

VAL HOYLE  
COMMISSIONER



DUKE SHEPARD  
DEPUTY COMMISSIONER

**BUREAU OF LABOR AND INDUSTRIES**

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

In the Matter of:

Case No. **51-18**

**VISION INTERNATIONAL  
PETROLEUM LLC & HAI CHHENG  
GOV,**

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

Respondents.

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**SYNOPSIS**

The forum concluded that Respondent Vision International Petroleum LLC ("Vision") violated ORS 659A.030(1)(b), ORS 659A.030(1)(g), OAR 839-005-0021, OAR 839-005-0030(4)(a), ORS 659A.199 and ORS 659A.030(1)(b) when it failed to take sufficient action to prevent unlawful harassment, terminated Complainant because of his race and in retaliation for his complaints about unlawful harassment in the workplace. Respondent Hai Chheng Gov, the sole member of the Vision limited liability corporation, violated ORS 659A.030(1)(g) by aiding and abetting Vision's violations. The forum awarded Complainant \$60,000 in damages for mental and emotional distress, stemming from the unlawful employment practices and \$1,600 in lost wages.

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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 November 14, 2018, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

1 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by  
2 Administrative Prosecutor Adriana Ortega, an employee of the Agency.

3 The Agency called BOLI Complainant Federico Bustamante Bahena and Chris  
4 Lynch, the Portland Operations Manager of BOLI’s Civil Rights Division BOLI, as  
5 witnesses.

6 Respondents were not present at the hearing and called no witnesses.

7 The forum received into evidence: (a) Administrative exhibits X1 through X16<sup>1</sup>  
8 and (b) Agency exhibits A1-A15.

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

13 **FINDINGS OF FACT – PROCEDURAL**

14 1) Complainant Federico Bustamante Bahena (“Complainant”) filed a  
15 complaint with the Agency’s Civil Rights Division on February 23, 2017, alleging that  
16 Respondent Vision International Petroleum LLC (“Vision”) discriminated against him  
17 based on his race, national origin and for engaging in protected whistleblowing activities  
18 in that Respondent subjected him to different terms and conditions, a hostile work  
19 environment and retaliated against him by terminating his employment in violation of  
20 ORS 659A.030(1)(a),(b),(f) and ORS 659A.199. He later filed an amended complaint

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22 <sup>1</sup> Exhibits X13A –X16 were received after the hearing commenced.

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

1 naming Respondent Hai Chheng Gov ("Gov") as an aider and abettor under ORS  
2 659A.030(1)(g). (Exs. A1, A1A, A10, A13)

3 2) On February 23, 2018, the Agency's Civil Rights Division issued a Notice  
4 of Substantial Evidence Determination ("SED") in which it found substantial evidence of  
5 the following unlawful employment practices:<sup>3</sup>

- 6 • Terminating Complainant's employment on the basis of race and national origin  
7 in violation of ORS 659A.030(1)(a).
- 8 • Subjecting Complainant to different terms and conditions of employment  
9 (harassment) on the basis of race and national origin in violation of ORS  
10 659A.030(1)(b).
- 11 • Retaliating against Complainant and terminating his employment for opposing  
12 unlawful employment practices in violation of ORS 659A.030(1)(f).
- 13 • Retaliating against Complainant and terminating his employment on the basis  
14 that Complainant made a good faith report of a violation of rule or law in violation  
15 of ORS 659A.199.
- 16 • Gov aided and abetted in the unlawful employment practices in violation of ORS  
17 659A.030(1)(g).

18 (Ex. A15)

19 3) On July 11, 2018, the forum issued a Notice of Hearing to Respondents,  
20 the Agency, and Complainant stating the time and place of the hearing as November 6,  
21 2018, beginning at 10:00 a.m., at the W. W. Gregg Hearing Room of the Oregon Bureau  
22 of Labor and Industries, located at 800 NE Oregon Street, 10th floor, Portland, Oregon.  
23 Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal  
24 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

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<sup>3</sup> Although the Division concluded that there was substantial evidence of discrimination on the basis of national origin, there were no allegations of national origin discrimination in the Formal Charges or Amended Formal Charges.

