where any events relevant to the Formal Charges are alleged to have occurred. For these reasons and based on these objections, Respondents decline to respond to this RFA.'

"*Analysis and Ruling:*

"The Agency asserts that this request is relevant because it has 'alleged the sexual harassment of two minors in Respondents' workplace' and age verification is relevant. Respondents object to providing responses as to 'establishments other than those where the Aggrieved Persons allegedly worked.' All parties acknowledge that there were other establishments with adult entertainment that included the name 'Stars' and there was some common ownership. However, the record does not contain sufficient information about the

relationship between Freehoo/Beaverton and other Stars-named businesses to help the forum understand whether they all operate under the same policies with the same leadership and/or management. Accordingly, the record does not establish that an answer to this request for admission is 'reasonably likely to produce information that is generally relevant to the case.'

"*Discovery Requested and Objection:*

> 'REQUEST NO. 25: Admit Respondent Jeff Struhar has acted in a managerial capacity inside a Stars establishment while intoxicated or under the influence of illegal drugs.
>
> 'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking information outside of the Agency's jurisdiction; the Oregon Liquor License Commission and criminal prosecutors, not the Bureau of Labor and Industries, have jurisdiction over such matters. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Struhar—who was not alleged to have been present inside Stars Cabaret & Steak House during any of the alleged events involving either aggrieved person, and who generally does not exercise managerial responsibility at Stars Cabaret & Steak House—will consider responding further.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' However, if Respondent Struhar was intoxicated or under the influence of illegal drugs while acting in a managerial capacity in Freehoo/Beaverton, that may be evidence of the workplace culture and management oversight. Accordingly, he is directed to provide a response for any such instances in the years 2012-2014.

"*Discovery Requested and Objection:*

> 'REQUEST NO. 28: Admit Respondent Todd Mitchell has acted in a managerial capacity inside a Stars establishment while intoxicated or under the influence of illegal drugs.
>
> 'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking information outside of the Agency's jurisdiction; the Oregon Liquor License Commission and criminal prosecutors, not the Bureau of Labor and Industries, have jurisdiction over

such matters. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Mitchell—who was not alleged to have been present inside Stars Cabaret & Steak House during any of the alleged events involving either aggrieved person—will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Request for Admission No. 25, which is incorporated herein in its entirety.

"*Discovery Requested and Objection:*

'REQUEST NO. 31: Admit Respondent Randy Kaiser has acted in a managerial capacity inside a Stars establishment while intoxicated or under the influence of illegal drugs.

'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking information outside of the Agency's jurisdiction; the Oregon Liquor License Commission and criminal prosecutors, not the Bureau of Labor and Industries, have jurisdiction over such matters. If the Agency narrows this request so that it relates to the claims and allegations regarding Aggrieved Person #1 or Aggrieved Person #2, Respondent Kaiser—who was not alleged to have been present inside Stars Cabaret & Steak House during any of the alleged events involving either aggrieved person—will consider responding further.'

"*Analysis and Ruling:*

"*See* Analysis and Ruling as to Request for Admission No. 25, which is incorporated herein in its entirety."

"I. <u>REQUESTS FOR PRODUCTION</u>

"*Discovery Requested and Objection:*

'REQUEST FOR PRODUCTION NO. 9: All documents or electronic records regarding the bylaws for Respondent Frehoo, Inc. and all akas.

'RESPONSE: Respondents object to this request as not reasonably likely to produce information that is generally relevant to the case. Respondents object this request to the extent that it seeks information about any entity other than Frehoo, Inc. dba Stars Cabaret & Steak House, as Frehoo does not do business under any name other than Stars Cabaret & Steak House,

> and the other listed entities are separate companies that are not parties to this case. Subject to and without waiving this objection, Respondents will produce the bylaws of Frehoo, Inc.'

"*Analysis and Ruling:*

"It appears that Respondents provided the bylaws for Freehoo/Beaverton to the Agency on August 19, 2016. Accordingly, this request is moot.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 13: All documents or electronic records prepared during the regular course of business as a result of the settlement agreement entered into with the City of Beaverton, executed by Jeff Struhar on April 30, 2015 and Dennis Doyle on May 5, 2015.
>
> 'RESPONSE: Respondents object to this request as overbroad, failing to describe the information sought with sufficient specificity to allow for a meaningful response, and not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking attorney-client privileged and/or, to the extent work-product protections apply in this Forum, attorney work product information. Respondents further object to this request as seeking evidence of conduct or statements made in compromise negotiations. If Complainant can narrow this request and explain its relevance and admissibility, Respondents will consider responding further.'

"*Analysis and Ruling:*

"The Agency contends that '[w]hether or not Respondents have kept records related to age verification and records related to their alleged "zero sex trafficking" policy, as required by the Beaverton Settlement Agreement, is relevant to the Agency's case.' Respondents argue, among other things, that this request seeks records after the time period of the alleged events in the Formal Charges. The agreement was executed on May 5, 2015 and as of July 30, 2016, Freehoo/Beaverton is no longer in operation. Aggrieved Person #1 last danced at Freehoo/Beaverton in 2012, and Aggrieved Person No. 2 last danced at Freehoo/Beaverton on August 30, 2014.

"The Settlement Agreement makes reference to 'maintain[ing] its zero-tolerance policy regarding sex trafficking and prostitution, as set forth in Exhibit A.' Exhibit 4 to Respondents Response, p. 3. Exhibit A is a picture of a poster stating that 'Stars Cabaret maintains a zero tolerance policy for prostitution and/or sex trafficking.' *Id.* at 18. This information referenced in Section 4 of the Settlement Agreement is 'reasonably likely to produce information that is generally relevant to' the Agency requests for alternative relief on page 20 of the Formal Charges. Accordingly, those records should be produced.

"The Agency has not sustained its burden to establish the relevance of the other records sought with this request and, thus, the remainder of the request is DENIED.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 14: Any and all communications, including but not limited to emails, text messages, correspondence, etc., between any of the named respondents regarding the facts alleged or the aggrieved persons mentioned in the Formal Charges.
>
> 'RESPONSE: Respondents object to this request as seeking attorney-client privileged and/or, to the extent work-product protections apply in this Forum, attorney work product information. Respondents further object to this request as overbroad, unduly burdensome, and as failing to describe the information sought with sufficient specificity to allow for a meaningful response. Subject to and without waiving these objections, Respondents incorporate by reference the responses to Interrogatory No. 1 and Interrogatory No. 2 directed at each of the Individual Respondents. If Complainant can narrow this request, Respondents will consider responding further.'

"*Analysis and Ruling:*

"It does not appear that Respondents addressed this request in their response [to the Agency's motion].[39] Accordingly, Respondents must provide the requested information, but may withhold documents which are covered by the attorney-client or work product privileges.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 15: Any and all communications, including but not limited to emails, text messages, correspondence, etc., between any of the named respondents and other individuals, outside the protection of attorney-client privilege, regarding the facts alleged or the aggrieved persons mentioned in the Formal Charges.
>
> 'RESPONSE: Respondents incorporate by reference their response to Request No. 14.'

[39] The 39-page response submitted by Respondents did not track the order of the requests in the Agency's motion, making it challenging and time consuming to attempt to locate Respondents' responses to particular requests in the voluminous document. If Respondents believe an argument regarding this request was overlooked, they may notify the ALJ, with a copy to the Agency, by email.

"*Analysis and Ruling:*

"It does not appear that Respondents addressed this request in their response [to the Agency's motion]. Accordingly, Respondents must provide the requested information, but may withhold documents which are covered by the attorney-client or work product privileges.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 17: Any and all names or identities used by all named respondents on social media, including but not limited to Facebook, Twitter, Instagram, LinkedIn, Snap Chat, XOTICSPOT.
>
> 'RESPONSE: This request does not request any specific document or group of documents, and Respondents therefore treat it as an interrogatory. Respondents object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case. Respondents further object to this request as seeking attorney-client privileged and/or, to the extent work-product protections apply in this Forum, attorney work product information. Subject to and without waiving these objections, Respondents state that Stars Cabaret & Steak House uses the following social media accounts: Facebook—"Starsbeaverton"; Twitter—"stars Beaverton."'

"*Analysis and Ruling:*

"Respondents assert that they have produced all social media posts as to Freehoo/Beaverton and that postings made by other Stars-named business are irrelevant. The Agency contends that it has reason to believe that Respondents use other methods of social media to promote the '"Stars" business, collectively.' For the reasons stated above, Respondents are not required to respond as to postings made by other Stars-named businesses. However, if any postings were made which promoted the Stars-named businesses 'collectively' -- as opposed to a posting advertising an individual location other than Freehoo/Beaverton -- then that information must be produced.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 18: Any and all social media posts, including but not limited to Facebook, Twitter, Instagram, LinkedIn, SnapChat, XOTICSPOT, by any named respondent regarding any of the facts alleged or the aggrieved persons mentioned in the Formal Charges.
>
> 'RESPONSE: Respondents object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case. Subject to and without waiving these objections, Respondents will produce social media posts from the accounts listed in Respondents'

> response to Request No. 17 that refer to either aggrieved person—and Respondents are not presently aware of any such posts—or to Respondents' anti-sex-trafficking efforts.'

"*Analysis and Ruling:*

"It does not appear that Respondents objected to this request in its response [to the Agency's motion]. However, it appears from the response above that any material would already be produced in response to Request No. 17. Accordingly, [no] further response is required.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 19: Any and all social media posts, including but not limited to Facebook, Twitter, Instagram, LinkedIn, SnapChat, XOTICSPOT, by any named respondent regarding 'naughty school girl' nights at Stars.
>
> 'RESPONSE: Respondents object to this request's use of the term "Stars" because each Stars-branded club is owned and operated by separate corporate entities, and none of the events regarding either aggrieved person is alleged to have occurred at any club other than Stars Cabaret & Steak House in Beaverton, Oregon. Respondents further object to this request as overbroad and failing to describe the information sought with sufficient specificity to allow for a meaningful response. Respondents further object to this request as not reasonably likely to produce information that is generally relevant to the case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret & Steak House relating to the theme of "naughty school girl" nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret & Steak House hosting such an event. Respondents further object to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally-protected free expression. Respondents also object to this request as overbroad insofar as it seeks age-based information, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element. Without waiving and subject to these objections, Respondents state that although this is a common "theme" night for gentlemen's clubs (and various other non-adult clubs), Stars Cabaret & Steak House has not had any schoolgirl-themed nights or events since at least 2010, and certainly did not host any such events during or after the alleged events involving Aggrieved Person No. 1 and Aggrieved Person No. 2 (I.e., between 2012 and the present).
>
> Respondents therefore have no relevant documents responsive to this request.'

"*Analysis and Ruling:*

"Respondents assert that they have produced all social media posts as to Freehoo/Beaverton and that postings made by other Stars-named business are irrelevant. For the reasons stated above, Respondents are not required to respond as to postings made by other Stars-named businesses. However, if any postings were made which promoted the Stars-named businesses 'collectively' -- as opposed to a posting advertising an individual location other than Freehoo/Beaverton -- then that information must be produced.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 20: All documents or electronic records regarding advertising or promotion of 'naughty school girl' nights at Stars.
>
> 'RESPONSE: Respondents object to this request's use of the term "Stars" because each Stars-branded club is owned and operated by separate corporate entities, and none of the events regarding either aggrieved person is alleged to have occurred at any club other than Stars Cabaret & Steak House in Beaverton, Oregon. Respondents further object to this request as overbroad and failing to describe the information sought with sufficient specificity to allow for a meaningful response. Respondents further object to this request as not reasonably likely to produce information that is generally relevant to the case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret & Steak House relating to the theme of 'naughty school girl' nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret & Steak House hosting such an event. Respondents further object to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally-protected free expression. Respondents also object to this request as overbroad insofar as it seeks age-based information, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element. Without waiving and subject to these objections, Respondents state that although this is a common "theme" night for gentlemen's clubs (and various other non-adult clubs), Stars Cabaret & Steak House has not had any schoolgirl-themed nights or events since at least 2010, and certainly did not host any such events during or after the alleged events involving Aggrieved Person No. I and Aggrieved Person No. 2 (i.e., between 2012 and the present).
>
> Respondents therefore have no relevant documents responsive to this request.'

"*Analysis and Ruling:*

"Respondents assert that advertisements produced by other Stars-named business[es] are irrelevant. For the reasons stated above, Respondents are not required to respond with documents produced by other Stars-named businesses. However, if there are any responsive documents which promoted the Stars-named businesses 'collectively' -- as opposed to * * * an individual location other than Freehoo/Beaverton -- then that information must be produced.

"*Discovery Requested and Objection:*

'REQUEST FOR PRODUCTION NO. 24: All documents and electronic records, not previously provided to the Agency, sufficient to provide the following information for all comments received via the Stars website at any time during the past five years:

'a. All content submitted with each comment, including but not limited to sender's name and email address;

b. URL of the webpage used for submitting the comment;

c. Email address(es) designated for receiving the comments;

d. Identities of all Stars personnel able to access the comments;

e. Content of any response(s) to the comment.

'RESPONSE: Respondents object this request to the extent that it seeks information about any entity other than Frehoo, Inc. dba Stars Cabaret & Steak House, as Frehoo does not do business under any name other than Stars Cabaret & Steak House, and the other listed entities are separate companies that are not parties to this case. Respondents further object to this request as overbroad, unduly burdensome, failing to describe the information sought with sufficient specificity to allow for a meaningful response, and not reasonably likely to produce information that is generally relevant to the case. Subject to and without waiving these objections, will produce any comments that satisfy all of the following criteria: comments that (1) are from the website for Stars Cabaret & Steak House; (2) were submitted during the time periods that the aggrieved persons allegedly were present at Stars Cabaret & Steak House; and (3) reference sexual harassment or either aggrieved person. At this time, Respondents are not aware of any responsive documents.'

"*Analysis and Ruling:*

"It does not appear that Respondents objected to this request in its response. The response above indicates that there are no responsive

documents for the time periods that the Aggrieved Persons were present or that reference either Aggrieved Person. Respondents are also required to produce additional responsive documents at Freehoo/Beaverton between the years 2012-2014, if such documents exist.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 28: Copies of any and all manager logs from August 2012 through October 2014.
>
> 'RESPONSE: Respondents object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case to the extent it seeks documents covering dates on which neither aggrieved person is alleged to have been present at Stars Cabaret & Steak House. Subject to and without waiving these objections, Respondents state that they already provided the Agency with this information when it was requested from Respondents during the Agency's investigation, and that to the best of Respondents' knowledge, no additional responsive documents exist that are within their possession, custody, or control.'

"*Analysis and Ruling:*

"The Agency argues that Respondents should produce additional responsive material dating back to 2010. However, the Agency only requested information beginning with August 2012. Accordingly, Respondents' response was sufficient.

"*Discovery Requested and Objection:*

> 'REQUEST FOR PRODUCTION NO. 32: All documents, logs, notes, or electronic records of Respondents' compliance officer(s) for the past five years.
>
> 'RESPONSE: Respondents object to this request as overbroad, vague in that it fails to specify who the term "compliance officer" refers to, failing to describe the information sought with sufficient specificity to allow for a meaningful response, and not reasonably likely to produce information that is generally relevant to the case. To the extent that this request refers to documents relating to Frehoo's settlement with the City of Beaverton, Respondents further object to this request as seeking evidence of conduct or statements made in compromise negotiations. If Complainant can narrow this request and explain its relevance and admissibility, Respondents will consider responding further.'

"*Analysis and Ruling:*

"For the reasons stated above regarding Request for Production No. 13, these records do not need to be produced.

"*Discovery Requested and Objection:*

> 'REQUEST NO. 37: All images, digital or otherwise, within the custody or control of any named Respondent of the VIP area of the Beaverton Stars between 2012 and the present
>
> 'RESPONSE: Respondents object to this request as vague, as there is no area of Stars Cabaret & Steak House that is designated as a "VIP area." Respondents further object to this request as overbroad and not reasonably likely to produce information that is generally relevant to the case. If Respondents can clarify this request and explain its relevance, Respondents will consider responding further.'

"Analysis and Ruling:

"In its motion, the Agency clarified that it was seeking images of an area on the floorplan of the Beaverton location with a raised floor called 'VIP Seating.' Respondents contend that the request is overbroad because it would encompass pictures of individuals dancing who are not parties to this case. A photograph of this seating area is reasonably likely to produce information generally relevant to the case as it will help the forum understand the environment in which the Aggrieved Persons performed. However, Respondents raised valid concerns. Accordingly, if Respondents have 'images, digital or otherwise' of the VIP Seating area that do not contain images of dancing or patrons, then those must be produced.

