



**BUREAU OF LABOR AND INDUSTRIES**

**BEFORE THE COMMISSIONER  
OF THE BUREAU OF LABOR AND INDUSTRIES  
OF THE STATE OF OREGON**

In the Matter of:

**INSIGHT GLOBAL, LLC,**

Respondent.

Case No. **76-18**

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER  
(AMENDED)\*

**SYNOPSIS**

In a case of first impression involving the City of Portland's Removing Barriers to Employment ordinance, the forum concluded that Respondent violated Portland City Code ("PCC") 23.10.030(A), (B) and administrative rule RBE 2.02(1) – (3) when it asked Complainant a question about his criminal history and excluded him from the hiring process after he disclosed a conviction. The forum awarded Complainant lost wages in the amount of \$7,960 and \$15,000 for mental and emotional suffering damages.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 6, 2019, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

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\* The original Final Order was amended to correct an error in the Order section concerning lost wages.

1 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by  
2 Administrative Prosecutor Adam Jeffries, an employee of the Agency. Complainant,  
3 Nathan B. Millsap (“Millsap”), was present throughout the hearing. Respondent Insight  
4 Global, LLC (“IG”) was represented throughout the proceeding by Attorneys Sharon  
5 Stufken (*pro hac vice*) and Jennifer Warburg (local counsel).

6 The Agency called BOLI Civil Rights Investigator Rosalia Radich and Millsap as  
7 its witnesses.

8 Respondent called Tara Travisano (by telephone) and Hillary Knudsen as  
9 witnesses.

10 The forum received into evidence: (a) Administrative exhibits X1 through X21; (b)  
11 Agency exhibits A1-A14, (c) Respondent exhibits R1-R4 and (d) exhibits ALJ1-ALJ2.<sup>1</sup>

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

### 15 FINDINGS OF FACT – PROCEDURAL

16 1) At all times material, the City of Portland and the Agency were parties to an  
17 intergovernmental agreement for enforcement of Portland City Code (“PCC”) chapter  
18 23.10 and the administrative rules implementing chapter 23.10 concerning Removing  
19 Barriers to Employment (RBE) 1.01 to 3.05. The agreement provides the Agency with  
20 the jurisdiction and authority to investigate complaints and enforce those provisions. IG

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22 <sup>1</sup> Exhibits ALJ1 and ALJ2 (applicable City of Portland ordinances and regulations) were requested by the  
23 ALJ at hearing. Exhibits R5 and R6 were withdrawn by IG.

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

1 was subject to the applicable city code and regulations. (Exs. X2b, X3, ALJ1-ALJ2)

2       2)       Millsap filed a verified complaint with the Agency's Civil Rights Division on  
3 October 20, 2017, alleging that he was the victim of the unlawful employment practices  
4 of Respondent, asserting that IG asked about his criminal record before an interview and  
5 refused to hire him based on a past criminal conviction, citing Portland City Ordinance  
6 23.10.030. (Ex. A1)

7       3)       On April 10, 2018, the Agency's Civil Rights Division issued a Notice of  
8 Substantial Evidence Determination ("SED") in which it found substantial evidence of an  
9 unlawful employment practice for exclusion of consideration for employment solely  
10 because of criminal history, in violation of PCC 23.10.030. (Ex. A13)

11       4)       On September 18, 2018, the forum issued a Notice of Hearing to IG, the  
12 Agency, and Millsap stating the time and place of the hearing as January 29, 2019,  
13 beginning at 9:00 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau of Labor  
14 and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon. Together  
15 with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a  
16 document entitled "Summary of Contested Case Rights and Procedures" containing the  
17 information required by ORS 183.413, a document entitled "Servicemembers Civil Relief  
18 Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice  
19 of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000  
20 to 839-050-0445. (Ex. X2)

21       5)       The Formal Charges alleged that IG engaged in the following unlawful  
22 employment practices:

- 23       • Direct or indirect conduct intended to or objectively likely to result in the gathering  
24       or disclosure of Millsap's criminal history prior to making a conditional offer of

1 employment to Millsap, in violation of RBE<sup>3</sup> 2.02(2).

- 2 • Gathered, obtained or used Millsap's criminal history before making a conditional offer of employment to Millsap, in violation of RBE 2.02(1).
- 3 • Accessed and considered Millsap's criminal history in the hiring process before making a conditional offer of employment, in violation of PCC 23.10.030(B).
- 4 • Based its decision to make or not make a conditional offer of employment upon criminal history that was disclosed by Millsap, in violation of RBE 2.02(3).
- 5 • Excluded Millsap from consideration solely because of his criminal history, in violation of PCC 23.10.030(A).<sup>4</sup>

6 The Formal Charges further alleged that the alleged violations were within the jurisdiction  
7 of BOLI pursuant to an Intergovernmental Contract between the City of Portland and  
8 BOLI. The Formal Charges sought lost wages estimated to be "at least" \$8,400 and  
9 damages for emotional, mental and physical suffering in the amount of "at least"  
10 \$15,000.00. In addition, the Agency requested an order requiring IG to complete training  
11 at its expense on PCC chapter 23.10. The Formal Charges also requested, alternatively,  
12 that an appropriate Cease and Desist Order be entered against Respondent if it engaged  
13 in or committed any unlawful employment practices alleged in the Formal Charges, and  
14 that the forum order that it immediately stop all such unlawful practices. The Formal  
15 Charges state that the forum's order may include such other relief as appropriate to  
16 eliminate the effects of the unlawful practices found as to Complainant and others  
17 similarly situated. (Ex. X2b)

18 6) IG filed an answer to the Formal Charges on October 8, 2018, in which it  
19 denied that it violated any Oregon or City of Portland laws or regulations. (Ex. X3)

20 7) On October 29, 2018, the ALJ issued an interim order, noting that IG is a  
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22 <sup>3</sup> "RBE" is an abbreviation for the administrative rules implementing PCC chapter 23.10 concerning  
23 Removing Barriers to Employment 1.01 to 3.05.