1 explaining the significance of the Notice of Hearing, and a copy of the forum's contested  
2 case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

3 4) The Formal Charges alleged that Vision engaged in unlawful employment  
4 practices in violation of ORS 659A.030(1)(a), ORS 659A.030(1)(b), ORS  
5 659A.030(1)(f), ORS 659A.199(1),(2), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I),  
6 OAR 839-005-0010(4)(a)(A)(B)(C), (d)(A) and OAR 839-010-0100(1). Additionally, the  
7 Formal Charges alleged that Gov unlawfully aided and abetted the unlawful  
8 employment practices in violation of ORS 659A.030(1)(g). The Formal Charges sought  
9 lost wages of at least \$3,200 and out-of-pocket expenses of at least \$500 and damages  
10 for emotional, mental and physical suffering in the amount of at least \$60,000. The  
11 Formal Charges also asked that Respondents be trained, at their expense, "on the  
12 correct interpretation and application of laws pertaining to employment discrimination"  
13 and that Respondents be enjoined from violating laws. The Formal Charges stated that  
14 the forum's order may include such other relief as appropriate to eliminate the effects of  
15 the unlawful practices found as to Complainant and others similarly situated. (Ex. X2a)

16 5) On July 31, 2018, ALJ Jennifer Gaddis issued an interim order reassigning  
17 the case to ALJ Kari Furnanz. The interim order specified that the hearing date and  
18 case deadlines remained the same, subject to any interim orders subsequently issued  
19 by ALJ Furnanz. (Ex. X3)

20 6) On August 21, 2018, the Agency moved for an Order of Default against  
21 Respondents, requesting that the forum find that Respondents were served and are in  
22 default. No responses to the motion were filed. The Agency also filed a supplement to  
23 the motion on September 11, 2018. The forum issued an interim order on September  
24

1 27, 2018, which stated, in pertinent part:

2 "OAR 839-050-0130(4) requires that 'a party must file an answer within  
3 20 days after service of the [Formal Charges].' OAR 839-050-0030(1), describes  
4 the methods of serving Formal Charges and states, in pertinent part:

5 "\* \* \* [T]he charging document [in a BOLI contested case] will be served  
6 on the party or the party's representative by personal service or by  
7 registered or certified mail. Service of a charging document is complete  
8 upon the earlier of:

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

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

12 'OAR 839-050-0330(1)(a) provides that default may occur when '[a] party  
13 fails to file a required response, including \* \* \* an answer, within the time  
14 specified in the [Formal Charges].'"

15 **"RESPONDENT CHHENG GOV**

16 "The Agency argues that Chheng Gov is in default because he was served  
17 with the Notice of Hearing and Formal Charges on July 13, 2018, by certified  
18 mail, and has failed to file an answer. The Agency submitted the green certified  
19 mail postcard showing that the NOH and Formal Charges were served by  
20 certified mail on Chheng Gov at the address listed for him on Oregon's Secretary  
21 of State website. (Agency Exs. B, D, E) Accordingly, the forum finds Chheng  
22 Gov to be in default for not filing an answer within 20 days of service and the  
23 Agency's motion is **GRANTED**.

24 **"RESPONDENT VISION**

"The Agency asserts that Vision is in default because the Agency served  
Chheng Gov by certified mail and Chheng Gov was identified as the registered  
agent of Vision on the website of Oregon's Secretary of State dated January 27,  
2017. 'Each manager [of a limited liability company] is an agent of the limited  
liability company for the purpose of its business.' ORS 63.140(2)(a).  
Accordingly, personal service upon Chheng Gov on April 13, 2017, constituted  
service upon Vision's 'representative' under OAR 839-050-0030(1)(a). (Agency  
Exs. B, D, E) Additionally, the Agency also submitted proof of service by certified  
mail at the address listed as the principal place of business on Oregon's  
Secretary of State website. (Agency Exs. B, C, E) Because Vision has not yet  
filed an answer, it is in default and the Agency's motion as to Vision is  
**GRANTED**.



1 Evidence Determination. (Exs. X9-9b)

2 10) The Agency filed its case summary on October 23, 2018. Respondents  
3 did not file a case summary. (Ex. X11; Hearing Record)

4 11) The forum held a prehearing telephone conference at 10:00 a.m. on  
5 Monday, November 5, 2018, at the request of the Administrative Prosecutor, who  
6 requested a postponement of a few days due to illness. Administrative Prosecutor  
7 Adriana Ortega appeared on behalf of the Agency. None of the Respondents called  
8 into the conference call. The conference was digitally recorded. The Agency  
9 demonstrated good cause for a postponement as required by OAR 839-050-0150(5),  
10 and the request for a brief postponement was granted. The hearing was rescheduled to  
11 begin on November 14, 2018, at 9:00 a.m. (Ex. X12)

12 12) On November 14, 2018, the ALJ issued an interim order appointing  
13 Jessica Dover, an Oregon Certified Court Interpreter pursuant to ORS 45.291, to serve  
14 as the Spanish language interpreter at the hearing. At the beginning of the hearing, the  
15 ALJ recessed the hearing briefly so that the interpreter and Complainant could  
16 communicate. After the recess, the interpreter stated that she could effectively  
17 communicate with Complainant. (Hearing Record; Ex. X13)

