



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. **63-18**

HORIZONTAL MOTORSPORTS, INC.,
and ROBERT S. DUGGER JR.,
individually as aider and abettor
pursuant to ORS 659A.030(1)(g),

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

Respondents.

SYNOPSIS

The Amended Formal Charges alleged that Respondents terminated Complainant because he made a report of a violation of state law (a wage claim), in violation of ORS 659A.199(1), OAR 839-010-0100(1), ORS 652.355(1)(a),(2), OAR 839-010-0100(4)(a), and ORS 659A.030(1)(g). When the evidence presented at hearing included other credible reasons for terminating Complainant's employment, the forum concluded that the Agency failed to prove the alleged violations by a preponderance of the evidence and dismissed all charges against Respondents.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Val Hoyle, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 15, 2019, in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by

1 Administrative Prosecutor Adam Jeffries, an employee of the Agency. Respondents were
2 represented throughout the proceeding by Attorney Gregory Englund. Additionally,
3 Respondent Robert Dugger, Jr. ("Dugger") was present throughout the hearing. Steve
4 Hamann was present throughout the hearing as the corporate representative of
5 Horizontal Motorsports, Inc. ("HMS") until the conclusion of Dugger's testimony.

6 The Agency called BOLI Complainant Byron Randolph ("Randolph"), Erin Owen
7 and BOLI Civil Rights Investigator Moayyad Khoshnaw as witnesses.

8 Respondent called Dugger, Bryan Notz, Steve Hamann and Debbie Bakkensen as
9 witnesses.

10 The forum received into evidence: (a) Administrative exhibits X1 through X13, (b)
11 Agency's exhibits A1-A17 and (c) Respondents' exhibits R1-R5, R7-R10 and R12.

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.¹

15 FINDINGS OF FACT – PROCEDURAL

16 1) Randolph filed a complaint with the Agency's Civil Rights Division on
17 October 4, 2017, alleging that HMS discriminated against him based on his inquiry into
18 his rights under wage and hour laws, and retaliated against him by terminating his
19 employment. He later filed an amended complaint naming Dugger as an aider and
20 abettor.² (Exs. A1, A13)

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

24 ² The amended complaint did not include the "Jr." designation following Dugger's name. However, there is
no dispute that Dugger was the person identified as the aider and abettor.

1 2) On March 30, 2018, the Agency's Civil Rights Division issued a Notice of
2 Substantial Evidence Determination ("SED") in which it found substantial evidence of the
3 following unlawful employment practices:

- 4 • Termination of Randolph's employment because he consulted an attorney about
5 a wage claim in violation of ORS 652.355.
- 6 • Termination of Randolph's employment in retaliation for making a wage inquiry in
7 violation of ORS 653.060.
- 8 • Termination of Randolph's employment in retaliation for reporting and opposing
unlawful employment practices in violation of ORS 659A.199.
- 9 • Dugger aided and abetted in the unlawful employment practices in violation of ORS
659A.030(1)(g).

10 (Ex. A14)

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

21 4) The Formal Charges alleged that HMS engaged in unlawful employment
22 practices in violation of ORS 659A.199(1), OAR 839-010-0100(1), ORS
23 652.355(1)(a),(2), OAR 839-010-0100(4)(a), OAR 839-010-0100(4)(a) and ORS
24 659A.030(1)(g). Additionally, the Formal Charges alleged that Dugger unlawfully aided
and abetted the unlawful employment practices in violation of ORS 659A.030(1)(g). The

1 Formal Charges sought damages for physical, mental and emotional suffering in the
2 amount of at least \$5,000 and lost wages of at least \$23,568. The Formal Charges also
3 asked for an order declaring that Respondents engaged in unlawful practices and
4 enjoining Respondents from violating laws pertaining to ORS 652.355 and ORS 659A.001
5 through ORS 659A.990. The Formal Charges stated that the forum's order may include
6 such other relief as appropriate to eliminate the effects of the unlawful practices found as
7 to Randolph and others similarly situated. (Exs. X2b – X2h)

8 5) Respondents filed an answer to the Formal Charges on September 27,
9 2018, in which they denied that they had unlawfully discriminated against Randolph. (Ex.
10 X3)

11 6) On December 12, 2018, the ALJ issued two interim orders. The first, entitled
12 "Requirements for Filing Motions and Other Documents," explained the forum's filing
13 requirements, including the method by which documents must be filed and the timeline
14 for filing documents. The second order required case summaries to be filed no later than
15 January 2, 2019, and set out the requirements for what each participant needed to include
16 in their case summary. (Exs. X4, X5)

17 7) The Agency and Respondents filed case summaries on January 2, 2019.
18 The Agency filed an addendum to its case summary on January 11, 2019. (Exs. X6, X8,
19 X13)