"Agency's 2nd Informal Request for Discovery

"A. <u>INTERROGATORIES</u>

"*Discovery Requested and Objection:*

> 'Interrogatory No. 12: Aside from Aggrieved Person #1 and Aggrieved Person #2, describe all instances in which a person under the age of 18 was present at Stars Cabaret-Bridgeport.
>
> 'Response No. 12: Frehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information regarding underage individuals at properties or businesses other than the one (Stars Cabaret & Steak House) in which the Agency claims Aggrieved Persons #1 or #2 allegedly worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars

> Cabaret-Bridgeport is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret-Bridgeport; and (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret-Bridgeport. Moreover, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevant to the case. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"*Discovery Requested and Objection:*

> 'Interrogatory No. 13: Aside from Aggrieved Person #1 and Aggrieved Person #2, describe all instances in which a person under the age of 18 was present at Stars Cabaret...At the Capitol.
>
> 'Response No. 13: Frehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information regarding underage individuals at properties or businesses other than the one (Stars Cabaret & Steak House) in which the Agency claims Aggrieved Persons #1 or #2 allegedly worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...At the Capitol is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...At the Capitol; and (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...At the Capitol. Moreover, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevant to the case. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than

Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"*Discovery Requested and Objection:*

> 'Interrogatory No. 14: Aside from Aggrieved Person #1 and Aggrieved Person #2, describe all instances in which a person under the age of 18 was present at Stars Cabaret...In the Cascades.
>
> 'Response No. 14: Frehoo objects to this interrogatory on multiple grounds. First, insofar as this interrogatory seeks information regarding underage individuals at properties or businesses other than the one (Stars Cabaret & Steak House) in which the Agency claims Aggrieved Persons #1 or #2 allegedly worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Cascades is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Cascades; and (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Cascades. Moreover, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element, this interrogatory seeks information that is not reasonably likely to produce information that is generally relevant to the case. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"*Discovery Requested and Objection:*

> 'Interrogatory No. 16: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret-Bridgeport operates business activities outside of the Stars Cabaret-Bridgeport facility in Bridgeport.
>
> 'Response No. 16: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret-Bridgeport is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret-Bridgeport; (3) Respondents are unaware of any allegation that

> either Aggrieved Person ever worked at Stars Cabaret-Bridgeport; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret-Bridgeport facility in Bridgeport, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret-Bridgeport operating business activities outside of the Stars Cabaret-Bridgeport facility in Bridgeport. Frehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"*Discovery Requested and Objection:*

> 'Interrogatory No. 17: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret.. in the Capitol operates business activities outside of the Stars Cabaret...In the Capitol facility in Salem.
>
> 'Response No. 17: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Capitol is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Capitol; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Capitol; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret...In the Capitol facility in Salem, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret...In the Capitol operating business activities outside of the Stars Cabaret...In the Capitol facility in Salem. Frehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"*Discovery Requested and Objection:*

> 'Interrogatory No. 18: Describe any and all circumstances, including promotional or event appearances, in which Stars Cabaret...In the Cascades operates business activities outside of the Stars Cabaret...In the Cascades facility in Bend.
>
> 'Response No. 18: Frehoo objects to this request as not reasonably likely to produce information that is generally relevant to the case because: (1) Stars Cabaret...In the Cascades is owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person occurred at Stars Cabaret...In the Cascades; (3) Respondents are unaware of any allegation that either Aggrieved Person ever worked at Stars Cabaret...In the Cascades; and (4) there is no allegation that Aggrieved Person #1 or #2 ever participated in any promotional or event appearance outside of the Stars Cabaret...In the Cascades facility in Bend, nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret...In the Cascades operating business activities outside of the Stars Cabaret...In the Cascades facility in Bend. Frehoo further objects to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally protected free expression. Respondents will consider responding further if the Agency will explain the relevance of the request.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"B. <u>REQUESTS FOR PRODUCTION</u>

"*Discovery Requested and Objection:*

> 'REQUEST NO. 40: Copies of any and all advertising and/or promotional material pertaining to 'naughty school girl' theme nights, events, or parties

at Stars Cabaret & Steak House, Stars Cabaret Bridgeport, Stars Cabaret...At the Capitol, and Stars Cabaret...In the Cascades.

'RESPONSE: Respondents object to this request on multiple grounds. First, insofar as this request seeks information regarding advertising and/or promotional material pertaining to "naughty school girl" theme nights, events, or parties at properties or businesses other than the one (Stars Cabaret & Steak House) where the Agency claims Aggrieved Persons #1 or #2 worked, it is not reasonably likely to produce information that is generally relevant to the case because: (1) Stars-Bridgeport, Stars Cabaret...At the Capitol, and Stars Cabaret...In the Cascades are owned and operated by corporate entities that are not parties to this proceeding; (2) none of the unlawful conduct alleged to have been experienced by either Aggrieved Person #1 or #2 occurred at Stars-Bridgeport, Stars Cabaret...At the Capitol, or Stars Cabaret...In the Cascades; and (3) Respondents are unaware of any allegation that either Aggrieved Person #1 or #2 ever worked at Stars-Bridgeport, Stars Cabaret...At the Capitol, or Stars Cabaret...In the Cascades. Respondents further object to this request as not reasonably likely to produce information that is generally relevant to the case, insofar as there is no allegation that Aggrieved Person #1 or #2 ever participated in any event at Stars Cabaret & Steak House relating to the theme of "naughty school girl," nor do the Formal Charges contend that either Aggrieved Person experienced harassment as a result of Stars Cabaret & Steak House hosting such an event. Respondents further object to this request as seeking information regarding activities that Oregon's Supreme Court has declared to be constitutionally-protected free expression. Respondents also object to this request as overbroad insofar as it seeks age-based information, because the Formal Charges allege only sex discrimination and include no claim for age discrimination or any other claim for which age is a material element. Finally, Respondents object to this request as overbroad insofar as it seeks information regarding advertising and/or promotional material pertaining to "naughty school girl" theme nights, events, or parties outside of times material to this matter. Without waiving and subject to said objections, Respondents state that there are no documents to produce in response to this request, as Stars Cabaret & Steak House did not host any "naughty school girl" theme nights, events, or parties at any time between January 1, 2012 and September 31, 2014, which (viewed expansively), is the relevant time period relating to this action.'

"*Analysis and Ruling:*

"For the reasons stated above in the ruling on Request for Admission No. 2, the record does not establish that an answer regarding locations other than Freehoo/Beaverton is 'reasonably likely to produce information that is generally relevant to the case.' Therefore, this request is DENIED.

"Information obtained via Subpoenas issued by Respondents

"The Agency requests that Respondents produce information relevant to this case pursuant to subpoenas issued with response times beyond the informal discovery and discovery motion deadlines. The Agency further asks that if Respondents contend documents received in response to subpoenas are not relevant, that those documents be submitted to the ALJ for an *in camera* review and relevancy determination. It does not appear that Respondents objected to this motion. Accordingly, the Agency's request is granted.

"SUMMARY OF RULINGS REQUIRING ACTION FROM RESPONDENTS

"Respondents are directed to do the following by September 12, 2016:[40]

"Interrogatories

- Freehoo/Beaverton is directed to answer Interrogatory No. 3 in the Agency's First Informal Request for Discovery, but may limit its response to Freehoo/Beaverton.

- Respondents Colburn, Heinzman-Myers, Herkenrath, Kaiser and Mitchell are directed to answer Interrogatory No. 6 of the Agency's First Informal Request for Discovery, but may limit the answer to whether he/she had a romantic or sexual relationship with an employee or independent contractor at Freehoo/Beaverton in the years 2012-2014.

"*Requests for Admission*

- Respondents are directed to respond to Requests for Admission 25, 28 and 31 to admit or deny whether there were any such instances while acting in a managerial capacity in Freehoo/Beaverton in the years 2012-2014.

"Requests for Production

- Provide copies of the information referenced in Section 4 of the Settlement Agreement with the City of Beaverton to the Agency. Since those documents may include names of individuals who are not parties to these proceedings, the documents may be produced subject to the terms of the interim protective order in this case.

- Respondents must provide the information requested in Request for Production No14 and 15, but may withhold documents that are covered by

[40] The parties may agree to modify this date. If there is a mutual agreement, the parties may simply email the ALJ with the agreed date for production and the ALJ will issue an interim order approving that date. If there is a disagreement as to the production date, the parties can request a prehearing telephone conference to address that.

the attorney-client or work product privileges.

- In response to Request for Production Nos. 17, 19 and 20, if any documents or postings were made which promoted the Stars-named businesses 'collectively' -- as opposed to a posting advertising an individual location other than Freehoo/Beaverton -- then Respondents must produce that information.

- In response to Request for Production No. 24, Respondents must produce additional responsive documents for Freehoo/Beaverton between the years 2012-2014, if such documents exist.

- If Respondents have 'images, digital or otherwise' of the VIP Seating area in Freehoo/Beaverton that do not contain images of dancing or patrons, then those must be produced to the Agency.

- Respondents must provide copies of documents received in response to subpoenas that were issued to the Agency. If subpoena responses are received after the date of this interim order, Respondents must provide copies of the responses to the Agency within seven days after receiving the subpoena responses. If Respondents contend documents received in response to subpoenas are not relevant, those documents should be submitted to the ALJ for an *in camera* review and relevancy determination."

(Exs. X64, X75, X83)

31) Respondents filed a Motion to Compel discovery on August 15, 2016. The Agency responded to the motion on August 22, 2016. On September 7, 2016, an interim order was issued ruling on the motion which stated, in pertinent part:

"LEGAL STANDARD

'Any discovery request must be reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7). * * *

"* * * * *

"ANALYSIS OF RESPONDENTS' MOTION

"* * * * *

"***Discovery Related to Aggrieved Person # 2***

"A. Interrogatories the Agency Did Not Respond to Individually

"*Discovery Requested and Objection:*

"Respondents assert that the Agency asserted a 'global objection as to form' to the following interrogatories:

> 'INTERROGATORY NO. 94: Describe all specific employment actions or decisions by any of the Individual Respondents or any other Stars Cabaret and Steak House owner, officer, manager, employee, or agent that the Agency contends constituted or contributed to an unlawful employment practice with regard to Aggrieved Person #2.'
>
> 'INTERROGATORY NO. 95: With respect to Complainant's response to Interrogatory No. 62, identify any individual manager of Frehoo, who told her she was required "to dance nude for customers" and Aggrieved Person #2's response, including whether she stated that she did not wish to dance or wished to leave and to whom Aggrieved Person #2 communicated this information.'
>
> 'INTERROGATORY NO. 102: With respect to Complainant's denial of Requested Admission No. 27 ("that Aggrieved Person #2 was located by authorities as a result of notification by Stars to criminal authorities"), describe the factual basis of this denial.'
>
> "INTERROGATORY NO. 103: With respect to Complainant's denial of Requested Admission No. 28 ('that Jon Herkenrath testified in a grand jury proceeding whereby Washington County District Attorney sought to charge Anthony Curry with criminal misconduct'), describe the factual basis of this denial."
>
> 'INTERROGATORY NO. 105: With respect to Complainant's denial of Requested Admission No. 30 ("that Anthony Curry does not have a personal relationship with any manager, employee, or owner of Stars"), describe the factual basis of this denial, including any relationship that the Agency contends existed between Curry and any owner, officer, manager, employee, or agent of Stars Cabaret & Steak House.'
>
> 'INTERROGATORY NO. 106: With respect to Complainant's denial of Requested Admission No. 37 ("that while Aggrieved Person #2 worked at Stars, she received the shifts she requested"), describe the factual basis of this denial.'

"The Agency objected to all of these requests, asserting that they had multiple discreet subparts and did not comply with OAR 839-050-0200(6).

"*Analysis and Ruling:*

"For the same reasons set forth above regarding Interrogatory Nos. 77, 78, 79, 82, 84, 85, 86, 87, 89, 90 and 91, the Agency is also directed to answer Interrogatory Nos. 94, 95, 102, 103, 105 and 106.

"B. Alleged Improper Objections or Improper Answers to Interrogatories

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 59: Identify and describe any and all other adult entertainment, gentlemen's club, or similar establishment where Aggrieved Person #2 worked as a dancer, whether before or after she worked at Stars' Beaverton location, and identify further whether she presented the same identification at any other club where she worked.'

'RESPONSE: Agency objects as this interrogatory is overbroad and irrelevant to the charges against Respondents.'

'INTERROGATORY NO. 60: If Aggrieved Person #2 did not work at any other club, specify whether she previously gained entry to any other similar establishment. If so, did she present the same identification she used at Stars?'

'RESPONSE: Agency objects as this interrogatory is overbroad and irrelevant to the charges against Respondents.'

"*Analysis and Ruling:*

"At the present time it is unclear whether these interrogatories are 'reasonably likely to produce information that is generally relevant to' whether there was negligence in verifying forms of identification. However, these interrogatories are likely to produce information generally relevant to emotional distress damages. Accordingly, the Agency must answer Interrogatories 59 and 60.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 61: Identify and describe any communications between any employee or manager of Stars and Anthony Curry, including whether Aggrieved Person #2 participated in that communication, the circumstances, any witnesses or other participants in such communications, and the purpose of the communication.'

'RESPONSE: The Agency objects to this interrogatory as the information is outside of the Agency's possession or control. The Agency does know that Aggrieved Person #2 spoke with Respondent Herkenrath verbally on

> the phone regarding scheduling for work. Aggrieved Person #2 stated these contacts occurred on a cell phone provided to her by Anthony Curry.'

"*Analysis and Ruling:*

"In the Agency's response to the motion to compel, it supplemented its answer to this interrogatory to provide further detail, but the Agency should include that additional detail in an amended interrogatory signed under oath in accordance with OAR 839-050-0200.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 64: Attached as Exhibit A is a list of "Rules of Conduct," "Entertainer Lessee Operating Guidelines," and related documents. Identify the person who asked Aggrieved Person #2 to sign these documents and describe whether, during the days that Aggrieved Person #2 worked at Stars, she ever violated any of these Rules of Conduct or Operating Guidelines. If so, describe in detail the facts and circumstances surrounding any violation, including Aggrieved Person #2's motivation for engaging in the violation, and any witnesses to any violation.'
>
> 'RESPONSE: Aggrieved Person #2 indicated that the documents looked familiar to her but she wasn't sure if they were the exact same documents. She stated she was given them on the day she auditioned, by the unidentified manager, and was asked to fill them out. She stated Respondents did not provide her a copy. Aggrieved Person #2 stated most of the rules were not followed and she saw dancers violating them all the time, with no action by management or other employees.'

"*Analysis and Ruling:*

"In its response, the Agency points out that its response to a subsequent interrogatory provided more detail. Given the additional detail provided later, no further response is needed.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 65: During the days Aggrieved Person #2 worked at Stars, describe whether she did or said anything inconsistent with the age as represented on the identification she used to gain entry to Stars, including all details about such comments, statements, or actions, including the circumstances, any witnesses to such comments or actions, and her purpose in engaging in such conduct.'

> ORIGINAL RESPONSE: 'The Agency objects to this interrogatory as overbroad and vague. The Agency also objects as to standing.'
>
> SUPPLEMENTAL RESPONSE: 'The Agency objects to this interrogatory as overbroad and vague. The Agency further asserts that this interrogatory is very poorly written and is a compound question containing multiple subparts Respondents make no attempt to define what actions or conduct would be "inconsistent with the age as represented on the identification [Aggrieved Person #2] used" and the Agency refuses to speculate as to Respondents' meaning.'

"*Analysis and Ruling:*

"Respondents are correct that this interrogatory may be relevant to whether Respondents 'knew of should have known' Aggrieved Person #2 was underage. However, as worded, it is overbroad and vague. Accordingly, the Agency should amend its response to indicate what actions, if any, Aggrieved Person #2 did to conceal the fact that she was underage, but need not respond further.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 66: During the days Aggrieved Person #2 allegedly worked at Stars, does the Agency have evidence that anyone had sex or engaged in sexual acts on the Stars premises? If so, describe the circumstances, the identity of the persons involved, any other witnesses, and the location.'
>
> 'RESPONSE: According to witnesses, it was not uncommon for dancers to engage in sexual acts on Respondents' premises. During the course of the Agency's investigation dancers, customers, and Respondents' club manager acknowledged that this was a systemic problem at Respondents' establishments. Respondents have not produced any evidence to prove that they addressed or corrected the systemic problems of sexual acts on the club's premises. Aggrieved Person #2 suffered from sexual abuse and harassment as a result of Respondents' acts or omissions. These witnesses are named in the previously provided discovery and include but are not limited to Nathan Wheeler, Steve Toth, the Aggrieved Persons, and unidentified customers. The Agency relies upon the discovery previously provided, including but not limited to Bates No. 00034, 000035, and 001134-001265.'