18 13) At the start of hearing, pursuant to ORS 183.415(7), the ALJ orally  
19 informed the participants of the issues to be addressed, the matters to be proved, and  
20 the procedures governing the conduct of the hearing. (Hearing Record)

21 14) During the hearing, the ALJ noted that the BOLI Complaint which  
22 contained Complainant's signature was written in the Spanish language. At the ALJ's  
23 request, the Agency submitted the English language version of the complaint that was  
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1 signed by Complainant. (Exs. A1, A1A; Hearing Record)

2 15) The hearing commenced on November, 14, 2018, and concluded that  
3 same day. (Hearing Record)

4 16) On November 27, 2018, Respondents filed a motion to postpone the  
5 hearing because Respondent Gov's sister passed away unexpectedly on November 9,  
6 2018, and her funeral service was held on November 15, 2018. The motion stated that  
7 Respondent Gov did not attend the hearing because of his involvement in the family  
8 matter. The ALJ issued an interim order, which stated, in pertinent part:

9 "The forum lacks the authority to grant Respondents' motion for the  
10 following reasons:

- 11 • First, Respondents were declared in default on September 27,  
12 2018, for failing to file an answer. When parties are in default, 'The  
13 administrative law judge will not permit the defaulted party to  
14 participate in any manner in the hearing, including, but not limited  
15 to, presentation of witnesses or evidence on the party's own behalf,  
16 examination of Agency witnesses, objection to evidence presented  
17 by the Agency, *making of motions* or argument, and filing  
18 exceptions to the Proposed Order.' OAR 839-050-0330(4).  
19 (Emphasis added.)
- 20 • Second, in ruling on motions for postponement, the administrative  
21 law judge must consider, among other factors, '[t]he timeliness of  
22 the request.' OAR 839-050-0150(5)(a)(B). While the forum is  
23 sympathetic to Respondent Gov's family situation, there is no  
24 authority to postpone a hearing which has already been held.  
There is also no evidence in the record explaining that Respondent  
Gov was unable to contact the forum to request a postponement  
prior to the November 14, 2018, hearing date.

20 "For those reasons, Respondents' motion is DENIED."

21 (Ex. X13A-X16).

22 17) On May 7, 2019, the ALJ issued a proposed order that notified the  
23 participants they were entitled to file exceptions to the proposed order within ten days of  
24

1 its issuance. The Agency timely filed exceptions on May 17, 2019. Respondents did  
2 not file any exceptions, and were not entitled to do so under OAR 839-050-0330(4)  
3 because they were in default.

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

5 1) Vision is a limited liability corporation in Oregon. Gov is the registered  
6 agent and the sole member of the corporation. (Testimony of Lynch; Exs. X2A, X9,  
7 A3)<sup>4</sup>

8 2) Complainant is from Mexico and identifies as Mexican. Spanish is his  
9 primary language. (Hearing Record; Exs. X2A, X9)

10 3) Complainant's friend, Martin Monroy, was employed by Vision and hired  
11 Complainant to work as a gas station attendant at the 76 station located on Main and  
12 Burnside Streets in Gresham, Oregon, in November 2016. Complainant's duties  
13 included putting gas into cars and filling propane gas tanks for customers. (Testimony  
14 of Complainant; Ex. X2A, X9)

15 4) Complainant felt that he was a good worker who took on responsibilities  
16 that were given to him. He often reported to work when he was called in on a day off.  
17 (Testimony of Complainant)

18 5) When Complainant came in to work in the evenings, he heard other  
19 workers talk badly about Latinos. For example, Complainant heard workers question  
20 why Gov gave work to Latinos, when they could do it. When Complainant walked into  
21 the area where a conversation like this was happening, he heard someone say "shut up,

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22 <sup>4</sup> Factual matters alleged in a charging document that are not denied in the answer are deemed admitted  
23 by the answering party. OAR 839-050-0130(3); *In the Matter of Banyan Built Constr. Inc.*, 36 BOLI 271,  
24 279 (2018).

1 he's going to hear you" and he was asked if he spoke English. Complainant did not tell  
2 Gov about these comments. Gov behaved well towards Complainant and did not say  
3 derogatory comments to him. Complainant only heard the comments from the other  
4 workers. (Testimony of Complainant)

5 6) Complainant earned minimum wage. Vision paid him in cash every two  
6 weeks. He earned approximately \$800 for every two-week pay period. At first, Monroy  
7 handed Complainant the cash for his wages. After a while, Gov provided Complainant  
8 with his cash wages. One of the two usually paid him. However, on January 19, 2017,  
9 Rodney, a white co-worker, paid Complainant his cash wages instead of Monroy or  
10 Gov. After Rodney handed Complainant his wages, Complainant counted the cash and  
11 noticed that the money was \$30 short and he told Rodney. Rodney responded that he  
12 paid him in full. Rodney then left the premises because it was the end of his shift.  
13 (Testimony of Complainant)