24 <sup>4</sup> The written Formal Charges identified the city code provision as "PCC 23.10.030(1)(A)." At hearing, the  
ALJ granted the Agency's unopposed request to strike the "(1)" from the citation due to a scrivener's error.

1 limited liability company, which is an unincorporated association under Oregon law. ORS  
2 63.001(17). The interim order further recognized that OAR 839-050-0110(1) requires  
3 unincorporated associations to be represented at all stages of the proceeding either by  
4 counsel or by an authorized representative. The order further noted that OAR 839-050-  
5 0020(13) provides:

6 “‘Counsel’ means an attorney who is in good standing with the Oregon State Bar  
7 or an out-of-state attorney who is granted permission by the administrative law  
8 judge to appear in the matter pursuant to ORS 9.241 and Oregon Uniform Trial  
9 Court Rule 3.170. Local counsel who obtained the order on behalf of the out-of-  
10 state attorney must participate meaningfully in the case in which the out-of-state  
11 attorney appears.”

12 The interim order then stated:

13 “[IG’s] answer was signed by Sharon Stufken, Assistant General Counsel  
14 for [IG]. The Answer does not include a reference to Ms. Stufken’s Oregon State  
15 Bar (“OSB”) number and it is not clear whether she is a member of the OSB. If  
16 she is a member of the OSB, [IG] must file a document stating this fact on the  
17 record. If Ms. Stufken is not a member of the OSB and [IG] desires her  
18 representation in this matter, [IG] must file a motion for Ms. Stufken to appear *pro*  
19 *hac vice* before the forum.

20 “Alternatively, an authorized representative can appear on behalf of [IG].  
21 An authorized representative includes an authorized officer or regular employee of  
22 the limited liability company. OAR 839-050-0110(2). Before a person may appear  
23 as an authorized representative, [IG] must file a letter specifically authorizing the  
24 person to appear on behalf of the party. OAR 839-050-0110(3).”

(Ex. X4)

8) On November 30, 2018, IG submitted a letter stating that it “specifically  
authorizes its employee, Sharon Stufken, to appear on behalf of [IG] in this matter  
pursuant to OAR 839-050-0110(3).” In response to the letter, the forum issued an interim  
order noting:

“OAR 839-050-0110(3) is BOLI’s rule that requires a written authorization for an  
authorized representative to appear on behalf of a party. However, since Ms.  
Stufken is an attorney who seeks to ‘appear on behalf of a party’ in front of an

1 administrative body in Oregon, she must satisfy the requirements set forth in  
2 Oregon Uniform Trial Court Rule ('UTCR') 3.170. See *also* ORS 9.241; OAR 839-  
050-0020(13); Oregon RPC 5.5(c). "

3 Copies of the forum's *Pro Hac Vice* Instructions and Certificate of Compliance were  
4 attached to the interim order. (Exs. X5, X6)

5 9) The forum issued an interim order on January 3, 2019, granting the  
6 Agency's unopposed motion for postponement. Based on the availability of the forum  
7 and the parties, the ALJ rescheduled the hearing to begin on Tuesday, February 5, 2019.  
8 (Exs. X7-X8, X10)

9 10) On January 7, 2019, IG filed a Notice of Appearance, notifying the forum of  
10 the appearance of Oregon attorney Jennifer Warburg, and indicating that attorney Stufken  
11 intended to submit a *pro hac vice* application. (X9)

12 11) On January 8, 2019, the ALJ issued two interim orders. The first, entitled  
13 "Requirements for Filing Motions and Other Documents," explained the forum's filing  
14 requirements, including the method by which documents must be filed and the timeline  
15 for filing documents. The second order required case summaries to be filed no later than  
16 January 22, 2019, and set out the requirements for what each participant must include in  
17 their case summary. (Exs. X11, X12)

18 12) After the forum received (1) a signed *pro hac vice* certification<sup>5</sup> seeking *pro*  
19 *hac vice* admission of Georgia Attorney Sharon Stufken, (2) a notice from the State Bar  
20 of Georgia stating that Stufken is an active member in good standing and (3) a certificate

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23 <sup>5</sup> On January 11, 2019, the ALJ granted IG's request to file the signed certification by email. (Ex. X15)  
24 See *also* OAR 839-050-0040(3).