"*Analysis and Ruling:*

"The Agency should amend its response to indicate whether any sexual acts occurred on the premises of Freehoo/Stars during the days Aggrieved Person #2 allegedly worked at Freehoo/Stars.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 127: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency's possession or knowledge that the Agency contends supports the Agency's denial that "Aggrieved Person #2 did not engage in prostitution at Stars Cabaret & Steak House," as stated in Request for Admission No. 81.'
>
> 'RESPONSE: The Agency objects to this Interrogatory on the basis that it is vague and Respondents failed to define what they meant by "prostitution." Notwithstanding that objection, to the extent that "prostitution" may include "sexually explicit conduct" within ORS 163.665(3), the Agency asserts that Aggrieved Person #2 was engaged in unlawful sexually explicit conduct during the entire course of her employment at Stars Cabaret and Steak House.'

"*Analysis and Ruling:*

"In the Agency's response to the motion to compel, it supplemented its answer to this interrogatory to provide further detail, but the Agency should include that additional detail in an amended interrogatory signed under oath in accordance with OAR 839-050-0200.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 128: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency's possession or knowledge that demonstrates or tends to show that, at the time that Aggrieved Person #2 sought work at Stars, any of the Individual Respondents had any personal knowledge of any shortcomings that existed in the age verification process.'
>
> 'RESPONSE: Respondents knew or should have known of any shortcomings that existed in the age verification process based on their lack of records and their inadequate vetting process. Evidence supporting this response includes, but is not limited to, Bates Nos. 000028-000029, 000034, and 005407-016998.'

"*Analysis and Ruling:*

"In the Agency's response to the motion to compel, it supplemented its answer to this interrogatory to provide further detail, but the Agency should include that additional detail in an amended interrogatory signed under oath in accordance with OAR 839-050-0200. Additionally, the response should indicate

which clubs it contends Respondents Kaiser, Mitchell and Struhar had 'particular control over.'

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 129: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency's possession or knowledge that demonstrates or tends to show that any person who the Agency contends was an owner, manager, representative, or agent of Stars Cabaret & Steak House was aware at the time Frehoo retained Aggrieved Person #2 to work as an exotic dancer that she had been "groomed by a sex offender" to seek employment as a nude dancer.'
>
> 'RESPONSE: The Agency objects to this interrogatory on the basis of relevance. Whether Respondents knew Aggrieved Person #2 had been groomed by a sex offender to dance nude on stage is irrelevant to Respondents' liability for their unlawful conduct.'

"*Analysis and Ruling:*

"Respondents note that the Agency denied Request for Admission No. 85 ('that BOLI has no evidence to suggest that Freehoo was aware at the time it retained Aggrieve Person #2 to work as an exotic danger that she had been 'groomed by a sex offender' to seek employment as a nude dancer'). Since this request was denied, one must assume that some evidence on that point exists. Such information is relevant to whether Respondents 'knew or should have known' of the age of Aggrieved Person #2, and her willingness to work as a nude dancer, which would assist the forum in understanding how reasonable person in complainant's circumstances would have perceived the workplace conduct. Accordingly, the Agency must respond.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 138: Identify all assumed (or "stage") names that Aggrieved Person #2 used at any time in connection with working or dancing at adult entertainment clubs from 2013 to the present.'
>
> 'RESPONSE: The Agency objects to this interrogatory to the extent that it requests stage names used by Aggrieved Person #2 outside of her employment with Respondents. Without waiving that objection, the Agency offers the following response: Isis and [redacted].'

"*Analysis and Ruling:*

"This interrogatory is likely to produce information generally relevant to emotional distress damages. Accordingly, the Agency must answer it.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 44: Copies of all photo identifications, whether legitimate, counterfeit, or falsified, possessed and/or used by Aggrieved Person #2 from 2014 to the present.'

'RESPONSE: The Agency objects to this request to the extent that it requests identifications outside of times material to Aggrieved Person #2's employment with Respondents. Without waiving its objection, the Agency has previously provided Bates Nos. 001029, 001051-001053, and 001709."

"*Analysis and Ruling:*

"This interrogatory is likely to produce information generally relevant to damages, and possibly other matters at issue. Accordingly, the Agency must answer it.

"***Discovery Related to Both Aggrieved Persons***

"A. Interrogatories the Agency Did Not Respond to Individually

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 107: Identify the specific act(s) or omission(s) by each Respondent that you claim constitutes any part of the "systemic practice of sexual harassment" that the Agency referred to in its responses to Interrogatory No. 35 and Interrogatory No. 41.'

"The Agency objected, asserting that this interrogatory has multiple discreet subparts and did not comply with OAR 839-050-0200(6).

"*Analysis and Ruling:*

"For the same reasons set forth above regarding Interrogatory Nos. 77, 78, 79, 82, 84, 85, 86, 87, 89, 90 and 91, the Agency is also directed to answer Interrogatory 107.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 122: Identify and describe with specificity, including but not limited to the particular Bates numbers of documents, all evidence or information in the Agency's possession or knowledge that demonstrates or tends to show that any of the Respondents authorized or knowingly allowed prostitution to occur at Stars Cabaret & Steak House. (Ex. G at 5).'

'RESPONSE: The Agency objects to this request as unduly repetitive and previously asked and answered. The Agency incorporates its previous responses to the above interrogatories here by reference. The Agency notes that the mental element to the unlawful conduct in this case is known or should have known.'

"*Analysis and Ruling:*

"The Agency provided information showing a number of interrogatories already answered on these topics. Accordingly, the objection that this is unduly repetitive is sustained, and no further answer is required.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 135: Describe all verbal communications between either of the Aggrieved Persons and any employee of the Agency-including the Commissioner-between 2012 and the present regarding or referring to the possibility that the Aggrieved Persons would file any civil or administrative action. The description should include the date, persons present, and the substance of the conversation. (Ex. I at 3).'

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

(a) Aggrieved Person #1: The Agency objects to this request as it is overbroad, vague and requests information not generally relevant to the factual matters alleged in this case. The Agency objects to this request to the extent it requests information subject to work-product and/or attorney-client information.

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

and

'INTERROGATORY NO. 139: Describe all verbal communications between either of the Aggrieved Persons and any employee of the Agency—including the Commissioner—between 2012 and the present regarding any of Respondents, exotic dancing, or any other matters potentially relevant to their alleged claims. The description should include the date, persons present, and the substance of the conversation.'

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

requests as they are overbroad and vague. The Agency objects to these requests to the extent they request information subject to work-product and/or attorney-client information. Without waiving and subject to these objections, the Agency offers the following responses:

> (a) Pertaining to Aggrieved Person #1, the Agency has already provided its investigative interview, Bates No. 001021-001025. This interview took place on August 18, 2015. Present were BOLI employees Rafael Colin and Chris Lynch.
>
> (b) Pertaining to Aggrieved Person #2, the Agency has provided Bates No. 001026-001028. This investigative interview was conducted by Agency employee Maria Perez and took place on May 5, 2015, by phone. The Agency has additionally provided Bates No. 001032-001041, a summary of an interview of Aggrieved Person #2 that took place on December 12, 2015. Present were Agency employees Chris Lynch and Jessica Ponaman.'

"*Analysis and Ruling:*

"The interrogatories are extremely broadly worded and are not focused on information that is 'reasonably likely to produce information that is generally relevant to the case.' The Agency's objection that these requests are overbroad is sustained and no further response to these interrogatories is required.

"<u>Requests for Production</u>

"*Discovery Requested and Objection:*

"The Agency objected to several requests on the grounds that 'the work product of the Agency's administrative prosecutors is irrelevant to the facts at issue in the contested cases.' The requests and objections made were as follows:

> 'Request for Production No. 3: Communications relating to the Aggrieved Persons' initial interviews with BOLI.'
>
> 'RESPONSE: All documents, not subject to privilege or work product protection, regarding communications relating to the Aggrieved Persons' initial interviews with BOLI have been provided in discovery.'
>
> 'Request for Production No. 10: All documents and electronically stored information that refer to, relate to or comprise any and all statements from any person or persons having any information or knowledge relating in any way to the allegations in the Complaint.'

‘RESPONSE: Any information responsive to this request, and not subject to privilege or work product protection, has been provided in the Agency's discovery that was previously provided to Respondents. Any subsequently acquired discovery will be provided as soon as possible.’

‘Request for Production No. 11: All statements obtained by or on behalf of the Agency from others, or made by the Aggrieved Persons or employees or officers of the Agency, concerning this action or its subject matter.’

‘RESPONSE: Any information responsive to this request, and not subject to privilege or work product protection, has been provided in the Agency's discovery that was previously provided to Respondents. Any subsequently acquired discovery will be provided as soon as possible.’

‘Request for Production No. 12: All videotapes, audiotapes, photographs or other recordings and electronically stored information that relate in any way to the claims or to any work allegedly performed by the Aggrieved Persons at Stars.’

‘RESPONSE: Any information responsive to this request, and not subject to privilege or work product protection, has been provided in the Agency's discovery that was previously provided to Respondents. Any subsequently acquired discovery will be provided as soon as possible. The Agency does not have access to information within Respondents' control that it has, thus far, refused to provide.’

‘Request for Production No. 25: Documentation of any and all communications relating to any false identification either of the Aggrieved Persons used to gain entry to or secure work at Stars.’

‘RESPONSE: The Agency has provided all materials responsive to this request, and not subject to privilege or work product protection, as part of the discovery previously provided to Respondents.’

‘Request for Production No. 37: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of the Oregon Bureau of Labor & Industries (BOLI) and the Oregon Department of Human Services (DHS) regarding or relating to any of the Respondents, Steven Toth, Aggrieved Person #1, or Aggrieved Person #2.’

‘RESPONSE: The Agency objects to this request to the extent that it requests information that would be protected work product. Without waiving its objection, the Agency has previously provided this information, including but not limited to Bates Nos. 001712, 001742-001749, and 001752-001756.’

"Respondents also sought to compel documents responsive to the following additional requests in this section of their argument, but the Agency did not specifically respond or insert a copy of their objections into their response:

> 'Request for Production No. 38: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of BOLI and the Washington County District Attorney 's Office regarding or relating to any of respondents, Steven Toth, Aggrieved Person #1, or Aggrieved Person #2. (Id. at 8).
>
> 'Request for Production No. 39: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of BOLI and the Oregon Liquor Control Commission (OLCC) regarding or relating to any of respondents, Steven Toth, Aggrieved Person # 1 or Aggrieved Person #2. (Id.)
>
> 'Request for Production No. 40: All documents relating to, describing, evidencing, or constituting communications between any employee, representative, official, or agent of BOLI and the Beaverton Police Department regarding or relating to any of respondents, Steven Toth, Aggrieved Person #1, or Aggrieved Person #2. (Id.)'

"*Analysis and Ruling:*

"Although the Agency did not initially object to all of these requests on the basis of relevancy, the ALJ is nevertheless required to make a determination as to whether the request is 'reasonably likely to produce information that is generally relevant to the case.' OAR 839-050-0200(7); *see* also OAR 839-050-0200(1) (describing the role of the ALJ in authorizing discovery). As with many of Respondents' interrogatories, these requests for production are extremely broadly worded and are not focused on information that is 'reasonably likely to produce information that is generally relevant to the case.' Additionally, the Agency indicates that some information has already been produced in response to some of the requests. Accordingly, no further response to these requests for production is required.

"*Discovery Requested and Objection:*

> 'Request for Production No. 4: Any testimony the Aggrieved Persons provided in any other proceeding, criminal or civil.'
>
> 'RESPONSE: The Agency objects to this request for production as overbroad and on the basis of relevance. The Agency has provided all testimony of the Aggrieved Persons in any relevant proceedings that are within the Agency's possession or control.'

"*Analysis and Ruling:*

"This request is overbroad, to the extent it requests information that is not related to the allegations in the Formal Charges. Since the Agency indicates it has produced all documents 'it could reasonably obtain and that bore some relevance to this proceeding,' no further response is required.

"*Discovery Requested and Objection:*

> 'Request for Production No. 15: All documents and electronically stored information that concern, refer or relate to any charge or complaint against Stars that the Aggrieved Persons filed or contemplated filing with any governmental or administrative agency including, without limitation, the U.S. Department of Labor ("DOL"), the Equal Employment Opportunity Commission ("EEOC"), the National Labor Relations Board ("NLRB"), the Oregon Department of Consumer and Business Services, Occupational Health and Safety Division ("OR-OSHA"), and the Occupational Safety and Health Administration ("OSHA")."
>
> 'RESPONSE: The Agency objects to this request as overbroad and irrelevant. The Agency also objects on the basis of privileged communications and protected work product.'

and

> 'Request for Production No. 22: All documents and electronically stored information that evidence, memorialize, refer to, relate to or concern possible legal action by the Aggrieved Persons against Stars that created prior to the point when: (a) the Agency began informally or formally investigating this matter; and/or (b) the Aggrieved Persons retained counsel or sought legal advice.'
>
> RESPONSE: 'The Agency objects to this request as overbroad, irrelevant, and seeking protected and privileged information.'

"*Analysis and Ruling:*

"These requests for production are extremely broadly worded and are not focused on information that is 'reasonably likely to produce information that is generally relevant to the case.' No further response to these requests for production is required.

"*Discovery Requested and Objection:*

> 'Request for Production No. 16: All documents and electronically stored information relating to any legal proceeding or threatened legal proceeding to which the Aggrieved Persons have been a party including, without

> limitation, all documents relating to any lawsuits the Aggrieved Persons have filed or threatened to file.'
>
> RESPONSE: 'The Agency objects to this request as overbroad and irrelevant. The Agency also objects on the basis of privileged communications and protected work product.'

"*Analysis and Ruling:*

"This request is overbroad, to the extent it requests information that is not related to the allegations in the Formal Charges. Since the Agency indicates it has produced all documents 'it could reasonably obtain and that bore some relevance to this proceeding,' no further response is required.

"*Discovery Requested and Objection:*

> 'Request for Production No. 19: All social media postings, communications, blog entries, comments or other written material concerning or referring to Stars that the Aggrieved Persons posted, uploaded or otherwise published or communicated on any Internet-based communication of any kind including, but not limited to, Facebook, Instagram, Snapchat, or other platforms.'
>
> RESPONSE: 'The Agency does not have anything responsive to this request within its possession. Any further information will be provided as soon as possible, once it's received.'

"*Analysis and Ruling:*

"The Agency's response is insufficient in that it does not indicate whether the Aggrieved Persons attempted to locate responsive information on their social media accounts. The Agency is directed to respond to this request by obtaining responsive information from the Aggrieved Persons, regardless of whether responsive information is currently 'within [the Agency's] possession.' *See In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa,* 34 BOLI 102, 144 (2015), *appeal pending* (a respondent may request a discovery order to obtain documents from a complainant through the Agency that are discoverable under OAR 839-050-0020(7)).

"*Discovery Requested and Objection:*

> 'Request for Production No. 20 [amended]: All social media postings, communications, blog entries, comments or other written material concerning or referring to any activities by the Aggrieved Persons that either of the Aggrieved Persons posted, uploaded or otherwise published or communicated on any Internet-based communication of any kind

including, but not limited to, Facebook, Instagram, Snapchat or other platforms.

'Respondents will agree to narrow the relevant time period of this request to 2012 to the present.'

'RESPONSE: The Agency objects to this request as overbroad and irrelevant to the extent that it requests "all social media postings, communications, blog entries, comments or other written material concerning or referring to any activities by the Aggrieved Persons posted, uploaded or otherwise published or communicated on any Internet-based communication of any kind." If Respondents can narrow this request to information relevant to this case, the Agency may consider responding further.'