14 7) Later that day, a female worker ("Terri")<sup>5</sup> telephoned Rodney and told  
15 him that he owed Complainant money. Rodney returned to the 76 station later that  
16 evening around 10:00 p.m. Rodney appeared to be "drunk" and "on drugs," and he  
17 started to insult Complainant. Complainant asked Rodney for the \$30 that was owed to  
18 him. In response, Rodney threw cash towards Complainant. Rodney then grabbed  
19 Complainant's timecard and punched it, and told Complainant to "get out" of there and  
20 "go back to Mexico." Complainant became angry and told Rodney he could not do that.  
21 Rodney grabbed a weapon that administers shocks and placed it next to Complainant's

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23 <sup>5</sup> Complainant was not certain if the female worker's name was "Terri," "Kari" or "Karen." Since this detail  
24 is not pertinent to the forum's analysis, this worker will be referred to as "Terri."

1 chest.<sup>6</sup> Complainant telephoned Monroy and asked for help. Monroy came to the  
2 station. (Testimony of Complainant)

3 8) After the incident between Rodney and Complainant, Terri called the  
4 police. Complainant and Monroy went inside the gas station to wait. The police arrived  
5 and spoke to the people outside, but did not talk to Complainant. After the police left,  
6 Complainant left with Monroy. (Testimony of Complainant)

7 9) Monroy later spoke to Gov and told him about the incident with  
8 Complainant and Rodney on January 19, 2017. Gov said that Complainant should  
9 return to work and there would be no problem. Complainant returned to work the next  
10 day. Around 3:00 p.m., Terri and another worker named Mario, who was Mexican, were  
11 present. Terri yelled rude things at Complainant and Mario, such as “go back to your  
12 country, to Mexico,” “you are taking our jobs,” “you are crying over \$30” and “get out of  
13 here, mother fucking Mexicans.” Terri threw \$30 at Complainant and said “get out of  
14 here.” (Testimony of Complainant)

15 10) Complainant was mad and offended by the words said to him by Rodney  
16 and Terri. (Testimony of Complainant)

17 11) Complainant spoke to Gov about how he was being treated by Rodney  
18 and Terri. Gov said that Complainant should ignore their conduct and continue working  
19 because Complainant was a good worker. Gov said he would take care of the problem  
20 and that Complainant should come back to work. Complainant told him “no” and said  
21 that Gov should first fix the problem because he was the boss. Complainant could not

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23 <sup>6</sup> Complainant did not testify that Rodney shocked him or activated the weapon, and his co-worker told a  
24 BOLI investigator that weapon was not charged. (Ex. A5; Testimony of Lynch)

1 ignore the offensive conduct because it was "really nasty." (Testimony of Complainant)

2 12) Gov told Complainant to come work at another gas station operated by  
3 Vision, located at the intersection of Foster Road and 122<sup>nd</sup> Avenue in Portland.  
4 Complainant understood that Gov was the boss in charge of this location. The  
5 Foster/122<sup>nd</sup> location employed the same workers as those that worked at the Gresham  
6 service station. When Complainant arrived at the new location, he noticed white  
7 workers talking amongst themselves and heard them question why Gov hired Mexicans  
8 to do work they were able to do themselves. The workers told Complainant there was  
9 no work available and that the schedule was full. Complainant told the other workers  
10 that Gov had sent him there to work. One of the workers replied, "I don't care."  
11 Complainant believed he was fired at that point. In his communications with BOLI, Gov  
12 admitted that Vision terminated Complainant's employment.<sup>7</sup> (Testimony of  
13 Complainant; Ex. A12A)

14 13) After he was terminated, it took Complainant more than a month to find  
15 another job. His new employer paid him more money than he earned working for  
16 Vision. (Testimony of Complainant)

17 14) All of the witnesses who testified were credible.

### 18 CONCLUSIONS OF LAW

19 1) At all times material herein, Vision was an employer as defined in ORS  
20 659A.001(4) and employed Complainant.

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22 <sup>7</sup> The forum accepted this statement made by Gov in his interactions with BOLI because it was consistent  
23 with other credible evidence in the record. However, the forum did not accept all statements made by  
24 Gov to BOLI. For example, Gov stated that Complainant was fired because "the employees all got in a  
fight and Terri said Complainant held her hostage and kept her in the office." However, that statement  
contradicts other credible evidence. (Exs. A5, A7)

1           2)     The actions, statements, and motivations of Gov (Complainant's  
2 supervisor) are properly imputed to Vision. *In the Matter of Lioness Holdings, LLC dba*  
3 *Tan Republic and Peter Lamka*, 36 BOLI 229, 264 (2018).

4           3)     Vision discharged Complainant because of his race in violation of ORS  
5 659A.030(1)(a).