1 of liability insurance for Stufken, the forum issued an interim order on January 14, 2019,  
2 granting Stufken's request to appear *pro hac vice* in the matter. (Exs. X13-X16)

3 13) The Agency and IG timely submitted their case summaries on January 22,  
4 2019. IG filed an amendment to its case summary on February 4, 2019. (Exs. 17-X19,  
5 X21)

6 14) At the start of hearing, the ALJ orally informed the participants of the issues  
7 to be addressed, the matters to be proved, and the procedures governing the conduct of  
8 the hearing. (Hearing Record)

9 15) Witnesses Hillary Knudsen and Rosalia Radich were not permitted to  
10 observe the hearing until after their testimony concluded. (Hearing Record)

11 16) In emails dated April 30, 2020, and May 1, 2020, the Agency and IG's  
12 counsel informed the forum that the Agency and IG agreed to receive filings (including  
13 the Proposed Order, exceptions to the Proposed Order and the Final Order) from the  
14 parties, the Contested Case Coordinator and the ALJ by email. (Forum File)

15 17) On May 4, 2020, the ALJ issued a Proposed Order that notified the  
16 participants they were entitled to file exceptions to the Proposed Order within ten days of  
17 its issuance. After obtaining an extension of time to file exceptions, the Agency and IG  
18 timely filed exceptions on May 26, 2020.

#### 19 **FINDINGS OF FACT – THE MERITS**

20 1) At all times material herein, IG was an active foreign limited liability  
21 company registered with the Oregon Secretary of State Business Registry that employed  
22 six or more persons in Portland, Oregon. (Testimony of Radich; Exs. X2b, X3, A4)

23 2) IG is a company that recruits and hires staff to fill positions for its clients'  
24

1 businesses. After meeting with its clients to determine hiring needs, IG recruiters contact  
2 potential candidates by telephone to fill positions. When appropriate, applicants are  
3 asked to meet with a recruiter for an in-person interview. After the in-person interview,  
4 candidates are invited to fill out a job application on a computer in the office. Responses  
5 to the applications are sent to the finance department in Atlanta, Georgia. IG's recruiters  
6 do not see the application responses. (Testimony of Knudsen; Ex. X3)

7 3) IG Recruiter Tara Travisano located Millsap's resume on a job recruiting  
8 website. She first attempted to contact Millsap by telephone and then emailed him on  
9 July 26, 2017, informing him that "[b]ased off of your resume, I feel you would be a great  
10 fit for a job opportunity that is currently available." She requested that Millsap call her if  
11 he was still in the job market. When Millsap received the email, he was "excited" and  
12 "ecstatic" about the possibility of full-time employment, and he telephoned her as  
13 requested. Travisano had a good telephone conversation with Millsap and found him to  
14 be professional. She invited him to come to IG's Portland office for an in-person interview,  
15 which took place on August 1, 2017, at 10:00 a.m. During the in-person interview,  
16 Travisano determined that Millsap might be a good fit for a couple of job openings. She  
17 told him that the openings were full-time positions that paid in the range of \$15-\$17 per  
18 hour. Millsap was willing to accept a full-time position that paid \$15 per hour. At the  
19 conclusion of the interview, Travisano directed Millsap to an IG computer and invited him  
20 to fill out a job application on the computer. She then left Millsap so that he could complete  
21 the application alone. (Testimony of Millsap, Travisano; Ex. A3, pp. 13-14)

22 4) After the initial portion of the application, there was a section titled  
23 "Voluntary Survey" with optional questions regarding an applicant's demographical  
24



1 information. At the end of the demographics questions, there was a button to click to  
2 proceed to the next page. On the following page, five questions were listed. The third  
3 question on this page asked for a “yes” or “no” response to the following: “I have received  
4 a felony conviction or deferred adjudication.” An applicant had to click either “yes” or “no”  
5 in response to this question to proceed to the next screen and complete the application.  
6 (Testimony of Millsap; Exs. A5, p. 16, R1)

7 5) IG included the felony conviction question on the application so that it could  
8 determine eligibility for the Work Opportunity Tax Credit (“WOTC”). The WOTC is a  
9 federal tax credit available to employers in order to create incentives to increase  
10 workplace diversity and to help “targeted” workers move from economic dependency to  
11 self-sufficiency. A job applicant who is an “ex-felon who has been convicted of a felony  
12 under any federal or state law, and is hired not more than 1 year after the conviction or  
13 release from prison for that felony” is a member of the “targeted” group the credit seeks  
14 to assist. (Testimony of Knudsen; Exs. A6, A12, A14)

15 6) Millsap became stressed when he saw felony conviction question on the  
16 computer application. He had a felony conviction after pleading guilty to assaulting a  
17 public safety officer on February 19, 2016. He was familiar with the Ban the Box<sup>6</sup> law and  
18 did not feel that the question was appropriate or legal. However, he could not move past  
19 the question without clicking “yes” or “no.” He felt “on the spot” and that he would be put  
20 on the “chopping block” of opportunity if he correctly answered “yes.” He decided to click  
21 “no” because he did not want his application to be filtered out. He completed the computer  
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23 <sup>6</sup> The forum notes that the City of Portland’s Removing Barriers to Employment law and similar laws in other  
24 jurisdictions are sometimes referred to informally as “Ban the Box” laws.