"*Analysis and Ruling:*

"Respondents assert that this request is relevant to determining 'possible other causes of emotional distress.' Based on that limitation and the amendment limiting the time period from 2012 to the present), the Agency is directed to respond to this request by obtaining responsive information from the Aggrieved Persons with any social media postings describing other causes of emotional distress from 2012 to the present time.

"***Discovery Related to Alleged Damages***

"*Discovery Requested and Objection:*

"Respondents moved to compel answers to Interrogatory Nos. 36 and 42. Since the Agency responded to those on August 30, 3016, no further response is necessary.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 37: If the Agency contends that any of Respondents is [sic] responsible for emotional distress damages, identify each physician or health care professional who was consulted— whether by the Agency, Aggrieved Person #2, or persons acting on their behalf— with respect to emotional distress damages or other non-economic damages Aggrieved Person #2 allegedly sustained as a result of any action by any of the Respondents.'

'INTERROGATORY NO. 38: With respect to each condition of Aggrieved Person #2 state the physician or health care provide [sic] who provided treatment or assessment for any condition relating to the alleged emotional distress.'

'INTERROGATORY NO. 39: With respect to each condition of Aggrieved Person #2 state the date(s) of any treatment for any condition relating to the alleged emotional distress.'

'INTERROGATORY NO. 40: With respect to each condition of Aggrieved Person #2 state any diagnosis or treatment plan, or recommendations for future treatment relating to the allegations in this case for any condition relating to the alleged emotional distress.'

"It does not appear that the Agency objects to this request, but rather that it has not yet received medical records from the attorney of Aggrieved Person #2.

"*Analysis and Ruling:*

"It is not clear why there has been a delay in the Agency obtaining the requested documents from Aggrieved Person #2. However, given the rapidly approaching hearing date, this information must be provided without further delay.

"*Discovery Requested and Objection:*

'INTERROGATORY NO. 20: Identify and describe any and all complaints that Aggrieved Person #2 made to anyone regarding their alleged experience(s) at Stars, including to whom the complaint(s) was made, whether the complaint(s) was verbal or written, the circumstances, any witnesses, the location where the interaction(s) took place, and any response(s) received.'

'RESPONSE: Aggrieved Person #2 first verbally reported her abuse and harassment to Detective Chad Optiz, of the Beaverton Police Department, during the course of the criminal investigation into Anthony Curry. These reports occurred on or about September 6, 2014.

'During the course of the criminal investigation, Aggrieved Person #2 also made a verbal report to REDACTED, of REDACTED, in Portland, Oregon, on or about October 2, 2014. REDACTED is a medical program set up to assess, treat and prevent of child abuse.

'Aggrieved Person #2 also stated that she made a verbal disclosure pursuant to a therapy session. Those records will be requested and provided as soon as possible, once received.

'Aggrieved Person #2 subsequently verbally reported her abuse and harassment to a Grand Jury, the date of which is unknown, and in open court, on June 4, 2015, in Washington County, Oregon. The criminal defendant was found guilty of his crimes against Aggrieved Person #2 and sent to prison.

> 'Aggrieved Person #2 gradually verbally complained to her mother about her treatment at Respondents' Stars-Beaverton location. She indicated it took a long time to tell her about it.'

"*Analysis and Ruling:*

"Respondents request an order for the production of documents. However, this is not a request for documents, and the Agency is already required to produce information in response to Request for Production No. 37-40 regarding medical treatment. Accordingly, no further response to this interrogatory is required.

"*Discovery Requested and Objection:*

> 'Request for Production No. 17: All documents and electronically stored information that describe, refer, relate to, substantiate or evidence any and all economic damages for which the Agency alleges any of Respondents is responsible.'
>
> 'Response: The Agency has provided all information within its possession and control, and not subject to privilege or work product protection, that relates to any damages sought by the Agency. (Ex. B at 40).'

and

> 'REQUEST FOR PRODUCTION NO. 18: All documents and electronically stored information that describe, refer, relate to, substantiate or evidence any and all non-economic damages for which the Agency alleges Stars is responsible.'
>
> 'Response: The Agency has provided all information currently within its possession, and not subject to privilege or work product protection, that relates to any damages sought by the Agency. Any further information will be provided as soon as possible, once it's received. (Id.)'

and

> 'REQUEST FOR PRODUCTION NO. 24: To the extent not already produced in response to the preceding requests, all documents and electronically stored information that concern, support or substantiate, or relate to any alleged loss or damage allegedly sustained as a result of the matters set forth in the Complaint.'
>
> 'Response: The Agency has provided all materials responsive to this request, and not subject to privilege or work product protection, as part of the discovery previously provided to Respondents. (Ex. B at 42).'

"*Analysis and Ruling:*

"Since the Agency is not seeking economic damages from Respondents, it need not respond further to Request for Production No. 17.

"With regard to Request for Production No. 18, it is not clear why there has been a delay in the Agency obtaining the requested documents from Aggrieved Person #2. However, given the rapidly approaching hearing date, this information must be provided without further delay.

"With respect to Request for Production No. 24, the Agency indicates it has produced responsive documents within its possession and it is unclear how this request differs from Request for Production No. 18. Since the Agency must produce additional information in response to Request for Production No. 18, no further response to this request is required.

"*Discovery Requested and Objection:*

> 'Request for Production No. 21: All medical and counseling records for the Aggrieved Persons from 2000 to the present from any institution, physician, physician's assistant, nurse, chiropractor, psychiatrist, psychologist, health care professional, alternative or religious health practitioner, mental health professional, employee assistance program or in-home nursing service by whom the Aggrieved Persons have been examined or treated, or with whom the Aggrieved Persons or someone on their behalf consulted. (Respondents make this request to the extent that the documents are in their possession or of any other person cooperating with the Agency or acting or purporting to act on the Agency's behalf. To the extent that these documents are not in the Agency's immediate possession or control or in the immediate possession or control of another state body but rather in the possession of health care providers, the provision of a signed authorization to obtain medical or counseling records and the identity of the health care providers shall be treated as compliance with this request. If a signed authorization is provided please identify any providers of care for physical or mental health by name of institution, address and telephone number, patient number, and dates of employment.)'
>
> 'Response: The Agency objects to this request as overbroad. The Agency will provide the relevant medical records within its possession.'

"*Analysis and Ruling:*

"The Agency objects to overbreadth, in particular because the request seeks records dating back to the year 2000 when the Aggrieved Persons would have been just one year old. For purposes of this case and due to the ages of the Aggrieved Persons, the forum finds that Respondents are entitled to

responses within the time period of one year prior to the events in the Formal Charges up until present day.

"*Discovery Requested and Objection:*

> 'INTERROGATORY NO. 92: With respect to Complainant's denial of Requested Admission No. 22 ("that Aggrieved Person #1 has not sustained any economic damages"), describe the factual basis of this denial and identify the nature of economic damages incurred.'
>
> 'Response: The Agency's Formal Charges do not seek economic damages on behalf of Aggrieved Person #1, nor does the Agency intend to ask for economic damages on behalf of Aggrieved Person #1.'

"*Analysis and Ruling:*

"The Agency has confirmed that it is not seeking economic damages on behalf of either of the Aggrieved Persons and, thus, need not respond further to this interrogatory.

"*Discovery Requested and Objection:*

> 'Request for Production No. 13: All calendars, diaries, journals, e-mail correspondence, or any personal records or notes that the Aggrieved Persons or any other witnesses created or maintained, including but not limited to any electronically stored information, at any time from 2000 to the present.
>
> 'Response: The Agency objects to this response as overbroad.'

"*Analysis and Ruling:*

"The Agency is correct that this request is overbroad. Respondents request that the forum limit the time frame from 2010 to the present, and the scope to include anything related to Respondents, to the mental or emotional [state] of the Aggrieved Persons, or to other sources of emotional distress.

"Responsive records regarding Respondents and emotional distress are relevant, but any other responsive material does not meet the forum's relevancy standard.

"With respect to time frame, for purposes of this case and due to the ages of the Aggrieved Persons, the forum finds that Respondents are entitled to responses within the time period of one year prior to the events in the Formal Charges up until present day.

"***Discovery Regarding Issues of Due Process***

"Respondents issued several discovery requests seeking communications between various BOLI employees. Respondents assert that these requests are related to the issues of due process and decision-maker bias. Those include Request for Production Nos. 5-8, 32-35, and 41, and Interrogatory Nos. 73-76, and 109. The interrogatories are extremely broadly worded and are not focused on information that is 'reasonably likely to produce information that is generally relevant to the case.' Given that the forum has previously ruled that Respondents have not sustained their burden in showing decision-maker bias, it is unclear how any of this information relates to the case. Accordingly, no further responses to these requests for production and interrogatories are required.

"***Allegations of Inconsistent Responses***

"Finally, Respondents ask the Agency to 'correct inconsistencies' in some of the discovery responses. The Agency contends that perceived inconsistencies can be created if the Agency 'view[s] evidence one way' and an Aggrieved Person views it differently. Respondents' argument appears to be more of an attack on the credibility of witnesses, rather than insufficient answers to discovery requests. Respondents will have the opportunity to point out any inconsistencies during the hearing. The motion to 'correct inconsistencies' is DENIED.

"SUMMARY OF RULINGS REQUIRING ACTION FROM THE AGENCY

"The Agency is directed to do the following by September 15, 2016:

Interrogatories

- Answer Interrogatory Nos. 37-40, 44, 59, 60, 77, 78, 79, 82, 84, 85, 86, 87, 89, 90, 91, 94, 95, 102, 103, 105, 106, 107, 121, 129, and 138.

- Supplement the answer to Interrogatory No. 24 to answer whether a Freehoo/Beaverton manager expressed a 'expressed a desire to have sex with Aggrieved Person #2.'

- In response to Interrogatory No. 43, if Aggrieved Person #1 has copies of photo identifications used from 2012 to the present time within her possession, custody or control, copies should be produced.

- Amend the response to Interrogatory No. 110 to either (1) identify more specific Bates Nos. within 005407-016998 or, alternatively, (2) provide a written explanation as to why this large grouping of documents (005407-016998) demonstrates or tends to support its denial that, 'with regard to the alleged employment of Aggrieved Person #1, Stars Cabaret and Steak House did not follow its regular hiring process for

exotic dancers.'

- Amend the answers to Interrogatories 113 and 115 to answer whether 'any person who the Agency contends was an owner, manager, representative or agent' of Freehoo/Beaverton knew of Toth's actions.

- Amend the response to Interrogatory No. 117 to indicate whether Aggrieved Person #1 made tips at Freehoo/Beaverton that she shared with other individuals at the club, such as DJs and security guards.

- Amend the answers to Interrogatory No. 61, 118 and 127 to include the additional detail contained in the Agency's response to the motion to compel, signed under oath in accordance with OAR 839-050-0200.

- Amend the answer to Interrogatory No. 128 to include the additional detail contained in the Agency's response to the motion to compel, and indicate which clubs it contends Respondents Kaiser, Mitchell and Struhar had 'particular control over.'

- Amend the answer to Interrogatory No. 65 to indicate what actions, if any, Aggrieved Person #2 did to conceal the fact that she was underage, but the Agency need not respond further.

- Amend the answer to Interrogatory No. 66 to indicate whether any sexual acts occurred on the premises of Freehoo/Stars during the days Aggrieved Person #2 allegedly worked at Freehoo/Stars.

Requests for Production

- The Agency must provide documents responsive to Request for Production No. 13, but may limit its response to documents referencing Respondents and/or emotional distress within the time period of one year prior to the events in the Formal Charges up until present day.

- The Agency must provide documents responsive to Request for Production Nos. 16, 18 and 19.

- The Agency is directed to respond to Request for Production No. 20 by obtaining responsive information from the Aggrieved Persons with any social media postings describing other causes of emotional distress from 2012 to the present time.

- The Agency must provide documents responsive to Request for Production No. 21, but may limit its response to records within the time period of one year prior to the events in the Formal Charges up until present day."

(Exs. X66, X78, X85)

32) After receiving an email from the parties indicating a joint agreement to revise the case schedule, the following deadlines were reset in an interim order dated September 8, 2016:

- The deadline for the Agency and Respondents to produce responsive information/documents to one another in response to rulings made regarding the Agency's and Respondents' motions to compel was moved to September 15, 2016.

- The deadline for filing dispositive motions was moved to September 22, 2016.

- The deadline for filing responses to dispositive motions was moved to October 13, 2016.

(Exs. X84, X86)

33) On August 8, 2016, Respondents filed Motions to Strike, to Make More Definite and Certain, and Motions to Dismiss. The Agency filed a response to the motion on August 22, 2016. An interim order was issued on September 14, 2016, which stated, in pertinent part:

> "The majority of Respondents' motions assert that the Formal Charges lack sufficient specificity to provide Respondents with a more detailed notice to prepare its defense. Adequate notice of an agency action must include a 'short and plain statement of the matters asserted or charged.' ORS 183.415(3)(d); *see also* OAR 839-050-0060(1)(b) (a charging document must contain a 'short and concise statement of the matters that constitute the violation'). Formal Charges alleging a civil rights violation must also 'specify the allegations of the complaint to which the respondent will be required to make response.' ORS 659A.845(1).
>
> "A violation can be found based on evidence 'reasonably related' to the allegations in the Formal Charges if the evidence either corroborates the Formal Charges or is 'included as a fact underlying a specific charge.' *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa,* 34 BOLI 102, 120 (2015), *appeal pending.*
>
> "As indicated below, the current motions are not the appropriate procedure for addressing most of the alleged deficiencies that Respondents find with the Formal Charges. Instead, many of the motions (1) raise questions that could be answered through the discovery process or (2) prematurely raise concerns that violations will be found against Respondents based on alleged inadequate notice in the Formal Charges.

"A. Motion to Strike and/or Delete Other Corporate Entities from the Case Caption/Alternative Motion to Make More Definite and Certain (Respondents' 'Motion One')

"1. Motion to Strike

Respondents move to strike the 'AKA entities' from the case caption. The caption in this case lists only one corporate Respondent: Freehoo, Inc. dba Stars Cabaret & Steak House ('Freehoo'). Following the identification of Freehoo as a party, numerous entities are listed, all preceded by the acronym 'aka.' Respondents assert that the 'AKA entities' should be removed from the caption since they are not named as parties. In response, the Agency argues that the Formal Charges 'very clearly identify Freehoo, Inc. as the only corporate entity respondent,' and that the other entities are ones 'through which Freehoo, Inc. conducts its business.'

"The forum has previously granted motions to strike when a pleading contains allegations that are irrelevant or not at issue before the forum. *See, e.g. Mountain Forestry, Inc.*, 29 BOLI 10, 24 (2007), ***aff'd without opinion, Mountain Forestry, Inc. v. Bureau of Labor and Industries,*** 229 Or App 504, 213 P3d 590 (2009). The Agency indicates it will be attempting to argue that the named corporate Respondent, Freehoo, 'conducted business as the' other corporate entities. At the pleading stage of the case -- which essentially requires adequate notice of what statutes or rules a Respondent is accused of violating -- the forum is not convinced that the 'AKA entities' are irrelevant or not at issue before the forum. Accordingly, Respondents' motion is DENIED.

"2. Alternative Motion to Make More Definite and Certain

In the alternative, Respondents move to require the Agency to amend the Formal Charges to 'state with specificity how the AKA entities are responsible for unlawful employment practices and, if they can do so properly given BOLI's jurisdictional requirements, to name the appropriate entities as parties.' If the 'AKA entities' were parties, then the Agency would be required to meet the pleading standard set forth in ORS 183.415(3)(d) and ORS 659A.845(1) as to those entities. However, since the Agency has confirmed that the Freehoo is the only corporate Respondent, it need not state how other non-party entities are 'responsible' for any unlawful conduct. Therefore, this motion is also DENIED.

"B. Motions to Make More Definite and Certain Allegations Against the Individual Respondents (Respondents' 'Motion Two')

"Respondents request that the Agency specify what statute or administrative rule each Respondent is alleged to have violated, and to identify the alleged acts by each Respondent that the Agency believes to constitute the violations.

"OAR 839-050-0060(1) requires that a charging document issued by the Agency contain:

> 'a) A reference to the particular statutes or administrative rules involved in the violation;
>
> '(b) A short and concise statement of the matters that constitute the violation; and
>
> '(c) A statement of the remedies sought and, when appropriate, the penalty imposed.'