6           4)     Vision subjected Complainant to unlawful harassment based on his race,  
7 in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(4)(a)(A), based on Vision's  
8 failure to take any appropriate and corrective action in response to the events of  
9 January 29, 2017, and the hostile work environment Complainant experienced  
10 thereafter.

11          5)     Complainant, acting in good faith and while employed by Vision, reported  
12 information that he believed was evidence of a violation of a state law (unlawful  
13 harassment) to Gov.

14          6)     Vision, acting through Gov, discharged Complainant from employment,  
15 because he made a good faith report to Gov about unlawful discrimination and  
16 harassment, thereby violating ORS 659A.199 and OAR 839-010-0100(1).

17          7)     At all times herein, Gov was an individual and a "person" under ORS  
18 659A.001(9)(a) and ORS 659A.030(1)(g).

19          8)     Gov aided and abetted Vision in the unlawful employment practices  
20 described above, in violation of ORS 659A.030(1)(g).

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

2 10) Pursuant to ORS 659A.850(4)(a)(B), the Commissioner of the Bureau of  
3 Labor and Industries has the authority under the facts and circumstances of this case to  
4 issue a cease and desist order, including an award of compensatory damages to  
5 Complainant, based on Respondents' unlawful practices. The sum of money awarded  
6 and the other actions required of Respondents in the Order below are an appropriate  
7 exercise of that authority.

### 8 OPINION

9 The Formal Charges alleged that Vision engaged in the following unlawful  
10 employment practices:

- 11 • Discharging Complainant's employment on the basis of race in violation of ORS  
12 659A.030(1)(a).
- 13 • Subjecting Complainant to different terms and conditions of employment  
14 (harassment) on the basis of race in violation of ORS 659A.030(1)(b).
- 15 • Retaliating against Complainant and terminating his employment for opposing  
16 unlawful employment practices in violation of ORS 659A.030(1)(f).
- 17 • Retaliating against Complainant and terminating his employment on the basis  
18 that Complainant made a good faith report of a violation of rule or law in violation  
19 of ORS 659A.199.

20 Additionally, the Agency alleges that Gov aided and abetted the unlawful  
21 employment actions in violation of ORS 659A.030(1)(g). The Agency seeks lost wages,  
22 out-of-pocket expenses and emotional distress damages for Complainant.

23 When a respondent defaults in a case in which the Agency has issued Formal  
24 Charges, the Agency need only establish a prima facie case to support the allegations  
of its charging document in order to prevail. *In the Matter of Leo Thomas Ryder dba  
Leo's BBQ Bar & Grill, 34 BOLI 67, 74 (2015).*

1 **LIABILITY OF VISION FOR DISCHARGE BECAUSE OF RACE**

2 It is an unlawful employment practice for “[a]n employer, because of an  
3 individual's race \* \* \* to \* \* \* discharge the individual from employment.” ORS  
4 659A.030(1)(a). To prove that Vision violated ORS 659A.030(1)(a) by terminating  
5 Complainant's employment, the Agency must establish a prima facie case consisting of  
6 the following five elements: (1) Vision was an employer; (2) Vision employed  
7 Complainant; (3) Complainant was in a protected class (race); (4) Vision discharged  
8 Complainant; and (5) Vision terminated Complainant because of his race. *In the Matter*  
9 *of Maltby Biocontrol, Inc., Howard Maltby, James Bassett, and Louis Bassett*, 33 BOLI  
10 121, 155-56 (2014).

11 It is undisputed that Vision was an employer and employed Complainant. As  
12 well, Complainant was in a protected class because of his race. Vision admitted that it  
13 discharged Complainant.

14 Additionally, the forum concludes that Vision terminated him “because of” his  
15 race for the following reasons. Although Gov told BOLI investigators that Complainant  
16 was terminated because he got into a fight with another employee, Complainant  
17 credibly testified that he and Monroy talked to Gov about Rodney pointing the weapon  
18 at Complainant's chest. Gov appears to have chosen to disregard that information and  
19 terminate Complainant instead of disciplining Rodney, a white employee who was the  
20 aggressor in the situation.