1 application and left IG's office. (Testimony of Millsap)

2 7) Immediately after the interview, Millsap felt an "inner conflict" because he  
3 had answered "no" to the felony conviction question. He wanted to be upfront, but also  
4 wanted to be considered for a job opportunity. A few hours after the interview, at 1:29  
5 p.m., Millsap sent an email to Travisano in which he thanked her for meeting with him and  
6 to further discuss employment opportunities that were available to him. He also stated:

7 " \* \* \* The next question was whether I have ever had a felony conviction before. I  
8 answered no to this because it is illegal for an employer to ask this in the [S]tate of  
9 Oregon. Oregon passed a 'ban the box' law in 2016 that forbids potential  
10 employers from asking applicants whether or not they have a felony conviction  
11 prior to giving the applicant a formal job offer. The truth of the matter is that I am  
12 a felon and I am currently on probation for assaulting a public safety officer."

13 Millsap then explained the circumstances of his arrest, and asked that he be judged "not  
14 by my record but by the professional efforts that I make and the nobility of my character."  
15 He explained that "at the end of the interview, I put that I am not a felon on the computer  
16 application because I wanted to see how far I would get before it became an issue. After  
17 thinking about this I have decided that I do not want to waste my time or yours for that  
18 matter. Thank you for reaching out to me and expressing interest in me as an employee."  
19 He concluded the email by complimenting Travisano and wishing her good luck.  
20 (Testimony of Millsap; Ex. A3, p. 15)

21 8) Millsap attempted to reach Travisano by telephone on August 3 and 4,  
22 2017, as he had not yet received a response to his email. On the afternoon of August 4,  
23 2017, he connected with Travisano by telephone. He spoke to her about the felony  
24 conviction question on the application and asked whether IG was still considering him for  
potential employment. Travisano told him that due to company policy, IG could not hire  
people with felony convictions. At that point, he believed there was no possibility of being

1 hired by IG and stopped trying. (Testimony of Millsap; Ex. A9 p. 6)

2 9) After the telephone conversation with Travisano, Millsap felt horrible. Up  
3 until then, he was hopeful that he would have a chance to be hired and prove himself. He  
4 felt dejected and like there was a wall that he could not get through. (Testimony of  
5 Millsap)

6 10) After IG removed him from consideration for a position in August of 2017,  
7 Millsap worked sporadically and earned the following wages each month:

8 August 2017	\$0
9 September 2017	\$500
10 October 2017	\$1,500
11 November 2017	\$1,500
12 December 2017	\$500
13 January 2018	\$500

14 In December 2017, his ability to work was limited due to an injury. He started working at  
15 a position for U-Haul on or about February 20, 2018, but earned no wages in that month  
16 prior to that time. (Testimony of Millsap)

17 11) After this incident, IG removed the criminal conviction question from its job  
18 application and no longer inquires about criminal convictions until after a conditional offer  
19 of employment is made. Upon receiving information about a criminal conviction, IG now  
20 makes an individualized assessment based on the severity of the crime. (Testimony of  
21 Knudsen; Ex. R3)

22 12) The testimony of all witnesses was credible with respect to the relevant  
23 facts, with the exception of Travisano's testimony on two issues.  
24

1 First, she testified that Millsap withdrew himself from consideration and that his  
2 felony conviction played no role in whether to consider him for employment. This  
3 testimony conflicted with statements made to BOLI by IG's Corporate Counsel, Bobby  
4 Nance. In response to questions from BOLI's Civil Rights Investigator, Nance referred to  
5 IG's Background Check Policy which states that a felony conviction less than seven years  
6 old "will preclude the individual from being eligible for employment" with IG. In addition,  
7 in an email to BOLI's investigator, Nance stated that "after being told by Mr. Millsap that  
8 he had a violent felony on his record, [IG] has not contacted him for future placements."  
9 Accordingly, Travisano's testimony on that matter was not credited.

10 Second, Travisano implied that there was not a specific job available for Millsap's  
11 skill set at the time of his interview. However, that testimony conflicts with her statements  
12 in the recruitment email that she sent to Millsap on July 26, 2017, in which she told him  
13 that she had reviewed his resume and felt Millsap "would be a great fit for a job opportunity  
14 that is currently available." Therefore, to the extent Travisano's testimony suggested that  
15 there was not a particular job available for Millsap, the forum disregarded that testimony.  
16 (Testimony of Travisano; Exs. A3, p. 13, A9, pp. 2, 8).

### 17 CONCLUSIONS OF LAW

18 1) At all times material herein, IG was an employer as defined in ORS  
19 659A.001(4) and RBE 1.02(3), and Millsap was an applicant for employment with IG.

20 2) IG violated PCC 23.10.030(A), (B) and administrative rule RBE 2.02(1) –  
21 (3) by asking Millsap a question regarding criminal convictions prior to making a  
22 conditional offer of employment, and then refusing to consider him for employment  
23 because of a criminal conviction.  
24

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein. PCC 23.10.060; ORS 659A.800 - ORS 659A.865.

4) Pursuant to PCC 23.10.060(D) and 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 Millsap back pay and money damages for emotional and mental suffering he sustained and to protect the rights of Millsap and others similarly situated. The sum of money awarded and the other actions required of IG in the Order below are an appropriate exercise of that authority.

## OPINION

This is a case of first impression involving the City of Portland's Removing Barriers to Employment ordinance. The Agency contends that IG engaged in the following unlawful employment practices:

- Direct or indirect conduct intended to or objectively likely to result in the gathering or disclosure of Millsap's criminal history prior to making a conditional offer of employment to Millsap, in violation of RBE 2.02(2).
- Gathered, obtained or used Millsap's criminal history before making a conditional offer of employment to Millsap, in violation of RBE 2.02(1).
- Accessed and considered Millsap's criminal history in the hiring process before making a conditional offer of employment, in violation of PCC 23.10.030(B).
- Based its decision to make or not make a conditional offer of employment upon criminal history that was disclosed by Millsap, in violation of RBE 2.02(3).
- Excluded Millsap from consideration solely because of his criminal history, in violation of PCC 23.10.030(A).