"The Formal Charges adequately meet the due process requirements of OAR 839-050-0060(1)(a), and motions to make more definite and certain are not the correct procedural tool for obtaining the information sought by Respondents. *See, e.g. Blachana, LLC*, 32 BOLI 220, 223 (2013), ***aff'd Blachana, LLC v. Bureau of Labor and Industries***, 273 Or App 806 (2015), 359 P3d 574 (2015) (discovery was the appropriate procedure for ascertaining additional information needed to defend the case); *see also Oregon Department of Fish and Wildlife*, 16 BOLI 263, 264 (1998). Therefore, this motion is DENIED.

"C. <u>Motion to Strike Paragraph 16/Alternative Motion to Make More Definite and Certain (Respondents' 'Motion Three')</u>

"Respondents argue that allegations in paragraph 16 of the Formal Charges 'which have no apparent connection to either Aggrieved Person or the underlying Amended Complaint' should be stricken or, alternatively, the forum should require the Agency to make those allegations more definite and certain. Paragraph 16 states as follows:

> 'During the course of the Agency's investigation, multiple witnesses described the systematic practice of sexual harassment by Respondents in their workplace, including but not limited to the following:
>
> > "a. Witnesses stated that dancers engaged in sex acts both inside and outside of the club. These acts were sometime engaged in as part of an individual private dance for money; or occurred after a dancer was 'bought off the floor,' a practice which involved a customer paying the club a specific amount of money to be permitted to take the dance out of the stage rotation, or to have a waitress go off the clock. Witnesses reported that dancers who were 'bought off the floor' were sometimes taken off-site to engage in sexual activities with the purchasing customer.
> >
> > "b. Steven Toth stated, under oath, that while he was employed as a manager for Respondents, he arranged for dancers to engage in

prostitution with customers. Steven Toth stated Respondent Todd Mitchell was present during one of these incidents.

"c. Witnesses described dancers being groped by managers and also engaging in sex acts with managers in order to secure better shifts or other work benefits. Steven Toth also reported that Respondent Jeff Struhar engaged in sex acts with employee-dancers both at the club and off site.'

'Respondents specifically take issue with the reference to a "systematic practice of sexual harassment by Respondents in the workplace." The Agency argues that the allegations are reasonably related to the commissioner's complaint and, also, that the facts in Paragraph 16 support the remedies sought in the Formal Charges. Based on the Agency's explanation, the forum is not convinced that the facts in Paragraph 16 are irrelevant. Accordingly, the motions to strike Paragraph 16 and/or make more definite and certain are DENIED.

"D. <u>Motion to Require the Agency to Make Paragraphs 22 and 23 More Definite and Certain (Respondents' 'Motion Four')</u>

"Respondents request that the forum require the Agency to clarify the means or manner by which Respondents allegedly discriminated against the Aggrieved Persons, as alleged in Paragraphs 22 and 23 of the Formal Charges. Respondents assert that they are 'entitled to know the form that the alleged discrimination took, and [each Respondent's] alleged role in it * * *.' Paragraphs 22 and 23 state as follows:

'22. On, about or between September 2012 to December 2012, Respondents, because of Aggrieved Person #1's sex, discriminated against her in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030.

'23. On, about or between August 14, 2014 to September 18, 2014, Respondents, because of Aggrieved Person #2's sex, discriminated against her in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former and current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030.'

"Although the Agency did not specifically address the sufficiency of the allegations in Paragraphs 22 and 23 in its response, the Agency's response generally argues that the Formal Charges comply with the Oregon's Administrative Procedures Act and BOLI's Contested Case Rules. The Agency contends that Respondents request 'additional information beyond the basic requirements' and 'offer no actual legal argument to support their suggested new standard of pleading.' Th[is] is similar to Respondents' 'Motion Two.' The Formal Charges adequately meet the due process requirements of OAR 839-

> 050-0060(1)(a), and motions to make more definite and certain are not the correct procedural tool for obtaining the information sought by Respondents. Accordingly, this motion is also DENIED."

(Exs. X55, X77, X87)

34) Based on an email request received from the parties indicating a joint agreement to revise the case schedule and a prehearing telephone conference held on September 15, 2016, the following deadlines were revised in an interim order dated September 16, 2016:

- The deadline for the Agency and Respondents to produce responsive information/documents to one another in response to rulings made regarding the Agency's and Respondents' motions to compel was changed to September 16, 2016. Medical records of Aggrieved Person #2 that were not available on that date were required to be produced the following week after they are received by the Agency and the Agency has the opportunity to make redactions in accordance with the time periods in the interim order of September 8, 2016.

- The deadline for filing dispositive motions was moved to September 23, 2016.

- The deadline for filing responses to dispositive motions was moved to October 14, 2016.

(Ex. X88)

35) On August 8, 2016, Respondents filed a Motion to Amend Answer and Defenses to Formal Charges and Notice of Hearing. The Agency filed a response to the motion on August 19, 2016. The ALJ issued an interim order ruling on the motion on September 19, 2016, which stated in pertinent part:

> "'For good cause shown to the administrative law judge, a party may amend its answer at any time before the hearing commences.' OAR 839-050-0140(3). All of the proposed amendments concern affirmative defenses. Respondents seek to amend two existing defenses and insert two new affirmative defenses. The forum recently summarized its precedent on the issue of what is or is not an appropriate affirmative defense as follows:
>
> > 'In general, an affirmative defense is a defense setting up new matter that provides a defense against the Agency's case, assuming all the facts in the complaint to be true. *See, e.g. Pacificorp v. Union Pacific Railroad*, 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of affirmative defenses previously recognized by this forum include statute of limitations, claim and issue preclusion, bona fide occupational requirement, undue hardship, laches, and unclean hands. Some other affirmative defenses recognized by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds,

> unconstitutionality, and waiver. ORCP 19B. In contrast, a defense that admits or denies facts constituting elements of the Agency's prima facie case that are alleged in the Agency's charging document is not an affirmative defense.'

In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 161 n. 33 (2015), *appeal pending.* The forum has also rejected affirmative defenses that raise matters not at issue before the forum or have no basis in fact. *See*, *e.g. Mountain Forestry, Inc.,* 29 BOLI 10, 23-24 (2007), ***aff'd without opinion, Mountain Forestry, Inc. v. Bureau of Labor and Industries***, 229 Or App 504, 213 P3d 590 (2009).

"ANALYSIS OF PROPOSED AMENDMENTS

"A. Fourteenth Amendment Procedural Due Process

"Respondents seek to add language to paragraph 13 of Section VIII.A of their Answer as follows:[41]

> 'The convoluted statutory and regulatory scheme that governs proceedings stemming from Commissioner's complaints, ~~and~~ the Commissioner's ability to enter a final order in this proceeding, the lack of impartiality on the part of the ultimate decision maker(s) including the Commissioner and/or the Deputy Commissioner, the appearance of the Contested Case Coordinator as a witness in this matter, and the associated ex parte communications deprive Respondents of their Fourteenth Amendment procedural due process rights.'

Respondents raised these issues in two separate motions before the forum. Their arguments were rejected because Respondents lacked evidence to establish that the decision maker in this case, the Deputy Commissioner, was personally biased against Respondents. See Interim Orders dated 5/31/2016 and 8/25/2016. Since the requested amendments 'ha[ve] no basis in fact,' the motion to insert this language is DENIED. Mountain Forestry, 29 BOLI at 23.

"B. Equitable Estoppel

"Respondents request that they be permitted to add the following affirmative defense to section VII. C of their Answer:

> '17. Aggrieved Person #2, knowing that she was underage, falsely represented that she was 21 years old with the intention that Stars would permit her to dance at the club. Respondents had no knowledge

[41] Throughout this interim order, the text of Respondents' proposed additions will be underlined and proposed deletions will be crossed out.

> that Aggrieved Person #2 was not the age that she represented herself to be. Stars acted in reliance on Aggrieved Person #2's false representation, to Respondents' detriment. Any claims related to damages allegedly suffered by Aggrieved Person # 2 are barred due to the principles of equitable estoppel.'

The forum recently described the doctrine of equitable estoppel as follows:

> 'Estoppel is a legal doctrine whereby one party is foreclosed from proceeding against another when one party has made "a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the other party, and (4) that induced the other party to act upon it." *State ex rel. State Offices for Services to Children and Families v. Dennis*, 173 Or App 604, 611, 25 P3d 341 (2001), *citing Keppinger v. Hanson Crushing*, Inc., 161 Or App 424, 428, 983 P.2d 1084 (1999). In order to establish **estoppel** against a **state agency**, a party must have relied on the agency's representations and the party's reliance must have been reasonable. *Id., citing Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995).'

Sweetcakes, 34 BOLI at 171 (emphasis in original). Respondents' proposed defense does not establish the elements of equitable estoppel for several reasons.

"First, the doctrine of equitable estoppel does not fit the procedural posture of this case which is a state agency action brought on behalf of a complainant, the Commissioner. There is no allegation that the Agency made a misrepresentation to Respondents. Accordingly, the allegations do not support the use of equitable estoppel against the Agency.

"Second, Respondents have not alleged that their reliance on a misrepresentation was 'reasonable,' which is a requirement for asserting such a defense. *Sweetcakes*, 34 BOLI at 171, *citing Dept. of Transportation*, 321 Or at 126.

"Finally, the facts alleged in this proposed defense more appropriately appear to be a denial of the allegations in Paragraph 20 of the Formal Charges, which alleges that Respondents 'fail[ed] to adequately vet forms of identification, and * * * knew or should have known that minors had been or eventually would be employed in Respondents' establishments and subjected to sexual harassment in the workplace.' A statement which denies an element of the Agency's case is viewed as a denial, rather than an affirmative defense. Sweetcakes, 34 BOLI at 161.

"Therefore, the request to add equitable estoppel as an affirmative defense is DENIED.

"C. Constitutional Right to a Jury Trial

"Respondents also seek to add the following affirmative defense:

'17. Forcing Respondents to defend against the Formal Charges in this forum violates Respondents' right to a jury trial pursuant to Article I, § 17 of the Oregon Constitution.'

"This argument was previously raised by Respondents and addressed by the forum. For the reasons set forth in detail in the interim order of August 25, 2016, there is no constitutional entitlement to a jury trial as to the claims under ORS chapter 659A alleged in the Formal Charges. Accordingly, the request to add this defense is also DENIED.

"* * * * *"

(Exs. X56, X72, X91)

36) On September 22, 2016, Respondents filed an Amended Answer and Defenses to Formal Charges and Notice of Hearing. (Ex. X93)

37) On October 4, 2016, a prehearing telephone conference was held at the request of Respondents to discuss a dispute between the parties regarding redactions made to medical records produced by the Agency to Respondents in response to the forum's interim order of September 8, 2016. After the Agency and Respondents were provided with the opportunity to address the issues, the Agency was ordered to submit copies of the medical records in dispute (both redacted and unredacted) to the ALJ for an *in camera* review determine whether the redactions were consistent with the interim order of September 8, 2016. (Ex. X103)

38) Respondents filed Respondents' Motion to Amend Protective Order to Include Identifying Information for Non-Party Witnesses Requesting Confidentiality of Their Identities on September 22, 2016. Respondents requested that the Interim Protective Order of April 27, 2016, be amended to include the following:

"1. PII [Personal Identifying Information] of Respondents Colburn, Heinzman-Myers, Kaiser, Mitchell, and Struhar as it relates to their responses to the Agency's Interrogatory No. 6; and

"2. PII of any witness who testifies or submits declarations about private or personal matters as described above, including employment at the Club that the witness seeks to keep private."

The Agency filed a response to the motion on September 30, 2016, asserting that the information that Respondents seek to protect is too broad and "would have the effect of essentially protecting the entire hearing from public disclosure." The Agency further argued that "there is no legal basis for protecting all witnesses to the degree requested

by Respondents." On October 13, 2016, the ALJ issued an interim order which stated, in pertinent part:

> "Respondents seek to add two categories of information to the Interim Protective Order.
>
> "First, Respondents seek to protect the responses of the individual Respondents to the Agency's Interrogatory No. 6. Interrogatory No. 6 requested the following information from Respondents Colburn, Heinzman-Myers, Kaiser, Mitchell, and Struhar:
>
> > 'Describe any and all romantic and/or sexual relationships that took place between you and any employee or independent contractor affiliated with Respondents, including the name of the individual, the dates of the relationship, and the individual's role in Respondents' business.'
>
> "The individual Respondents were ordered to 'answer whether [he or she] had a romantic or sexual relationship with an employee or independent contractor at Freehoo in the years 2012-2014.' The forum has previously protected private or personal information of the employees of a respondent employer, such as drug screen reports and medical records. *See In the Matter of Logan International, Ltd.*, 26 BOLI 254, 259 (2005); *In the Matter of Sharon Kaye Price*, 21 BOLI 78, 80-81 (2000). The forum has also previously issued a protective order preventing the public disclosure of the legal names of aggrieved persons who requested that their names be kept private. *See Blachana, LLC*, 32 BOLI 220, 224 (2013), ***aff'd Blachana, LLC v. Bureau of Labor and Industries***, 273 Or App 806 (2015), ___ P3d ___ (2015). Accordingly, because Interrogatory No. 6 requests private and intimate information about individuals who are not parties to this case, it would be appropriate to limit the disclosure of the names of the individuals who are named in Respondents' answers to Interrogatory No. 6.
>
> "Second, Respondents seek to protect the disclosure of the PII 'of any witness who testifies or submits declarations about private or personal matters as described above, including employment at the Club that the witness seeks to keep private.' The Agency asserts that this request is too broad. The forum agrees that the request extends beyond any protective order that appears to have ever been issued by the forum and, indeed, may not be consistent with Oregon's Public Records Law. However, as indicated above, the forum has previously limited the disclosure of private or personal information about individuals who were employed by a respondent employer. Accordingly, if a party submits a declaration signed by a current or former employee who is not a Respondent in this case, that declaration must be filed under seal in accordance with the terms of the Interim Protective Order. This directive applies to all prehearing filings. The treatment of the names of witnesses who testify at hearing will be discussed with the parties at a later date in advance of the hearing.

"Accordingly, Respondents' Motion to Amend Protective Order is hereby GRANTED IN PART AND DENIED IN PART as explained above."

"SUMMARY OF RULING

"The interim order of April 27, 2016, is hereby amended to include the following:

PII also includes:

(1) The names of individuals identified in Respondents' responses to the Agency's Interrogatory No. 6, and

(2) The names of any non-party current or former employees of a Stars' establishment who have signed a declaration filed with the forum.

When the participants file documents with the PII described above, the original document should be submitted for filing under seal. Additionally, a copy with redactions removing the names of individuals described above should also be filed with the Contested Case Coordinator."

In response to a question sent by email from Respondents, the ALJ clarified that the interim order includes individuals that are considered to be either employees or independent contractors. (Exs. X94, X102, X107, X109)

39) Respondents filed motions for summary judgment on behalf of all Respondents on September 23, 2016. The Agency filed a response to the motions on October 13, 2016. (Exs. X99, X100, X108)

40) Amended Formal Charges were filed on October 19, 2016, removing references to "AKA entities" in the case caption and identifying Frehoo as the only corporate Respondent. (Ex. X112)

41) On October 11, 2016, Respondents filed a document with the following motions:

1. Motion to postpone the hearing scheduled for November 8, 2016;

2. Motion to postpone the ruling on Respondents' motions for summary judgment;

3. Motion to reopen and extend the period for informal discovery so that Respondents "have the opportunity to discover information necessary to assess the truthfulness and reliability of the remaining BOLI investigator interview accounts"; and

4. Motion to permit Respondents to file a reply brief in response to the Agency's response to Respondents' motion for summary judgment.