21 **LIABILITY OF VISION FOR RACE DISCRIMINATION**

22 It is an unlawful employment practice for “[a]n employer, because of an  
23 individual's \* \* \* race \* \* \* to discriminate against the individual in compensation or in  
24

1 terms, conditions or privileges of employment.” ORS 659A.030(1)(b). The Amended  
2 Formal Charges allege two theories of race discrimination: (1) harassment by  
3 supervisor and (2) harassment by a co-worker.<sup>8</sup>

#### 4 *Harassment by a Supervisor*

5 The forum first examines whether there is evidence of harassment by a  
6 supervisor. Supervisors with “immediate (or successively higher) authority over the  
7 employee” are considered agents of an employer for purposes of an employer’s Title VII  
8 liability. *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998).<sup>9</sup> Determining  
9 whether a particular individual is a supervisor “is not dependent upon job titles or formal  
10 structures within the workplace.” *Dawson v. Entek Int’l.*, 630 F3d 928, 940 (9th Cir  
11 2011), *citing McGinest v. GTE Service Corp.*, 360 F3d 1103, 1119 n.13 (9th Cir 2004).  
12 Rather, for purposes of vicarious liability under Title VII a person is a supervisor “if he or  
13 she is empowered by the employer to take tangible employment actions against the  
14 victim.” *Vance v. Ball State University*, 570 US 421, 424 (2013). A tangible employment  
15 action is “a significant change in employment status, such as hiring, firing, failing to  
16 promote, reassignment with significantly different responsibilities, or a decision causing  
17 a significant change in benefits.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761  
18 (1998).

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20  
21 <sup>8</sup> There is also a specific separate allegation of subjecting Complainant to different terms and conditions  
because of his race. Because the forum has already found discrimination in regards to the termination, it  
finds this allegation to duplicate the claim of harassment and will not separately analyze it.

22 <sup>9</sup> Federal law similar to Oregon’s civil rights laws is not binding on the forum, but federal decisions can be  
23 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”).

1 In this case, Complainant testified as to negative treatment he received from co-  
2 workers. There was no evidence that a supervisor harassed him and, in its closing  
3 argument, the Agency did not argue that he was harassed by a supervisor.  
4 Accordingly, the forum finds there was no evidence of harassment by a supervisor and  
5 proceeds to analyze the allegation of co-worker harassment.

#### 6 *Co-Worker Harassment*

7 A prima facie case of co-worker harassment based on race consists of the  
8 following elements: (1) respondent is a respondent as defined by statute; (2)  
9 complainant is a member of a protected class; (3) complainant was harmed by  
10 harassment directed at complainant by co-workers; (4) complainant's race was a reason  
11 for the co-worker harassment; and (5) the harassment was sufficiently severe or  
12 pervasive to have the purpose or effect of unreasonably interfering with the  
13 complainant's work performance or creating an intimidating, hostile or offensive working  
14 environment. OAR 839-005-0010(4)(f); *Maltby*, 33 BOLI at 145. The standard for  
15 determining whether harassment is sufficiently severe or pervasive to create a hostile,  
16 intimidating or offensive working environment is whether a reasonable person in the  
17 circumstances of the complaining individual would so perceive it. OAR 839-005-  
18 0010(4)(b).

19 Elements (1) and (2) of the Agency's prima facie case are not in dispute.  
20 Element (3) is satisfied by Complainant's credible testimony that Rodney failed to pay  
21 him \$30 owed to him, threw cash at Complainant when he asked for the money and  
22 pointed a weapon at his chest. This treatment, coupled with racial epithets such as  
23 Rodney telling him to "go back to Mexico," established Element (4). Element (4) is also  
24

1 supported with the testimony that employee Terri used racial epithets towards  
2 Complainant. See *Maltby*, 33 BOLI at 146 (recognizing that insults prefaced by the  
3 words "Spanish" or "Hispanic" demonstrated a racial motivation).

4 Element (5) is satisfied by Complainant's credible testimony that the racial  
5 comments and stun gun confrontation were upsetting and caused him to be  
6 uncomfortable in the workplace. The forum further finds that a reasonable person in the  
7 circumstances of Complainant would perceive the conduct to be sufficiently severe and  
8 pervasive to create a hostile, offensive or intimidating work environment.

9 "An employer is liable for harassment by the employer's employees or agents  
10 who do not have immediate or successively higher authority over the complaining  
11 individual when the employer knew or should have known of the conduct, unless the  
12 employer took immediate and appropriate corrective action." OAR 839-005-0010(4)(f).  
13 Monroy and Complainant spoke to Gov about the altercation with the stun weapon and  
14 the derogatory racial comments directed towards Complainant.<sup>10</sup> After that, Gov said it  
15 would be "fine," but the treatment did not stop. Accordingly, Vision is liable for the  
16 harassment of Complainant by Rodney and Terri.

#### 17 **LIABILITY OF VISION FOR DISCHARGE BECAUSE OF OPPOSITION TO UNLAWFUL** 18 **HARASSMENT**

19 The Agency alleges that Vision violated ORS 659A.199 & OAR 839-010-0100(4)  
20 by terminating Complainant because he made a good faith report of information he

21 \_\_\_\_\_  
22 <sup>10</sup> Complainant admitted that he did not inform Gov about the offensive comments about Mexicans that  
23 were made in the workplace prior to January 19, 2017. Accordingly, the forum concludes that Vision only  
24 "knew or should have known of" the conduct that occurred after Monroy and Complainant made  
complaints to Gov.