20 8) The Agency filed Amended Formal Charges on January 3, 2019, to correct
21 the spelling of Dugger's last name and to reference ORS 652.355(2). (Ex. X9)

22 9) On January 2, 2019, the Agency filed an unopposed motion for protective
23 order to protect the confidentiality of Oregon Employment Department records pursuant
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1 to ORS 657.665(1). The Agency submitted documents Bates numbered 00077 and
2 00078 for the ALJ's *in camera* inspection with the motion. The ALJ reviewed the
3 documents submitted by the Agency for *in camera* inspection and issued an interim order
4 on January 4, 2019, ruling that the documents are confidential under ORS 657.665(1)
5 and were protected from public disclosure. (Exs. X7, X11)

6 10) On January 3, 2019, the Agency filed a motion requesting that it be
7 permitted to cross examine the individuals who signed declarations for Respondents that
8 were filed with Respondents' case summary. In an email dated January 8, 2019,
9 Respondents' counsel stated that Respondents agreed to stipulate to the Agency's
10 motion. The ALJ issued an interim order on January 9, 2019, granting the motion. (Exs.
11 X10, X12)

12 11) Before the hearing began, the Agency objected to the presence of both
13 Hamman and Dugger in the hearing room. The ALJ permitted Dugger to be present
14 because he was a named party and permitted Hamman, a corporate officer of HMS, to
15 be present as the corporate representative of HMS.³ (Hearing Record)

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

19 13) The hearing commenced on January 15, 2019, and concluded that same
20 day. (Hearing Record)

21 14) On January 2, 2020, the ALJ issued a proposed order that notified the
22 participants they were entitled to file exceptions to the proposed order within ten days of
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24 ³ See OAR 839-050-0150(3)(b).

1 its issuance. After obtaining an extension of time to file exceptions, the Agency timely
2 filed exceptions on February 6, 2020. Respondents did not file any exceptions.

3 **FINDINGS OF FACT – THE MERITS**

4 1) HMS is an active Oregon corporation. Dugger and Hamann founded the
5 business together. Dugger is the president and secretary of the corporation. Hamann is
6 the shop foreman and general manager of operations. Dugger's father, Robert Dugger,
7 Sr., (a dentist) also has a business interest in HMS. Debbie Bakkensen was the office
8 manager for Dugger, Sr.'s dental practice and provided bookkeeping services to HMS.

9 (Testimony of Khoshnaw, Dugger, Bakkensen; Exs. X2b, X3,⁴ X9, A3)

10 2) HMS's business primarily focused on repairing and maintaining Subaru
11 cars. However, HMS had been looking to hire a fabricator to expand its services to
12 perform metal fabrication work on race cars. (Testimony of Hamann)

13 3) HMS hired Randolph in December of 2014 to work as a mechanic and metal
14 fabricator. Randolph was initially paid \$20 per hour for fabrication work and \$18 for
15 technician work. Eventually, he earned \$20 per hour for all work he performed, regardless
16 of the type. (Testimony of Randolph, Dugger, Hamann; Exs. X2b, X3, X9)

17 4) During his employment, Randolph regularly missed work to meet with his
18 attorney in Salem regarding a child custody dispute. Randolph often spoke to people at
19 work about the difficulties of the custody case and the need to meet with his attorney.
20 While at work, Randolph was often on the telephone talking to his attorney about the
21 case. During this same period of time, Randolph became more difficult to work with

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

1 because of his attitude, and other employees avoided being near him. On one occasion,
2 Randolph had an issue with a co-worker, Notz, and, in front of a customer, Randolph told
3 Notz, "you don't have to be a bitch about it." Notz told Dugger about this incident.
4 Hamann received complaints from other employees about Randolph's attitude. When
5 Hamann spoke to him about his attitude, Randolph acknowledged that he could
6 sometimes be "rough around the edges." Hamann arranged for Randolph to work in a
7 separate area away from the other employees. Hamann also spoke to Dugger about
8 Randolph's attitude. About a month prior to Randolph's termination, Hamann
9 recommended that Dugger terminate Randolph. However, Dugger decided to give
10 Randolph a second chance. HMS and Dugger did not discipline Randolph for any
11 performance issues prior to his termination. (Testimony of Randolph, Dugger, Hamann,
12 Notz)

13 5) A check HMS issued to Randolph on April 15, 2015, was returned due to
14 insufficient funds in HMS's bank account. HMS replaced this returned check on April 27,
15 2015. (Testimony of Bakkensen; Exs. X3, R6)

16 6) Additionally, a check HMS issued to Randolph on June 9, 2015, was
17 returned due to insufficient funds in HMS's bank account. HMS replaced this returned
18 check on June 12, 2015. (Testimony of Bakkensen; Exs. X3, R6)

19 7) On or before September 30, 2016, Randolph asked for an advance on his
20 paycheck to help him pay his rent.⁵ HMS agreed to Randolph's request and provided him