Respondents asserted that the motions were based on their "discovery of falsified and misleading information in [BOLI] interview notes [which] occurred almost simultaneously with the discovery that the Agency inappropriately redacted plainly discoverable information from the Aggrieved Person's medical records." Respondents also asked that the forum "conduct a fact-finding process to assess the validity of the record in this case to determine whether it contains additional falsified or misleading materials." Finally, Respondents requested expedited consideration of their motions, a prehearing telephone conference and a shortening of the Agency's time for responding to the motion. The Agency filed a response to the motion on October 18, 2016, requesting that the forum deny Respondents' motions and order Respondents to produce individuals who have signed declarations at hearing so that they can be cross examined pursuant to OAR 839-050-0260(9). Respondents also filed a "supplemental" motion on October 18, 2016, with an additional witness declaration. On October 19, 2016, the ALJ issued an interim order ruling on Respondents' motions which stated, in pertinent part:

> "First, Respondents contend that they recently discovered that some of the witness interview statements from BOLI investigators 'contain false and/or misleading statements.' Respondents refer to notes from interviews of witnesses named Megan * * *, Hayli * * * and Laurel * * *, and compare information in the interview notes to declarations from those witnesses which appear to contradict some of the statements contained in the interview notes. Respondents assert that the Agency should not rely on the investigation notes from those witness interviews when responding to Respondents' summary judgment motion because those notes are 'unreliable, misleading, and even falsified.' In reviewing the Agency's response to Respondents' motion for summary judgment, it does not appear that the Agency has submitted the notes from the interviews of [Megan], [Hayli] and [Laurel] with its summary judgment response. Accordingly, it does not appear that any action needs to be taken prior to ruling on Respondents' motion for summary judgment.
>
> "Secondly, the fact that BOLI interview notes differ from statements in declarations made by witnesses can be pointed out and discussed at the hearing in this matter. There is no prehearing procedure to 'conduct a fact-finding process to assess the validity of the record in this case to determine whether it contains additional falsified or misleading materials.' Respondents' counsel will have the opportunity to cross-examine all of the Agency's witnesses and can point out any discrepancies in documents.
>
> "Finally, Respondents have not provided a reason why the motion was filed at this date, instead of at an earlier time prior to the deadline. There is nothing to suggest that the alleged 'false and/or misleading statements' were not contained in documents produced to Respondents at the beginning of this case. Respondents' motions do not explain why there is an urgency at this late date to

conduct additional discovery that could have been conducted earlier in the case.[42]

"For all of those reasons, Respondents' request for an expedited ruling on their motions is DENIED. However, as indicated above, Respondents may address issues regarding the reliability and accuracy of documents produced by the Agency at the hearing in this matter.

"AGENCY'S REQUEST TO CROSS EXAMINE DECLARANTS

"Respondents have submitted three declarations with its motions and supplemental motions. In its response to the motions, the Agency requested the opportunity to cross examine the witnesses at hearing, pursuant to OAR 839-050-0260(9). The Agency's request is GRANTED. Respondents' declarations will not be received into evidence unless the witnesses appear at hearing so that they can be subject to cross examination."

(Exs. X106, X110, X111, X113)

42) On October 27, 2016, Respondents filed a motion to extend the time for filing their case summary materials by one day, until October 26, 2016. In response to an email from the ALJ requesting copies of documents which supported the representations in Respondents' motion, supplemental materials were submitted by Respondents on October 28, 2016. The Agency filed a response opposing the motion on October 28, 2016. The ALJ issued an interim order ruling on Respondents' motion on November 1, 2016, which stated, in pertinent part:

"'The administrative law judge may disregard any document that is filed with the Forum beyond the established number of days for filing.' OAR 839-050-0050(1). It is undisputed that Respondents' case summary and exhibits were filed one day late on October 26, 2016, the date of the postmark from the U.S. Postal Service. OAR 839-050-0040(1). OAR 839-050-0050(3) provides that 'the administrative law judge may grant [an] extension of time only in situations where the requesting participant shows good cause for the need for more time or where no other participant opposes the request.' Under OAR 839-050-0020(16), '[g]ood cause means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law, including these rules.'

"This forum has recently summarized the good cause standard as follows:

[42] In support of their motion, Respondents reference redactions made to medical records that Respondents contend are not consistent with the forum's discovery order. However, it is unclear how the redactions relate to information in the notes of BOLI's investigators, which are the subject matter of these motions. Additionally, Respondents' request to engage in discovery as to who made redactions to medical records does not appear to be reasonably likely to produce information that is generally relevant to the case as required by OAR 839-050-0200(7).

> 'To show good cause, Respondents must demonstrate an excusable mistake or a circumstance over which Respondents had no control. The excusable mistake or circumstances over Respondents had no control means "there must be a superseding or intervening event which prevents timely compliance." *In the Matter of Ashlanders Senior Foster Care, Inc*., 14 BOLI 54, 61-62 (1996), *citing In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 151, 821 P2d 1134 (1991). The mistaken act or failure to act is excusable if a party mistakenly acts or fails to act due to being misled by facts or circumstances that would mislead a reasonable person under similar circumstances. *Ashlanders, citing In the Matter of 60 Minute Tune*, 9 BOLI 191 (1991), *affirmed without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 174, 822 P2d 974 (1993).'

In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa, 34 BOLI 102, 203 (2015), *appeal pending*. The forum has only found 'good cause' to exist on rare occasions, which generally include a showing that a party took reasonable measures to meet a deadline, but an unforeseen circumstance arose. For example, the forum found 'good cause' to exist when a respondent relied on their attorney to file an answer and an 'electronic glitch' in the attorney's new computer docketing system failed to flag the due date. *In the Matter of Glenn Walters Nursery, Inc*., 11 BOLI 32, 34-35 (1992).

"After reviewing the sequence of events described in great detail by Respondents, the forum concludes that Respondents took reasonable steps to meet the case summary deadline, but were faced with unexpected delays caused by third party printing vendors. Respondents hired attorneys to defend this case and prepare its case summary filing. Respondents' counsel assigned [a paralegal] to arrange for the printing of the exhibits.[43] When [the paralegal] learned of a printing delay from the first vendor, she immediately contacted another vendor and engaged the help of others in the office to assist with copying and driving to multiple post offices.[44] Unlike past cases before the forum, Respondents' counsel and counsel's staff not only made initial efforts to meet the filing deadline, but then proceeded to take multiple additional steps late into the night to attempt to file the case summary on time. Therefore, Respondents have demonstrated 'good cause' and their motion for a one-day extension is GRANTED."

(Exs. X116-X124, X128)

---

[43] The Agency asserts that Respondents should not have waited until the date of filing to contact a printing vendor. However, that does not appear unreasonable in light of the fact that multiple vendors accepted the work after being informed of the deadline.

[44] To be clear, the forum does not consider a misinterpretation of post office hours to support "good cause" for an extension. *See Green Thumb Landscape & Maintenance, Inc.,* 32 BOLI 185, 189 (2013) (finding no "good cause" when envelope was mailed to the wrong address with insufficient postage). Rather, the problems with third party printing vendors coupled with the totality of the efforts taken after learning of printing delays/errors support a finding of "good cause."

43) The Agency filed its case summary on October 25, 2016, and filed an addendum to the case summary on November 4, 2016. (Exs. X114, X145)

44) Respondents' case summary was filed on October 26, 2016. Addendums to the case summary were filed on November 1, 2016, November 3, 2016, and November 7, 2016. (Exs. X116, X127, X139, X155)

45) On November 1, 2016, Respondents sent an email to the ALJ and the parties with a copy of Respondents' Motion to Exclude Agency Case Summary, which was subsequently filed with the forum. Respondents' moved to exclude the Agency's case summary filing, asserting that they were prejudiced because the Agency's case summary documents were sent by "media mail" and did not arrive at the office of Respondents' counsel until October 31, 2016, six days after the case summary deadline. On November 2, 2016, the ALJ entered an interim order requiring the Agency to file and serve its response to Respondents' motion no later than noon, November 3, 2016, because Respondents' motion required an expedited ruling prior to the hearing scheduled to begin on November 8, 2016. The ALJ further required the parties to file and serve all documents by hand delivery. On November 3, 2016, the Agency filed a response to Respondents' motion. The ALJ issued an interim order on November 4, 2016, which denied Respondents' motion, but provided that Respondents may raise objections regarding individual exhibits or witnesses if they believed they were prejudiced by the delay caused by the "media mail" postage on the service copy of the Agency's case summary. (Exs. X114, X130, X131, X141, X146-X148, X150)

46) Both the Agency and Respondents filed motions to cross examine authors of declarations and individuals who were interviewed by investigators. The ALJ denied the motions in an interim order issued on November 4, 2016, but noted that the forum would likely give greater weight to the statements of individuals who testify at hearing and are subject to cross examination. (Exs. X115, X133, X138, X150)

47) On October 28, 2016, the Agency filed a motion in limine to exclude the testimony of a witness identified in Respondents' case summary, a family member who had allegedly abused AP2 in 2010. Respondents filed a response to the motion on November 2, 2016. The ALJ granted the Agency's motion in an interim order issued on November 4, 2016. (Exs. X119, X134, X150)

48) Respondents filed a motion to exclude the testimony of the Agency's expert for failing to comply with OAR 839-050-0260(1)(b). After Respondents filed their motion, the Agency indicated that it would file an addendum to its case summary with supplemental information about the expert. On November 4, 2016, the ALJ issued an interim order denying Respondents' motion as moot, but stated the Respondents could raise the issue again if the supplemental information provided by the Agency was insufficient under BOLI's contested case rules. (Exs. X132, X150)

49) On October 31, 2016, a prehearing telephone conference was held. The conference was originally scheduled to discuss a number of issues in preparation for the hearing set for November 8, 2016. Immediately prior to the hearing, Respondents'

counsel sent an email to the ALJ and all of the parties which stated that Respondent Frehoo, Inc. "filed for protection under the US Bankruptcy Code in the District of Oregon at approximately 0900 today" and that "the automatic stay under 11 USC 362 is now in effect and precludes post-petition action against the debtor which could have been maintained prior to the filing." The Agency responded, stating: "The Oregon Department of Justice has indicated that the automatic stay does not apply to our proceeding and that we can move forward with our November 8th hearing. Given the different viewpoints on this issue, the Agency requests that Respondents be required to make a formal filing and the Agency be given the opportunity to respond."

The ALJ informed the parties by email that no action would be taken until a written document was filed with the forum. During the prehearing telephone conference, Respondents were informed that a formal written document should be filed with the forum. Following the conference, Respondents filed a Notice of Bankruptcy with the forum and the Agency filed a response to the Notice on November 2, 2016. On November 3, 2016, the Agency notified the ALJ that a hearing was scheduled in bankruptcy court on November 7, 2016, to address whether the BOLI proceeding was covered by the bankruptcy automatic stay provision.

On November 8, 2016, the bankruptcy court entered an order stating that the pending BOLI proceeding was "exempt from the operation of the automatic stay pursuant to 11 U.S.C. § 362(b)(4) as an exercise of the state's police power which satisfies the pecuniary purpose test." The bankruptcy court order further stated that the exemption did not allow for collection or enforcement, and that BOLI should not take any collection or enforcement action against Frehoo beyond filing a proof of claim in the bankruptcy court without further order of the bankruptcy court. (Exs. X125, X126, X129, X144, X157)

50) On November 2, 2016, Respondents filed an Emergency Motion for Set-Over due to the pending bankruptcy hearing. The Agency indicated by email that it did not oppose the motion. On November 4, 2016, the ALJ entered an interim order setting the case over for one day, and the hearing was scheduled to begin November 9, 2016. (Exs. X135, X142, X150, X154)

51) In an interim order issued on November 4, 2016, the parties were informed that the ALJ would be granting Respondents' motions for summary judgment to dismiss Respondents Pamela Colburn and Lisa Heinzman-Myers, and would be denying the remainder of the motions. The forum issued an interim order on November 8, 2016, ruling on Respondents' motions for summary judgment, which stated, in pertinent part:

"INTRODUCTION

"On March 31, 2016, the Agency issued Formal Charges against Respondents. Amended Formal Charges were filed on October 19, 2016, removing references to 'AKA entities' in the case caption. Respondent filed an answer to the Formal Charges on April 20, 2016, and filed an Amended Answer

on September 22, 2016. The Amended Formal Charges allege that Respondents discriminated against both Aggrieved Persons in compensation or in terms, conditions or privileges of employment, in violation of ORS 659A.030(1)(b), *former* and *current* OAR 839-005-0021(1), (2) and *former and current* OAR 839-005-0030. ORS 659A.030(1)(b) states, in pertinent part, that it is an unlawful employment practice '[f]or an employer, because of an individual's * * * sex * * * to discriminate against the individual in compensation or in terms, conditions or privileges of employment.' The Amended Formal Charges also allege that all of the individual Respondents 'aided, abetted, incited, compelled and/or coerced acts forbidden under ORS chapter 659A, specifically the unlawful practices alleged here, and [are] individually liable for violations alleged herein as an aider and abettor pursuant to ORS 659A.030(1)(g).'

Respondents filed motions for summary judgment on behalf of all Respondents on September 23, 2016. The Agency filed a timely response to the motions on October 13, 2016.[45]

"SUMMARY JUDGMENT STANDARD

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

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

ORCP 47C.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's Amended Formal Charges; (2) Respondents' Amended Answer; (3) Respondents' argument made in support of its motions and the exhibits submitted with Respondents' motions, and (4) the Agency's argument opposing Respondents' motions, and the exhibits submitted with the Agency's response.

"DISCUSSION

"Respondents raised the follow[ing] motions for summary judgment:

[45] The interim order of May 16, 2016, extended the deadline for responding to motions to 14 days.

1. Respondent Frehoo, Inc. dba Stars Cabaret & Steak House ('Frehoo') should be granted summary judgment as to Aggrieved Person #2's claim of sexual harassment because Frehoo did not know nor should it have known of her 'alleged touching by a patron, which she did not report.'

2. Respondent Frehoo should be granted summary judgment regarding Aggrieved Person #2's 'claim in so far as it is based on taking her clothes off or being looked at by a supervisor.'

3. Respondent Frehoo should be granted summary judgment as to claims concerning Aggrieved Person #1 because Frehoo was not her 'employer' under ORS 659A.001(4).

4. Respondent Frehoo should be granted summary judgment as to the agency's request for injunctive relief because the business is closed.

5. The forum should grant summary judgment to the extent that any of the claims or relief sought relate to corporate entities other than Frehoo.

6. The forum should dismiss the claims seeking damages for the Aggrieved Persons because they are not 'Complainants.'

7. All of the individual Respondents are entitled to summary judgment as to the charges of aiding and abetting.

"Following is a discussion and analysis of each of Respondents' motions.

"A. <u>Aggrieved Person #2's Claim of Sexual Harassment Due to Alleged Touching by a Patron</u>

"Respondents move for summary judgment as to the claims of Aggrieved Person #2 because 'the harassment claim appears to be based on a few instances of alleged unwelcome touching by a customer, * * * which it is undisputed that [Aggrieved Person #2] failed to report.' In response, the Agency argues that 'asking a child to take off her clothes, for the entertainment of adult customers, whether it involves overt sex acts or "simply" the lewd exhibition of body parts' meets the criteria for sexual harassment. The Agency further states that a child cannot consent to a sex act, citing ORS 163.315(1).

"'Sexual harassment' is defined as follows:

> '(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:
>
> > '(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:

> '(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
>
> '(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.
>
> '(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.'

OAR 839-005-0030. In this case, there is evidence that Aggrieved Person #2 had to submit to 'conduct of a sexual nature when such conduct is directed toward an individual because of [her] sex' when she performed nude dancing for the purpose of entertaining adults at Frehoo. Accordingly, the forum must determine whether that conduct was 'unwelcome.'

"When the Agency argues that Aggrieved Person #2 was incapable of consenting to sexual acts under ORS 163.315(1),[46] the Agency is essentially arguing that the conduct was 'unwelcome.' Courts that have considered this issue have held that 'the age of consent in the state in which [an individual] is employed' determines whether sexual conduct was 'welcome.' *EEOC v Finish Line, Inc*, 915 F Supp 2d 904, 917 (MD Tenn 2013), *quoting Doe v. Oberweis Dairy*, 456 F.3d 704, 713 (7th Cir 2006). These cases are consistent with an Oregon Court of Appeals opinion which held that 'a person's incapacity to consent under ORS 163.315(1) extends to civil cases.' *Wilson v Tobiassen*, 97 Or App 527, 534, 777 P2d 1379, 1384 (1989), *rev den*, 308 Or 500 (1989). Accordingly, it is reasonable to extend the age of consent in ORS 163.315(1) to this administrative proceeding, which would render any sexual conduct involving Aggrieved Person #2 as 'unwelcome.' Therefore, Respondents have not demonstrated that, as a matter of law, Aggrieved Person #2 was not subjected to sexual harassment.