1 believed to be evidence of a violation of ORS 659A.030(1)(b).

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

3 It is an unlawful employment practice for an employer to discharge \* \* \* an  
4 employee \* \* \* for the reason that the employee has in good faith reported  
5 information that the employee believes is evidence of a violation of a state or  
6 federal law, rule or regulation.

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

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

12 The "good faith" requirement in ORS 659A.199 is met when the whistleblower has a  
13 reasonable belief that the information reported has occurred and that the information, if  
14 proven, constitutes evidence of a violation of a state or federal law, rule or regulation.

15 *Hey Beautiful Enterprises, Ltd. and Kimberly Schoene*, 34 BOLI 80, 95 (2015).

16 Under ORS 659A.199, an employee "report[s]" information when the employee  
17 communicates information to "anyone" that the employee believes is evidence of a  
18 violation of state law. Complainant's reports to Gov about the unlawful racial  
19 harassment directed towards him satisfy the reporting requirement of ORS 659A.199.

20 The forum concludes that Gov's decision to terminate Complainant was motivated, at  
21 least in part, by Complainant's report of harassment because: (1) the termination  
22 shortly followed the report of harassment, (2) Gov failed to take action to correct the  
23 harassment and insisted that everything would be "fine," and (3) Gov told BOLI that  
24 Complainant was terminated for being in a fight, although the instigator of the fight  
(Rodney) was not terminated. Accordingly, the Agency established a prima facie case  
of a violation of ORS 659A.199.

1 The Agency also alleges that Vision violated ORS 659A.030(1)(f) when it  
2 terminated Complainant because he opposed Respondents' unlawful harassment. The  
3 analysis used in determining that Vision violated ORS 659A.199 applies equally to the  
4 Agency's ORS 659A.030(1)(f) claim. Accordingly, the forum's conclusion that Vision  
5 violated ORS 659A.199 necessarily leads to the conclusion that Vison also violated  
6 ORS 659A.030(1)(f) when it terminated Complainant after his reports of discrimination.  
7 *See Hey Beautiful Enterprises, Ltd.*, 34 BOLI at 96.

8 **LIABILITY OF GOV FOR AIDING AND ABETTING**

9 ORS 659A.030(1)(g) provides that it is an unlawful employment practice “[f]or  
10 any person, whether an employer or employee, to aid, abet, incite, compel or coerce the  
11 doing of any of the acts of this chapter or to attempt to do so.” A corporate officer and  
12 owner who commits acts rendering the corporation liable for an unlawful employment  
13 practice may be found to have aided and abetted the corporation's unlawful employment  
14 practice. *In the Matter of Bravo Event Services, Inc. and Dan Kor*, 36 BOLI 250, 268  
15 (2018).

16 As set forth above, Gov was the registered agent and sole member of Vision, a  
17 limited liability corporation. Accordingly, he aided and abetted (1) the unlawful  
18 harassment of Complainant by failing to take sufficient corrective action and (2)  
19 unlawfully terminating Complainant's employment. Therefore, he is in violation of ORS  
20 659A.030(1)(g). As an aider and abettor, Gov is jointly and severally liable with Vision  
21 for all of Vision's unlawful employment practices.

22 ///

23 ///

24

1 **DAMAGES**

2 Lost Wages

3 Complainant is eligible for a back pay award because he was discharged in  
4 violation of ORS 659A.030(1), ORS 659A.199 and ORS 659A.030(1)(g). ORS  
5 659A.850. The purpose of a back pay award in an employment discrimination case is to  
6 compensate a complainant for the lost wages he would have received but for the  
7 unlawful employment practice. *In the Matter of Oregon Truck Painting, LLC, On Time*  
8 *Painting, Inc., Richard Bowman, Individually, and Amanda M. Marin, Individually*, 37  
9 BOLI \_\_, \_\_ (2018). Back pay awards are calculated to make a complainant whole for  
10 injuries suffered as a result of the unlawful termination. *Id.*

11 Complainant earned approximately \$800 every two weeks, which calculates to  
12 approximately \$1,600 per month. After his termination, he was unemployed for a month  
13 until he found a new position that paid him higher wages than he earned working for  
14 Vision. Accordingly, the forum concludes that Complainant is entitled to \$1,600 in lost  
15 wages.

16 Out-of-Pocket Expenses

17 This forum has consistently held that out-of-pocket expenses that are directly  
18 attributable to an unlawful practice are recoverable from a respondent as a means to  
19 eliminate the effects of any unlawful practice found. *Id.* There was no testimony or  
20 other evidence in the record as to any out-of-pocket expenses Complainant had to pay  
21 as a result of his termination, and the Agency appeared to acknowledge that in its  
22 closing argument. Accordingly, the forum does not award out-of-pocket expenses.