“The proper construction of a municipal ordinance is a question of law, which [is] resolve[d] using the same rules of construction that [courts] use to interpret statutes.” *City of Eugene v. Comcast of Oregon II, Inc.*, 359 Or. 528, 540, 375 P.3d 446 (2016). Accordingly, one must “look primarily to the ordinance’s text, context, and legislative

1 history, although [courts] may look also to general rules of statutory construction as  
2 helpful.” *Id.* at 540-41, 375 P.3d 446 (internal quotation marks and brackets omitted).

### 3 **ACCESSING OR GATHERING CRIMINAL HISTORY**

4 The alleged violations of PCC 23.10.030(B), RBE 2.02(1) and RBE 2.02(2) all  
5 involve allegations that IG engaged in conduct involving accessing or gathering an  
6 applicant’s criminal history prior to making a conditional offer of employment.

7 PCC 23.10.030(B) states:

8 “An Employer may consider an applicant’s criminal history in the hiring process  
9 only after making a Conditional Offer of Employment. An Employer violates this  
10 Chapter if an Employer accesses an applicant’s criminal history prior to making a  
11 Conditional Offer of Employment.”

11 RBE 2.02 provides further guidance for interpreting the ordinance. First, RBE  
12 2.02(1) states that “[i]n [general,] [a]n Employer who gathers, obtains, or uses an  
13 Applicant’s Criminal History before making a Conditional Offer of Employment violates”  
14 PCC 23.10.030(B) and the applicable administrative rules. RBE 2.02(2) provides a more  
15 specific interpretation and reads:

16 “**Gathering of Criminal History Prohibited.** Before making a Conditional Offer of  
17 Employment, an Employer shall not engage in any direct or indirect conduct that  
18 is intended or objectively likely to result in the gathering or disclosure of an  
19 Applicant’s Criminal History. This includes, but is not limited to, performing criminal  
background checks, requesting an Applicant to disclose his or her Criminal History  
in an application form or at an interview, or engaging in any conduct that is intended  
or objectively likely to cause an Applicant to disclose his or her Criminal History.”

20 In this case, it is undisputed that no offer of employment was ever made to Millsap.  
21 Accordingly, the only inquiry is whether IG engaged in conduct that was intended or  
22 objectively likely to result in the gathering or disclosure of his criminal history. In this case,  
23 after Travisano interviewed Millsap, she directed him to an IG computer to fill out a job  
24 application. (Finding of Fact, #3)

1 IG asserts that it is not liable for this violation because the criminal history question  
2 was in a voluntary or optional section of the application. This argument fails for two  
3 reasons. First, the question was on a separate page from the heading with the “Voluntary  
4 Survey” information. Additionally, Millsap could not avoid answering the conviction  
5 question; he had to click on either “yes” or “no” to advance to the next screen and  
6 complete the application. (Finding of Fact, #4) Accordingly, it was reasonable for Millsap  
7 to perceive that he was required to answer the question and that it was not voluntary.  
8 Second, even if the question had been clearly marked as voluntary, the question  
9 nevertheless “request[ed that] an Applicant to disclose his \* \* \* Criminal History in an  
10 application form.” The issue of whether a response to the criminal history question was  
11 optional or voluntary is not relevant to establishing a violation. Therefore, the Agency  
12 established violations of PCC 23.10.030(B), RBE 2.02(1) and RBE 2.02(2).

### 13 **HIRING DECISION BASED ON CRIMINAL HISTORY**

14 Both PCC 23.10.030(A) and RBE 2.02(3) pertain to making employment decisions  
15 because of the disclosure of criminal history information. Accordingly, the forum will  
16 analyze these provisions in the same manner as other cases in which an employer  
17 allegedly discriminated against a person because of his or her protected status. PCC  
18 23.10.030(A) states that it is “an unlawful practice for an Employer to exclude an applicant  
19 from consideration solely because of the applicant’s criminal history.” Accordingly, to  
20 establish a prima facie case of a violation of PCC 23.10.030(A), the Agency must show:  
21 (1) IG was an employer as defined by statute; (2) Millsap was an applicant for employment  
22 with IG; (3) IG was aware of Millsap’s criminal history information; (4) IG excluded Millsap  
23  
24

1 from consideration; and (5) IG's decision to exclude Millsap was based "solely" on his  
2 criminal history.

3 Elements 1 – 3 are not in dispute. Because the evidence regarding Elements 4  
4 and 5 is essentially the same, those will be analyzed together. Millsap credibly testified  
5 that Travisano told him that IG would not be proceeding with the hiring process because  
6 of his felony conviction. Additionally, IG's Corporate Counsel Bobby Nance told BOLI's  
7 Investigator that IG did not contact Millsap for future placements after learning "he had a  
8 violent felony on his record." Nance also referenced IG's policy stating that a felony  
9 conviction less than seven years old "will preclude the individual from being eligible for  
10 employment with" IG. Therefore, the Agency established that IG excluded Millsap from  
11 the hiring process "solely" because of his criminal history, in violation of PCC  
12 23.10.030(A).