"Respondents also assert that Frehoo did not know, nor should it have known, of any sexual harassment of Aggrieved Person # 2. An employer can be held liable for harassment if the employer knew or should have known of the conduct and fails to take immediate and appropriate corrective action. *In the Matter of Murrayhill Thriftway, Inc*., 20 BOLI 130, 153 (2000).[47] There is a disputed issue of fact in this case as to whether Respondents should have taken greater care in checking the identification presented by Aggrieved Person #2 to

---

[46] Under Oregon law, a person under the age of 18 is "incapable of consenting to a sexual act." ORS 163.315(1)(a). As well, it is illegal to use a person who is less than 18 years of age in a display of sexually explicit conduct. ORS 163.670(1); 163.665(1). The definition of "sexually explicit conduct" includes "actual or simulated * * * [l]ewd exhibit of sexual or other intimate parts." ORS 163.665(3)(f). Oregon also prohibits exhibiting an obscene performance to a minor. ORS 167.075(1).

[47] If the harassment is from a supervisor, there is a presumption that the employer should have known of the harassment, but there is no presumption if the harassment was from a non-employee. *Id.*

determine whether she was over the age of 18 and eligible to dance nude for entertainment purposes. Therefore, this motion is DENIED.

"B. Aggrieved Person #2's Claim 'Based on Taking Her Clothes Off or Being Looked at By a Supervisor'

"Respondents assert that Aggrieved Person # 2 cannot base her sexual harassment claim on the fact that she took her clothes off or was watched by a supervisor while dancing nude because those things were an integral part of her work as a dancer. As previously stated, Aggrieved Person #2 was under the age of 18 when she danced nude at Frehoo in front of adults for entertainment purposes, and there is a disputed fact as to whether Respondents knew or should have known that she was underage. Therefore, Respondents have not demonstrated that they are entitled to summary judgment as a matter of law and this motion is also DENIED.

"C. * * * * *[48]

"D. Agency's Request for Injunctive Relief

"In the Amended Formal Charges, the Agency seeks an injunction against 'Respondents, their agents, employees and successors' pursuant to ORS 659A.030(1)(b), OAR 839-005-0021 and OAR 839-005-0030. Respondents request summary judgment on behalf of Frehoo, its 'agents,' and 'employees' because Frehoo ceased operations on July 31, 2016. Respondents argue that because the purpose of an injunction is to prevent future harm, the need for injunctive relief as 'set forth on page 20, paragraph 3 of the Formal Charges' is moot due to the closure of the business. In response, the Agency produced evidence that there are indications that, as of September 28, 2016, the Frehoo location in Beaverton was still set up as a business and 'could resume operations at that location with little or no delay.' [49] (Agency Ex. C, Lynch Decl., ¶ 7) More specifically, Lynch observed:

- Seating, privacy curtains, glassware and bottles of alcohol appeared ready for use.
- Sound equipment in the DJ booth was powered on and appeared ready for use.
- Pilot lights were burning on a gas range in the kitchen.
- In an office, a video monitoring system and a computer were powered on.

[48] This section related to claims involving AP1. All of those claims have since been resolved by the parties.

[49] The Agency also made an argument based on ORS 659A.850(4) which is not cited on page 20, paragraph 3 of the Amended Formal Charges and, thus, was not considered when ruling on Respondents' motion.

Id. As well, Frehoo is listed as an active business with the Corporation Division of Oregon's Secretary of State. (Agency Ex. H)

"When recently faced with the question of nonmonetary relief after the closure of a respondent's business, the Commissioner ruled as follows:

> '[T]he nonmonetary remedies sought by the Agency would be a futile exercise of the forum's authority, given that *Respondent MBI is no longer doing business in Oregon and that there is no indication in the record that MBI has any intention of resuming business in Oregon in the future*.'

In the Matter of Maltby Biocontrol, Inc, 2014 BOLI 121, 157 (2014) (emphasis added). By contrast, in this case there is evidence on the record in the Lynch Declaration, as described above, which creates a question of fact as to whether there is 'an intention [to] resum[e] business in Oregon in the future.' Accordingly, Respondents' Fifth Motion for Summary Judgment is DENIED.

"E. <u>Claims Related to Corporate Entities Other Than Frehoo</u>

"Respondents request that the forum 'grant summary judgment to the extent that any of the claims or relief sought related to corporate entities other than Frehoo.' This argument was based on the caption in the original Formal Charges which named Frehoo as the only corporate Respondent. The identification of Frehoo as a party was followed by the listing of numerous other corporate entities, which were preceded by the acronym 'aka.' The Agency did not object to Respondents' argument in its response and recently filed Amended Formal Charges which 'remove[d] the "aka" entities.' Accordingly, because the 'AKA entities' have been removed from the caption and there are no claims made against any corporate entities other than Frehoo, Respondents' motion is DENIED AS MOOT.

"F. <u>Damage Claims on Behalf of Aggrieved Persons who are not Complainants</u>

"The Agency seeks damages for each Aggrieved Person in the amount of $4,000,000 under ORS 659A.850. Respondents assert that the forum has no authority to award damages because the Aggrieved Persons are not complainants and ORS 659A.850(4)(b) refers to 'paying award of actual damages suffered by the *complainant*.' (Emphasis added). In response, the Agency points out that the language in ORS 659A.850(4)(b) referencing 'damages suffered by the complainant' is preceded by the phrase 'including but not limited to * * *.' The Agency also cites to past cases awarding damages to an aggrieved person and legislative history. *See*, *e.g. Blachana, LLC*, 32 BOLI 220 (2013), *aff'd Blachana, LLC v. Bureau of Labor and Industries*, 273 Or App 806 (2015), 359 P3d 574 (2015), *opinion adh'd to as modified on recons sub nom. Blachana, LLC v. Oregon Bureau of Labor & Indus.*, 275 Or App 46 (2015).

"A BOLI Final Order 'may require that the respondent:

'(a) Perform an act or series of acts designated * * * that are reasonably calculated to:

'(A) Carry out the purposes of [ORS chapter 659A];

'(B) Eliminate the effects of the unlawful practice that the respondent is found to have engaged in, *including but not limited to* paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief; and

'(C) Protect the rights of the complainant and other persons similarly situated * * * *'

ORS 659A.850(4) (emphasis added). The Oregon Supreme Court recently stated that the phrases 'includes' and 'including but not limited to' indicate that 'the legislature likely intended a nonexclusive meaning.' *Sather v. SAIF Corp*, 357 Or 122, 134, 347 P3d 326 (2015). In other words, the reference to 'actual damages suffered by the complainant' does not mean 'that the specific examples constitute the universe of items to which the general term refers; rather, it means only that our interpretation of the general term includes consideration of those specific examples.' *Schmidt v. Mt Angel Abbey*, 347 Or 389, 404, 223 P3d 399 (2009). Accordingly, the reference in ORS 659A.850(4)(b) to 'damages suffered by complainant' includes that specific example, but does not *exclude* an award of damages to an aggrieved person. Thus, BOLI's interpretation is consistent with how the Supreme Court has interpreted similar phrases in *Sather* and *Schmidt*. Therefore, Respondents' motion to dismiss the claims requesting damages on behalf of the Aggrieved Persons is DENIED.

"G. <u>Aiding and Abetting Allegations against the Individual Respondents</u>

"ORS 659A.030(1)(g) provides that it is an unlawful employment practice '[f]or any person, whether an employer or an employee, to aid, abet * * * the doing of any of the acts forbidden under this chapter or to attempt to do so.' 'Person' includes 'individuals.' ORS 659A.001(9)(a). 'Aiding and abetting, in the context of an unlawful employment practice, means to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.' *Maltby*, 33 BOLI at 151 (internal citations omitted). 'A corporate officer and owner who commits acts rendering the corporation liable for an unlawful employment practice may be found to have aided and abetted the corporation's unlawful employment practice.' *Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 97 (2015). *See also In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67 (2012); *In the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012). Aiding and abetting, in the context of an

unlawful employment practice, means 'to help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission.' *Hey Beautiful,* 80 BOLI at 97.

"Respondents assert that aiding and abetting requires active participation in an unlawful act, and Respondents cannot be liable simply because of their ownership interests or positions in the organization. In response, the Agency asserts that the individual Respondents can be liable for '[t]heir complete indifference and inaction to monitor and remedy the situation.'

"1. Facts Regarding the Individual Respondents

"Following is a summary of the facts regarding each individual Respondent.[50]

"*Colburn and Heinzman-Myers*

"Colburn and Heinzman-Myers own interests in corporations that own NPC Concepts ('NPC'). NPC holds a 100% ownership stake in Frehoo. Colburn and Heinzman-Myers both live in Colorado. Heinzman-Myers has not visited Oregon since 1976. These individuals are not involved in recordkeeping for Frehoo and have no knowledge of, or responsibility for, creating or enforcing policies. These individuals did not know of any conduct involving the Aggrieved Persons until after suspects were arrested. The Agency has admitted that it has no 'evidence or information in [its] possession or knowledge that demonstrates or tends to show that either' Colburn or Heinzman-Myers 'has ever played an active role in the management of [Frehoo] or in the development of any of its employment policies.' (Resp. Ex. 20, Interrogatory Response #32)

"*Herkenrath*

"Herkenrath began working for Frehoo in December 2010, and performed on-site management duties beginning in 2012. During the time Aggrieved Person #1 was allegedly at the club, Herkenrath worked part-time as a manager on the day shift, and also worked as a security person. He recalls seeing Aggrieved Person #1 with Toth on one occasion. Herkenrath has known Toth since Herkenrath was ten years old. Toth told Herkenrath about the initial job opportunity to work for Frehoo.

"Herkenrath was present when Aggrieved Person #2 applied for a position at Frehoo, but he was not the manager on duty.

[50] For purposes of this summary judgment motion, the facts are presented in the light most favorable to the Agency, the nonmoving party. Accordingly, not all facts Respondents discussed in their motions are included.

"*Kaiser*

"Kaiser holds an ownership in Frehoo through his interest in RKG Holdings, Inc. During the events at issue in this case, Kaiser was responsible for overseeing the management of Stars Cabaret in Bend, Oregon, where he lives. He also generally oversees the financial, corporate and legal matters that affect for clubs in Oregon, including Frehoo. He was not generally involved in the day-to-day management of Frehoo. Kaiser never had any contact with the Aggrieved Persons.

"*Mitchell*

"Mitchell has an ownership interest in Frehoo through his interest in SHM Holdings, Inc. He is the corporate secretary of Frehoo. He was the corporate officer designated to oversee the management of Frehoo. In 2012, prior to the time that Aggrieved Person #1 was allegedly on Frehoo's premises, Frehoo hired an investigator to determine whether entertainers were engaging in prostitution, and to ensure the security was doing its job. At the time that Toth was arrested, Mitchell had never received any complaints that Toth sexually harassed anyone. The last communication Mitchell had with Toth was to send him a letter terminating his employment with Stars-Bridgeport, the location where Toth worked at the time of his arrest.

"Mitchell never had any contact with Aggrieved Person #2. During 2012 through 2014, Mitchell had a romantic/sexual relationship with a woman who worked as an entertainer at Frehoo.

"*Struhar*

"Struhar has an ownership interest in Frehoo through his interest in JMS Holdings, Inc., and is the corporate president of Frehoo. He has the ability to exercise management control at Frehoo, and has a romantic or sexual relationship with a Stars entertainer. Lynch Decl., p. 4.

"2. Analysis and Ruling

"The forum agrees with the Agency that sometimes the failure to take action can support a claim for aiding and abetting. *See, e.g. Alch v Superior Court*, 122 Cal App 4th 339, 389, 19 Cal Rptr 3d 29, 67 (2004) (under California law, talent agency could be liable for aiding and abetting an employer's age discrimination violation if talent agency gave 'substantial assistance or encouragement' to the employer); *Hurley v Atl City Police Dep't*, 174 F3d 95, 126 (3d Cir 1999) (under New Jersey law, 'inaction can form the basis of aiding and abetting liability if it rises to the level of providing substantial assistance or encouragement'); *Chapin v. Univ. of Mass*., 977 F Supp 72, 78 (D.Mass.1997) (holding that the inaction of a supervisor who is aware of sexual harassment is aiding and abetting in violation of Massachusetts law).

> "With respect to Respondents Herkenrath, Kaiser, Mitchell and Struhar, there is evidence that they had management control over Frehoo and may have failed to take action to prevent conduct at Frehoo which led to the events involving the Aggrieved Persons. However, there is no evidence to demonstrate that Colburn and Heinzman-Myers (who both reside in Colorado) had any involvement with Frehoo other than financial interests. Accordingly, Respondents' motion to dismiss Colburn and Heinzman-Myers is GRANTED, and the motion as to the remaining individual Respondents is DENIED."

(Exs. X150, X156) The ALJ's ruling on Respondents' motion for summary judgment is hereby CONFIRMED.

52) At the start of the hearing on November 9, 2016, the ALJ orally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Hearing Record)

53) To comply with the terms of the interim protective orders, throughout the hearing the aggrieved persons were referred to as AP1 and AP2 instead of their actual names. However, when AP1 and AP2 testified, their actual first names were used, but were not included in the transcript. With the exception of the named Respondents, Frehoo's employees and alleged independent contractors were referred to by their first names. When the medical records of AP1 and AP2 were discussed, any hearing observers who had not certified that they had read and agreed to the terms of the interim protective orders were asked to leave the room. (Hearing Record)

54) On November 14, 2016, the parties submitted a Joint Stipulation of Exhibits identifying exhibits that all the parties agreed should be admitted into evidence. (Ex. X158)

55) During the hearing, the ALJ sustained Respondents' objections to the audio recording of the BOLI interview of Nathan Wheeler (Ex. A28) because it contained material that was irrelevant, immaterial, repetitious and unreliable. Additionally, because Wheeler did not testify in person, Respondents did not have an opportunity to cross examine the witness. (Hearing Record)

56) The Agency attempted to offer evidence of sexual harassment at the Stars Salem location through the testimony of Chris Lynch. Respondents objected to this evidence on the basis of relevancy. The ALJ permitted Lynch to testify as to this evidence through an offer of proof. At the conclusion of the offer of proof, the ALJ sustained Respondents' objection because there was insufficient evidence on the record as to when the incident happened and how the management of the Salem club related to Frehoo. (Hearing Record)

57) On November 23, 2016, the ALJ issued an interim order which stated:

"INTRODUCTION

"The following summarizes rulings made during the hearing, as well as additional directives that will apply to the case when the hearing resumes.

"HEARING DATES

"The hearing in this case began on November [9], 2016, and went into recess before noon on November 18, 2016, after the Agency indicated it had no additional witnesses available to testify that day. The hearing will resume at **9:00 a.m. on Tuesday, November 29, 2016, and will continue until December 7, 2016**. At this time, the hearing facility is not available after December 7, 2016. The parties were informed that they needed to work towards December 7, 2016, as the ending date for the presentation of witness testimony and evidence. If necessary, the ALJ will arrange for closing arguments to be made on another date at another location.

"At 4:00 p.m. on Monday, November 28, 2016, the parties will have access to the hearing room to set up for hearing the next day.

"WITNESS TESTIMONY

"The Agency has indicated that it will call its expert witness to testify on November 29, 2016, and that this testimony (including direct, cross examination and re-direct) will last the entire day. Respondents have asserted that it seems unlikely that this testimony will last the entire day, and have requested that the Agency be prepared to have additional witnesses lined up. The Agency was instructed to disclose any additional witnesses to Respondents by noon on Monday, November 28, 2016.

"Furthermore, this hearing has progressed much slower than anticipated by the parties. Accordingly, the following procedures will be implemented going forward to help move the case along more expeditiously:

- When presenting their respective cases, both the Agency and Respondents should fill the entire day with witness testimony and avoid 'dead spots,' except for the usual mid-morning, lunch and mid-afternoon breaks. The parties will be expected to have additional witnesses ready in the event the testimony of a witness proceeds more quickly than anticipated. If a party does not have a witness lined up, they should be prepared to explain why there is 'good cause' for the lack of a witness.

- In order to avoid 'unduly repetitious evidence' under OAR 839-050-0260(2), the parties will be discouraged from asking testifying witnesses to summarize statements made by other witnesses who will also be testifying at the hearing. In other words, in most circumstances information should

be presented with live testimony, rather than by having one witness read a lengthy summary statement of another witness who will also be coming in to testify.

- When the hearing resumes after the lunch hour break each day at approximately 1:00 p.m., the parties will be asked to identify the witnesses they intend to call the following day.

- On the morning of November 29, 2016, the Agency will be asked to provide an updated estimate as to when its case-in-chief will be complete, and Respondents will be asked for an estimation of how long its case will take.