1           Emotional Distress Damages

2           The Agency seeks damages on behalf of Complainant in the amount of “at least”  
3 \$60,000 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*  
6 *Oregon Truck Painting, LLC, On Time Painting, Inc., Richard Bowman, Individually, and*  
7 *Amanda M. Marin, Individually*, 37 BOLI at \_. The commissioner has the authority to  
8 fashion a remedy adequate to eliminate the effects of unlawful employment practices.  
9 *Id.*

10           In determining an award for emotional and physical suffering, the forum  
11 considers the type of discriminatory conduct, and the duration, frequency, and severity  
12 of the conduct. It also considers the type and duration of the mental distress and the  
13 vulnerability of the aggrieved persons. A complainant’s testimony, if believed, is  
14 sufficient to support a claim for mental suffering damages. *Id.*

15           The record included evidence that the discriminatory conduct of Vision and Gov  
16 negatively impacted Complainant. The Formal Charges seek “at least” \$60,000 in  
17 damages for emotional, mental, and physical suffering. Complainant testified about the  
18 hurt and anger he felt based on the hostile work environment. Unlike past BOLI cases  
19 awarding higher amounts to victims of unlawful harassment and unlawful termination,  
20 there was no evidence in the record as to how Complainant felt following his termination  
21 or any lasting impacts on his life up to the date of the hearing. Accordingly, based on  
22 the record in this case, the forum agrees with the Agency that \$60,000 is an appropriate  
23 award of emotional distress damages.

1 **OTHER REQUESTED RELIEF**

2 In its Amended Formal Charges, the Agency asked the forum to issue a cease  
3 and desist order against Respondents, requiring them to immediately stop all of the  
4 unlawful employment practices alleged in the Amended Formal Charges. BOLI's  
5 Commissioner is authorized to issue an appropriate cease and desist order reasonably  
6 calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4).  
7 Among other things, that may include requiring a respondent to:

8 "(a) Perform an act or series of acts designated in the order that are reasonably  
9 calculated to:

10 "(A) Carry out the purposes of this chapter;

11 "(B) Eliminate the effects of the unlawful practice that the respondent is found to  
12 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

13 "(C) Protect the rights of the complainant and other persons similarly situated[.]”

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

16 **EXCEPTIONS**

17 The Agency filed four exceptions requesting that the forum make corrections of  
18 scrivener's errors. The forum concludes that the exceptions are well taken and the  
19 exceptions are GRANTED, as reflected in revisions to the sections above.

20 **ORDER**

21 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS  
22 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(b), ORS  
23 659A.030(1)(g), OAR 839-005-0021, OAR 839-005-0030(4)(a), ORS 659A.199 and  
24 ORS 659A.030(1)(b) by Respondents **Vision International Petroleum, LLC and Hai**

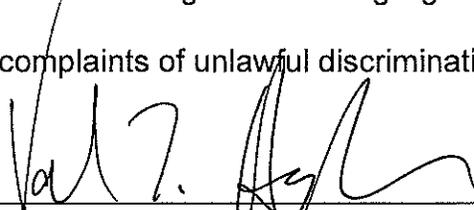
1 **Chheng Gov**, and as payment of the damages awarded, the Commissioner of the  
2 Bureau of Labor and Industries hereby orders Respondents **Vision International**  
3 **Petroleum, LLC and Hai Chheng Gov** to deliver to the Administrative Prosecution Unit  
4 of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon  
5 Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor  
6 and Industries in trust for **Federico Bustamante Bahena** in the amount of:

7 1) SIXTY THOUSAND DOLLARS (\$60,000.00), representing  
8 compensatory damages for emotional and physical suffering experienced by  
9 Complainant as a result of Respondents' unlawful employment practices found  
10 herein; plus,

11 2) ONE THOUSAND SIX HUNDRED DOLLARS (\$1,600.00),  
12 representing wages lost as a result of Respondents' unlawful employment  
13 practices; plus

14 3) Interest at the legal rate on the sum of SIXTY-ONE THOUSAND  
15 SIX HUNDRED DOLLARS (\$61,600.00), until paid.

16 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and  
17 659A.850(4), and to eliminate the effects of Respondents' unlawful employment  
18 practices found herein, the Commissioner of the Bureau of Labor and Industries hereby  
19 orders Respondents **Vision International Petroleum, LLC and Hai Chheng Gov** to  
20 cease and desist from discriminating or retaliating against any employee based upon  
21 the employee's race or complaints of unlawful discrimination.

22  
23  
24  


Val Hoyle, Commissioner  
Bureau of Labor and Industries

ISSUED ON: May 23, 2019