13 RBE 2.02(3) states that employers should disregard criminal history that is  
14 disclosed by an applicant before a conditional offer is made, and that an employer "shall  
15 not base its decision to make or not make a Conditional Offer of Employment upon any  
16 Criminal History that was disclosed by the Applicant." Accordingly, there are essentially  
17 two portions at issue. First, the forum concludes that the Agency established a violation  
18 of RBE 2.02(3) because IG did not "disregard" the criminal history disclosed by Millsap.

19 The prima facie case for the second portion of RBE 2.02(3) (hiring decision was  
20 based on criminal history) is similar to a violation of PCC 23.10.030(A), except for Element  
21 5. To establish Element 5 when analyzing RBE 2.02(3), the Agency must prove that IG  
22 decided not to make a conditional offer because of the criminal history disclosed by  
23 Millsap. In this case the result is essentially the same as the conclusion with respect to  
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1 PCC 23.10.030(A). However, there could be some cases in which an applicant is not  
2 excluded from consideration “solely” based on the criminal history in violation of PCC  
3 23.10.030(A), but instead bases its hiring decision, at least in part, on the applicant’s  
4 criminal history. As previously stated, the evidence established that IG decided to end  
5 the hiring process because of Millsap’s criminal history. Accordingly, the forum concludes  
6 that IG violated RBE 2.02(3).

### 7 **IG’s CONFLICT OF LAW ARGUMENT**

8 In its Answer and at hearing, IG argued that the applicable ordinances and  
9 administrative rules do not apply if they conflict with federal regulations. More specifically,  
10 IG’s counsel argued that Ban the Box laws do not apply when they conflict with the federal  
11 Work Opportunity Tax Credit (“WOTC”) law. While the WOTC was mentioned in IG’s  
12 answer, IG did not assert a legal argument or affirmative defense regarding the WOTC.  
13 Nevertheless, the forum assumes that IG intended to argue that the City of Portland’s  
14 ordinance and regulations are preempted by federal law. “[F]ederal preemption, is an  
15 affirmative defense.” *Durnford v. MusclePharm Corp.*, 907 F3d 595, 604 (9th Cir 2018).  
16 “The failure of the party to raise an affirmative defense in the answer is a waiver of such  
17 defense.” OAR 839-050-0130(3). Accordingly, because IG did not assert preemption as  
18 an affirmative defense, the forum concludes that IG waived that argument.

19 Moreover, even if an affirmative defense had been properly asserted, the forum  
20 concludes that the IG’s argument lacks merit. Under the Supremacy Clause of the  
21 Constitution, Congress has the power to preempt state law. U.S. Const. art. VI, cl. 2;  
22 *Arizona v. United States*, 567 US 387, 398-99 (2012). State laws are preempted when  
23 Congress enacts a statute withdrawing specified powers from the states, when Congress  
24

1 determines that a particular field must be regulated specifically by Congress or when a  
2 state law conflicts with federal law. *Arizona*, 567 US at 398-400. In this case, IG did not  
3 identify any particular federal statute or regulation that meets any of these conditions.

4       Additionally, there is little evidence in the record as to the specifics of the WOTC  
5 such that the forum can determine whether any conflict exists. However, the evidence  
6 that is in the record indicated that the WOTC is a federal tax credit available to employers  
7 in order to create incentives to increase workplace diversity and to help “targeted” workers  
8 move from economic dependency to self-sufficiency. (Finding of Fact, #5) A job applicant  
9 who is an “ex-felon who has been convicted of a felony under any federal or state law,  
10 and is hired not more than 1 year after the conviction or release from prison for that felony”  
11 is a member of the “targeted” group the credit seeks to assist. In this case, the question  
12 IG asked was whether the applicant “received a felony conviction.” The inquiry was not  
13 limited to an applicant “hired more than 1 year after the conviction or release from prison,”  
14 which is the criteria for the WOTC. Thus, the question on the job application was overly  
15 broad to serve the purpose of gathering WOTC tax credit information. Additionally,  
16 although there is an indication that the applicant is to provide the information “on or before  
17 the day a job offer” is made, the Portland law speaks to gathering the information after a  
18 “conditional” offer is made. This does not make the two laws in conflict. For example,  
19 based on the information in the record, an employer who gathers the information *after* a  
20 conditional offer is made but “on” the same day of the offer could be in compliance with  
21 both the Ban the Box and WOTC requirements. Therefore, there is insufficient legal  
22 authority or factual evidence in the record for the forum to conclude that there is conflict  
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1 between the City of Portland laws at issue in this case and the WOTC.<sup>7</sup>

## 2 **DAMAGES**

### 3 *Lost Wages*

4 Millsap is eligible for a back pay award due to the violations described above PCC  
5 23.10.060; ORS 659A.850. The purpose of a back pay award in employment  
6 discrimination cases is to compensate a complainant for the loss of wages and benefits  
7 the complainant would have received but for the respondent's unlawful employment  
8 practices. *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238  
9 (2015). Back pay awards are calculated to make a complainant whole for injuries suffered  
10 as a result of the discrimination. *Id.* A complainant who seeks back pay is required to  
11 mitigate damages by using reasonable diligence to find other suitable employment. *Id.*