"STRICKEN TESTIMONY OF DET. OPITZ

"After the conclusion of the Agency's direct examination of Beaverton Police Det. Chad Opitz, Lauren Mehrtens, an attorney from the Beaverton City Attorney's Office, appeared and asked to be heard. Ms. Mehrtens stated that she would be instructing Det. Opitz not to answer any questions regarding a pending criminal investigation. The Agency had asked some questions about this investigation in its direct examination of Det. Opitz and, thus, Respondents were effectively prevented from having an opportunity to conduct cross examination on that subject. Accordingly, the portion of the direct testimony of Det. Opitz on that topic was stricken from the record. The court reporter provided the forum with a transcript of that testimony, and copies of the transcript were provided to the Agency, Respondents, and Ms. Mehrtens.

"The Agency was provided with the opportunity to file a legal brief or motion as to why the stricken testimony should be admitted. The brief must be emailed to Respondents, Ms. Mehrtens and the ALJ by 5:00 p.m. on Monday, November 28, 2016. The original, hard copy for the forum file may be delivered to the ALJ on the morning of November 29, 2016.

"Respondents and the Beaverton City Attorney may file responses to the Agency's briefing. Responses must be emailed to the Agency, the Beaverton City Attorney's office and the ALJ by noon on Thursday, December 1, 2016. The original, hard copy for the forum file may be delivered to the ALJ on the morning of December 2, 2016."

(Exs. X159, X160)

58) The Agency filed a Motion to Allow Evidence of Third Party Minor Dancer on November 28, 2016. Respondents and the City of Beaverton filed responses to the Agency's motion on December 1, 2016. On December 6, 2016, the ALJ announced on the record that the Agency's motion was denied because there was no way to predict whether Det. Opitz would need to rely on records which were determined to be exempt from disclosure under ORS 192.501 to 192.505 to answer questions on cross

examination, in violation of the public officer privilege of ORS 40.270. If he could not answer questions due to privilege, then Respondents would not have the opportunity to fully and completely cross examine the witness. (Exs. X161, X162, X163; Hearing Record)

59) Throughout its case-in-chief, Respondents attempted to offer the testimony of witnesses who were not listed on their case summary and the Agency objected. Respondents were unable to establish that the witnesses met the standard for an "impeachment" witness. However, the ALJ allowed the witnesses to testify when Respondents established that the Agency offered witness testimony that differed from what was provided in discovery and, thus, Respondents would not have had advance notice of the need to list the "impeachment" witnesses in their case summary. (Hearing Record)

60) During the hearing, the Agency requested copies of email communications between Kaiser and Herkenrath. Respondents asserted that the emails were protected by attorney client and work product privileges. At the ALJ's request, Respondents produced copies of the emails for *in camera* inspection. The ALJ ruled that one email was covered by attorney client privilege and need not be produced. With respect to an email subject to the work product privilege, which is not absolute, the ALJ did not find a substantial need for the document to be produced. (Hearing Record)

61) At the conclusion of the evidentiary portion of the hearing, the ALJ and the parties discussed the filing of post-hearing briefs on matters which arose during the hearing, including motions made by Respondents at the conclusion of the Agency's case-in-chief. On December 12, 2016, the parties were provided with a copy of an excerpt from the proceedings on December 1, 2016, which included discussion of the issues. On December 13, 2016, the ALJ issued an interim order allowing the parties to file briefs regarding cases cited in the hearing by Respondents and the offer of proof regarding witness Alexa/"Satine" no later than December 19, 2016. The Agency and Respondents filed post-hearing briefs on December 19, 2016. (Exs. X164 - X166)

62) In response to a question from the Agency, the ALJ sent an email to the parties on December 19, 2016, which lifted the requirement that documents had to be filed and served by hand delivery. (Ex. X167)

63) On December 19, 2016, the ALJ sent an email to the parties which stated, in pertinent part:

> "As discussed at the end of the evidentiary portion of the hearing in this matter, closing arguments will take place at BOLI's Portland office at the address below on **Wednesday, December 21, 2016**. The proceedings will begin at **9:00 a.m.** (note that this is a half hour change from what was previously discussed). The parties may access the hearing room after 8:00 a.m. to set up their materials.
>
> "Each side's closing arguments will be limited to 90 minutes, and the Agency will have 15 minutes at the end for rebuttal closing arguments.

"If the parties intend to make any video or PowerPoint presentations, they should be prepared with their own equipment and should bring copies of any materials that are presented on screen."

(Ex. X168)

64) On December 20, 2016, the ALJ sent an email to the parties which stated, in pertinent part:

"Following are the forum's interim rulings after reviewing the parties' post-hearing briefs:

"1. Respondents' motions for judgment as a matter of law are DENIED. The issues raised in the motions will be addressed in the Proposed and Final Orders.

"2. The testimony of witness Alexa/'Satine' is not admitted into evidence. This witness was not identified in Respondents' case summary and was labeled as an 'impeachment' witness. Impeachment by extrinsic evidence, e.g. testimony of a witness or by introduction of an exhibit, can be used to show bias, interest, prejudice, improper motive, a witness's ability to perceive or remember, prior inconsistent conduct and prior inconsistent statements directly related to a relevant issue, and conviction of a crime as set out in OEC 609. Respondents did not demonstrate that this witness testimony met any of the categories of 'impeachment' evidence set forth in OEC 609.

"Respondents also asserted that this witness was first named in the hearing testimony of Steve Toth and was not disclosed in response to discovery requests. The ALJ has the authority to take appropriate remedial action when relevant information is not produced in response to a discovery order. *See, e.g. In the Matter of Columbia Components, Inc.*, 32 BOLI 257, 263-64 (2013). However, in this circumstance, although the Agency was asked to identify the names of any witnesses, there is no information to indicate that the Agency knew of the name of this witness prior to Toth's testimony and failed to disclose it. Accordingly, the witness testimony cannot be admitted due to an alleged failure on the part of the Agency to respond to a discovery request.

"This testimony is not admitted into evidence but will remain in the record as an offer of proof.

"Additionally, the Agency's motion for the forum to take judicial notice of the final order of the OLCC (Ex. A25) is DENIED. Ex. A25 is a Stipulated Settlement Agreement for Entry into Final Order. The agreement, as well as any 'statements made in compromise negotiations' are inadmissible under OEC 408. *See also In the Matter of Ruston, Christopher and Christine Stahler*, 34 BOLI 56, 66 (2015)."

(Ex. X169)

65) The ALJ issued an interim order on February 2, 2017, inviting the parties to submit briefing on the issue of damages. The Agency filed its brief on February 10, 2017, and Respondents filed their briefing on December 21, 2017. (Exs. X171, X172, X173)

66) On January 5, 2017, the Agency filed a request for hearing transcript and Respondents sent an email also requesting a copy of the transcript. With the ALJ's interim order of February 2, 2017, the parties were provided with copies of draft transcripts of the testimony of AP1 and AP2 to be reviewed for the purpose of determining which portions should be subject to the interim protective orders in this matter. The parties were encouraged to confer and notify the ALJ if they were able to reach a stipulation. After the parties informed the ALJ that they could not reach an agreement regarding the testimony, a telephone conference was scheduled for February 27, 2017, to discuss the matter. After the parties discussed their general positions regarding the treatment of the transcripts, a briefing schedule was set forth in an interim order issued on March 1, 2017 so that the parties could explain their respective positions in writing.

In response to the forum's interim order of March 1, 2017, the parties submitted briefs outlining their respective positions as to which portions of the draft transcripts of the testimony of AP1 and AP2 should be redacted to remove information subject to the interim protective orders. On March 15, 2017, the ALJ issued an interim order specifying the particular portions of the transcript that should be redacted to remove "[i]nformation of a personal nature such as but not limited to that kept in a personal, medical or similar file" pursuant to ORS 192.502(2). (Exs. X170, X171, X176, X177, X179, X180)

67) During the February 27, 2017, telephone conference, the Agency and Respondents requested 45 days to file exceptions to the Proposed Order to allow time to review the transcript of the hearing. The ALJ granted the oral request to deviate from the forum's typical 10-day exceptions period, and indicated that the Exceptions Notice in the Proposed Order would reflect the revised time period. (Post-Hearing Record)

68) The ALJ issued an interim order on February 22, 2017, requesting that the Agency file a brief addressing the issue of adequate notice in the Amended Formal Charges no later than March 1, 2017. Respondents were permitted to file responsive briefing no later than March 8, 2017. The Agency filed its brief on March 1, 2017, and Respondents filed their brief on March 8, 2017. On March 15, 2017, the ALJ issued an interim order which stated as follows:

> **"INTRODUCTION**
>
> "The parties submitted briefing on the issue of the adequacy of notice in the Amended Formal Charges with respect to particular sections of OAR 839-005-0030 in response to the forum's interim order issued February 22, 2017.

"The Agency argued that all sections of OAR 839-005-0030 – including the proxy liability theory set forth in OAR 839-005-0030(3) – were relevant at the time the charges were issued. The Agency asserted that the allegations in the Amended Formal Charges are sufficient, but moved 'for leave to issue Second Amended Formal Charges to further clarify that each subsection applies and specifically allege that Steven Toth and Respondents' other managers acted as a proxy for Respondent Frehoo, Inc., during times material.' (Agency's Post-Hearing Brief, p. 4)

"Respondents asserted that they 'did and reasonably could have understood that the Agency was proceeding based only on sections (5) ('Harassment by Supervisor, No Tangible Employment Action') and (7) ('Harassment by Non-Employees') of OAR 839-005-0030, and not on the basis of proxy liability.' (Resp's Post-Hearing Brief, p. 11) (emphasis in original). Respondents further argue that they would be substantially prejudiced if the Agency could add the theory of proxy liability to the Amended Formal Charges. Additionally, Respondents asserted that if the Agency is permitted to amend, then Respondents should be granted leave to amend their Answer and the record should be reopened to allow Respondents to offer evidence to defend against proxy liability allegations.

"RULING

"The Agency mentioned the proxy liability theory for the first time during closing arguments. OAR 839-050-0140(4) does not apply because the Agency did not move to amend the Amended Formal Charges before the close of the evidentiary portion of the hearing. Under OAR 839-050-0140(5), the ALJ may allow pleadings to be amended to conform to evidence when (1) the Agency has shown good cause for not including the new matter in its charging document and (2) Respondents are not able to show substantial prejudice from the amendment. The ALJ may grant a continuance to allow the objecting party to produce additional evidence.

"As set forth in the rule, if the forum found there was good cause and permitted the Agency to add the proxy liability theory, the record would need to be reopened to allow Respondents to present additional evidence to respond to the new allegation. Because the evidentiary record in this case closed on December 7, 2016, the forum declines to permit the Agency to amend and add the proxy liability allegations.

"As indicated above, Respondents expected to defend against charges of harassment by supervisor, no tangible employment action, under OAR 839-005-0030(5) and harassment by non-employees under OAR 839-005-0030(7). The Amended Formal Charges and the Amended Answer also included allegations and defenses related to the definition and standard for determining sexual harassment as set forth in OAR 839-005-0030 (1) and (2). The Amended Formal

Charges did not mention the theories set forth in OAR 839-005-0030(3) (employer proxy), OAR 839-005-0030(4) (harassment by supervisor plus tangible employment action), OAR 839-005-0030(8) (withdrawn consent), OAR 839-005-0030(9) (opportunities/benefits granted).

"Accordingly, the forum GRANTS the Agency's request to amend the Amended Formal Charges to specifically cite to OAR 839-005-0030(1), (2), (5) and (7). The request to add additional sections of OAR 839-005-0030 to the Amended Formal Charges is DENIED."

(Exs. X174, X175, X178, X181)

69) On May 1, 2017, the Agency submitted a Notification of Settlement of Charges as to AP1 and Joint Request for Transcript. The ALJ issued an interim order on May 10, 2017, which stated:

"**Notification of Settlement**

"On May 1, 2017, the Agency filed a document notifying the forum that the parties reached an agreement in settlement of the charges concerning Aggrieved Person #1 and that a fully executed settlement document would be submitted to the forum within the coming weeks. **The parties are hereby ordered to submit a fully executed settlement agreement or, alternatively, a status report with an estimate as to when an agreement will likely be filed no later than May 19, 2017.**

"After the settlement is finalized according to the procedures set forth in OAR 839-050-0220, a Proposed Order will be issued which contains the facts necessary to make proposed findings regarding the charges concerning Aggrieved Person #2.

"**Request for Transcript**

"The parties also jointly requested a copy of the hearing transcript "as soon as practicable and prior to the issuance of the Proposed Order." Under normal circumstances, the forum does not receive a transcript of the hearing until after a Final Order is issued and a Notice of Appeal is filed. See OAR 839-050-0350(3). However, this case involves several unique circumstances, which are as follows:

- The hearing lasted for 15 days, including closing arguments.
- A court reporter was present throughout the entirety of the hearing to transcribe the testimony, arguments and objections made by the parties, and statements of the ALJ.
- Over 40 witnesses testified and there were significant factual disputes.

- The ALJ had access to a draft transcript when preparing the Proposed Order.

Given the totality of these circumstances, the ALJ exercises discretion pursuant to OAR 839-050-0240 and finds that distribution of the transcript to the parties will likely result in a more efficient process for reviewing the Proposed Order and drafting any potential Exceptions that may be filed.

"The final, certified transcript will be provided to the ALJ by the court reporter within the next few days. The ALJ will then instruct the Contested Case Coordinator to make hard copies of the transcript and provide them to the parties at the same time and on the same day, subject to the following conditions:

- The parties may use the transcript solely for the purpose of reviewing the Proposed Order and filing Exceptions (or, thereafter, for appellate purposes).

- The parties may not scan or make electronic copies of the transcript.

- The parties may only make and distribute hard copies of the transcript to attorneys and staff who are involved in reviewing the Proposed Order and filing Exceptions (or, thereafter, for appellate purposes).

- The parties are bound by all interim protective orders that have been issued in this matter.

IT IS SO ORDERED"

(Exs. X182, X183)

70) On May 12, 2017, Respondents filed a request for clarification regarding the use of the transcript, and the Agency responded on May 15, 2017. After reviewing the issues and concerns raised by the parties, the ALJ issued an interim order on May 17, 2017, which stated, in pertinent part:

"After reviewing the issues and concerns raised by the parties, the interim order of May 10, 2017, is hereby supplemented as follows:

- Electronic copies of the transcript may be made for the purposes described in the interim order of May 10, 2017. However, any electronic copies must be secured with a password or some other means of restricting access only to those individuals permitted to review the transcript under the terms of the May 10, 2017, interim order.

- The forum will release copies of the transcript to the Agency, Respondents' counsel and counsel for AP2. The Contested Case Coordinator will contact the parties when the transcript is available to be

picked up from BOLI's Portland office. The forum will not be providing a copy of the transcript to counsel for AP1, because the parties notified the forum that an agreement was reached to resolve the claims involving AP1.

- No one is permitted to copy or use the transcript for purposes other than for the reasons set forth in the May 10, 2017, interim order.[51]

- The restrictions set forth above and in the interim order of May 10, 2017, shall remain in place until a Notice of Appeal is filed with the Oregon Court of Appeals (unless this ruling is modified by a subsequent interim order or by the Deputy Commissioner in the Final Order).

"**Record Clarification as to Volume 9**

"The index at the beginning of Volume 9 indicates that page 1873 was removed and saved in a sealed envelope. However, that particular page is not subject to the interim protective orders and was not removed and placed in a sealed envelope.

IT IS SO ORDERED"

(Exs. X184 - X186)

71) Telephone conferences with the parties were held on May 19, 2017, and May 26, 2017, to discuss the status of the settlement documents regarding AP1. After requests were received for a Final Order of Informal Disposition ("FOID") as to the claims involving AP1, the ALJ issued a FOID on June 15, 2017, disposing of the claims related to AP1. (Exs. X187 - X189, X191, X192)

72) On June 14, 2017, Respondents filed motion to remove the restrictions on the use of the hearing transcript. The Agency filed a response to Respondents' motion on June 16, 2017. Respondents' motion is DENIED. (Exs. X190, X193)

73) The ALJ issued a proposed order on July 18, 2017, that notified the participants they were entitled to file exceptions to the proposed order within 45 days of its issuance. The Agency and Respondents timely filed exceptions on September 1, 2017. The exceptions are addressed following the Opinion section of the Final Order.

[51] This forum only has jurisdiction over the matters alleged in the Amended Formal Charges. Any additional concerns regarding access to the transcript for purposes of fairness in the civil proceeding are not properly directed to the forum and could be raised with the court.