12 The forum has previously awarded back pay to job candidates who are excluded  
13 from consideration due to unlawful discrimination. *See, e.g. In the Matter of Alpine*  
14 *Meadows Landscape*, 19 BOLI 191, 214-16 (2000) (back pay awarded to complainant  
15 who was not hired due to his age); *In the Matter of Sierra Tile Mfg., Inc.*, 1 BOLI 291, 294  
16 (1980) (awarding back pay after finding that complainant was not hired because of his  
17 race). In this case, prior to the disclosure of Millsap's conviction, IG interviewed him for  
18 a full-time position that paid at least \$15 per hour. Although IG suggests it was  
19 speculative that he would have actually been hired, Travisano emailed him about "a job  
20 opportunity that is currently available" and she found him to present favorably in both his  
21 telephone and in-person interviews. IG did not remove him from consideration until after  
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23 <sup>7</sup> This ruling is limited to the record developed in this case and is not meant to conclude that there could  
24 never be a conflict between a federal law and the City of Portland ordinance and regulations.

he disclosed his felony conviction. That decision was based on IG's internal policy. There was no evidence that the lack of a criminal conviction was a requirement of the particular job position. Therefore, but for the unlawful discrimination, Millsap would have earned \$2600<sup>8</sup> per month after receiving an offer of employment. There was no evidence in the record as to the start date of the job position for which Millsap applied, except for Travisano's testimony that the job was "currently available." Accordingly, the forum infers that Millsap would have started working in the position at the beginning of the next month, September 2017.

Millsap credibly testified that he continued to seek employment and worked sporadically in the months following his application for employment with IG. He ultimately secured a full-time position on or about February 20, 2018. Based on this information, the forum calculates his lost wages as follows:

<u>Month</u>	<u>IG Position Monthly Wage</u>	<u>Actual Earned Wages</u>	<u>Lost wages<sup>9</sup></u>
September 2017	\$2,600	\$500	\$2,100
October 2017	\$2,600	\$1,500	\$1,100
November 2017	\$2,600	\$1,500	\$1,100
December 2017	\$2,600	\$500	\$0 <sup>10</sup>
January 2018	\$2,600	\$500	\$2,100
February 2018 <sup>11</sup>	\$1,560	\$0	\$1,560
<b>Total IG Wages:</b>	\$14,560		
<b>Total actual earned:</b>		\$4,500	
<b>Back Pay Total:</b>			\$7,960

<sup>8</sup> The forum calculated this figure using this methodology: \$15 per hour x 40 hours per week x 4.33 weeks per month (52 weeks per year divided by 12 months).

<sup>9</sup> Lost wages were calculated by subtracting the actual earned wages from the wages that would have been paid to Millsap if he had been hired by IG.

<sup>10</sup> Millsap's ability to work was limited in December 2017 due to an injury. Accordingly, the forum finds that IG did not cause any lost wages for that month.

<sup>11</sup> Millsap obtained another position on or about February 20, 2018. Accordingly, wages were only calculated for 13 working days prior to that date.

1       *Emotional Distress Damages*

2           The Agency seeks damages on behalf of Complainant in the amount of at least  
3 \$15,000 for emotional, mental and physical suffering. Pursuant to ORS 659A.850, the  
4 Commissioner of the Bureau of Labor and Industries has the authority to award money  
5 damages for emotional, mental, and physical suffering sustained. *In the Matter of Frehoo*  
6 *Inc.*, 36 BOLI 42, 71 (2015). The commissioner has the authority to fashion a remedy  
7 adequate to eliminate the effects of unlawful employment practices. *Id.*

8           In determining an award for emotional and physical suffering, the forum considers  
9 the type of discriminatory conduct, and the duration, frequency, and severity of the  
10 conduct. It also considers the type and duration of the mental distress and the  
11 vulnerability of the aggrieved persons. A complainant's testimony, if believed, is sufficient  
12 to support a claim for mental suffering damages. *Id.*, citing *In the Matter of Dr. Andrew*  
13 *Engel, DMD, PC*, 32 BOLI 94, 141 (2012).

14           Millsap credibly testified that he felt "on the spot" when he saw the criminal  
15 conviction question on the job application. He felt stressed and like he was on the  
16 chopping block. A few days later, when Travisano told him that IG does not hire people  
17 with felony convictions, Millsap felt horrible and dejected. He lost the hope that he could  
18 be hired and prove himself to an employer. The forum concludes that \$15,000 is an  
19 appropriate award of emotional distress damages as a result of IG's unlawful  
20 discrimination. See, e.g. *In the Matter of Barrett Business Services, Inc.*, 22 BOLI 77, 96-  
21 97 (2001) (awarding \$15,000 to a complainant when a potential employer made inquiries  
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as to whether she was disabled during the application process).<sup>12</sup>

*Additional Relief requested by the Agency*

In its Formal Charges, the Agency asked that IG and its managers, supervisors and human resources personnel be trained, at IG's expense, "on Removing Barriers from Employment including, but not limited to PCC Chapter 23.10." The Agency further requested that the training "be conducted 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 gives the Commissioner the authority to require IG and its managers, supervisors and human resources personnel to undergo training of the type sought in the Formal Charges. IG argued at hearing that this type of relief was not necessary because, after this incident, IG removed the criminal conviction question from its job application and no longer inquires about criminal convictions until after a conditional offer of

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<sup>12</sup> See also *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 239 (2015) (awarding \$20,000 for mental and emotional suffering); *In the Matter of Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 101 (2015) (awarding complainant \$10,000 in emotional distress damages).

1 employment is made. (Finding of Fact, # 11) There was also credible evidence that IG  
2 now makes an individualized assessment based on the severity of the crime. These  
3 measures are steps in the right direction, but the forum is unable to conclude that IG's  
4 current policies and procedures satisfy all of the requirements of PCC 23.10.030 and RBE  
5 2.03 regarding the appropriate use of criminal history. Accordingly, the forum finds that  
6 the training requested by the Agency is an appropriate remedy in this case. The forum  
7 limits the required training to only the managers, supervisors and human resources  
8 personnel who interact with job applicants in the City of Portland.

## 9 **EXCEPTIONS TO THE PROPOSED ORDER**

### 10 *Agency's Exceptions*

11 The Agency's Exceptions 1-3 and 5 request that the forum make minor punctuation  
12 corrections. The exceptions are GRANTED, as reflected in the sections above.

13 The Agency's Exception 4 asks the forum to revise the calculation of lost wages  
14 per month from 4 weeks per month to "52 weeks per year divided by 12 months." This  
15 exception is GRANTED, as reflected in footnote 8 above.

### 16 *IG's Exceptions*

17 In Respondent's Exception 1, IG requests that the forum modify the conclusion in  
18 the Proposed Order "to reflect that [IG] is not in violation of Portland's Ban-the-Box rule  
19 in light of the undisputed evidence regarding the basis for IG's inclusion of the voluntary  
20 criminal history question on its application for employment." In other words, IG argues  
21 that because the forum found that the criminal history question was included to determine  
22 eligibility for the federal WOTC program, this places the City of Portland's rules and  
23 regulations in direct conflict with federal law. However, as explained above, the forum  
24

1 concludes that this case presents no conflict between the two laws. The question is not  
2 whether IG may ask a criminal question, but rather when and under what circumstances  
3 it may do so. As indicated above, it may not do so before making a conditional offer of  
4 employment.

5 Moreover, IG's reference to PCC 23.10.040(B)(3) does not assist its argument.  
6 That ordinance states, in pertinent part:

7 "B. For the following positions, an Employer may consider an applicant's criminal  
8 history at any point in the hiring process, and may use the City Criminal History  
9 Matrix provided by administrative rule to screen applicants, but must nonetheless  
10 comply with all other requirements of this Chapter. An individualized assessment  
shall be required for any criminal convictions not contained on the City Criminal  
History Matrix.

11 \* \* \*

12 3. Positions designated by the Employer as part of a federal, state or local  
13 government program designed to encourage the employment of those with  
criminal histories."

14 IG's argument ignores the provision requiring that an employer must "comply with all other  
15 requirements of this Chapter." As well, there is no evidence in this case that IG was  
16 considering Millsap for a position that IG had designated "as part of a federal state or local  
17 government program designed to encourage the employment of those with criminal  
18 histories." Rather, the evidence was that some positions that IG filled might fit that  
19 category. Accordingly, IG's Exception 1 is OVERRULED.

20 Exceptions 2 and 3 object to the amount of emotional distress and lost wage  
21 damages awarded. The reasoning to support the awards is addressed in the Opinion  
22 above and the forum is not persuaded that the amount of damages should be changed.  
23 Therefore, IG's Exceptions 2 and 3 are OVERRULED.



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A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 850(4), and to eliminate the effects of Respondent **Insight Global LLC's** violations of ORS 23.10.030(A), (B) and administrative rule RBE 2.02(1) – (3), and as payment of damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Insight Global LLC** to deliver to the Administrative Prosecution Unit, Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant **Nathan Millsap** in the amount of:

1) SEVEN THOUSAND NINE HUNDRED AND SIXTY DOLLARS (\$7,960), less lawful deductions, representing wages lost by Nathan Millsap as a result of Respondent Insight Global, LLC's unlawful employment practice found herein; plus,

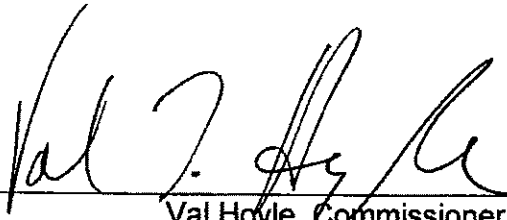
2) FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for emotional and mental suffering Nathan Millsap experienced as a result of Respondent Insight Global, LLC's unlawful employment practices; plus,

3) Interest at the legal rate on the sum of TWENTY-TWO THOUSAND NINE HUNDRED AND SIXTY DOLLARS (\$22,960) from the date the Final Order is issued until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), the Commissioner of the Bureau of Labor and Industries hereby orders that the managers, supervisors and human resources personnel of Respondent **Insight Global, LLC** who interact with job applicants in the City of Portland must participate in training on the correct interpretation and application of the City of Portland's Removing Barriers from Employment ordinances and rules including, but not limited to PCC Chapter 23.10, by the Bureau of Labor and Industries Technical Assistance for Employers Unit or

1 other trainer agreeable to the Agency. This training is to be held at the expense of  
2 Respondent **Insight Global, LLC**.

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Val Hoyle, Commissioner  
Bureau of Labor and Industries

ISSUED ON: June 18, 2020