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22 ⁵ The forum is unable to determine the regular pay date schedule for Randolph's wages. Dugger testified
23 that Randolph was initially paid on a weekly basis, but towards of the end of his employment HMS switched
24 to "bi-weekly" pay periods. The record reflects that wages were paid to Randolph on an almost weekly
basis throughout his employment. (Testimony of Bakkensen; Ex. R12) All parties agree that the September

1 with a check (No. 1646) in the amount of \$250. Randolph deposited the \$250 advance
2 check in his Wells Fargo bank account on that same date. (Testimony of Randolph; Exs.
3 A16, R1)

4 8) On October 5, 2016, Randolph received a message from his bank titled
5 "Deposit Hold Alert." The message stated that the bank had received the \$250 deposit
6 on September 30, 2016, and credited it to Randolph's account, but that "[s]ome or all of
7 these funds will not be available for your immediate use." The message further stated
8 that the "[a]mount [d]elayed" was \$250 due to "Insufficient Funds At Inquiry Time."⁶ The
9 bank notified Randolph that the funds would be available on October 12, 2016. The
10 message also stated that Randolph should not make withdrawals or write checks against
11 the deposit until he "verified the funds are available" and notified him that he could
12 determine the availability of the funds "by checking the Available Balance for this
13 account." Finally, the message stated that if "a check you deposited is returned, we will
14 mail a notice to you the same day and deduct the amount of the check from your account.
15 A deposit item return fee will also be deducted from your account for each check
16 returned." After receiving this message, Randolph believed he had a negative balance in
17 his bank account. (Testimony of Randolph; Ex. A16)

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20 30, 2016, paycheck was an early advance requested by Randolph to pay his rent, and was not a regularly
21 scheduled pay date. October 5, 2016, was the actual pay date.

22 ⁶ In Respondents' initial written response to Randolph's BOLI complaint, Bakkensen stated that Check 1646
23 had been returned due to insufficient funds. (Ex. A6) She credibly testified at hearing that she made that
24 statement in the position statement because she "took it as word" that the check had bounced. However,
after Bakkensen had the opportunity to obtain and review HMS's bank account records, she discovered
that HMS actually did have sufficient funds in its account to honor the check. (Testimony of Bakkensen;
Ex. R12) She reviewed the bank balance from September 30, 2016, until October 10, 2016, and there was
no reason for a \$250 check to be returned due to insufficient funds. The balance in HMS's bank account
was \$7,300.80 on September 30, 2016, the date check 1646 was issued, and \$11,508.33 on October 5,
2016, the date check 1646 cleared. (Ex. R12) The record is unclear as to why Randolph's bank issued
the insufficient funds notice.

1 9) On October 5, 2016, at 11:11 a.m., Randolph sent the following text
2 message to Dugger: “Hey, I just got off the phone with my attorney. I also need to stop
3 at the * * * police department to take care of my ticking [sic]. I will be there after that[.]”
4 Because of the reference to the police, Dugger assumed that “ticking” meant a “ticket”
5 from the police, and that the mention of an attorney pertained to that matter. (Testimony
6 of Dugger; Ex. R4)

7 10) Immediately after the text about the police, Randolph sent a text asking
8 Dugger to call him “ASAP.” Dugger asked, “What’s up?” and Randolph answered, “Your
9 check you wrote me Friday is bouncing[.]” Dugger responded, “[O]k I’ll give you a new
10 one I had a prob[lem] with my account last week it’s good now[.]” Dugger was not aware
11 of his bank balance at the time he sent this text, but assumed the problem was on “his
12 end” because the balance in HMS’s business account fluctuated daily. (Testimony of
13 Dugger; Ex. R4)

14 11) Randolph and Dugger then exchanged the following messages:

15 Randolph:	“I need everything in cash from now on[.]”
16 Dugger:	“[S]orry can’t do cash[.]”
17 Randolph:	“Then I’m fucked for today. Put my hole [sic] pay check in my box. 18 Tonight, no later[.]”
19 Dugger:	“You know you can take the check to chase [bank] and cash it[.]”
20 Randolph:	“They charge me for that. 7 plus bones [be]cause I bank with [W]ells [F]argo.”
21 Dugger:	“[L]et me know what the fees are. [N]o need to contact my dad[.]”

22 Dugger attempted to text his father and alert him that Randolph might be coming to his
23 father’s office, but accidentally sent the following text to Randolph instead of his father:

1 “Byron [Randolph] might be on his way there he is going crazy[.]” Randolph responded,
2 “Wrong number? I’m not going crazy, I expect more from you[.]” (Testimony of Randolph,
3 Dugger; Exs. A9, R4).

4 12) On October 5, 2016, HMS prepared a check to replace the September 30
5 advance check in the amount of \$537.50, which represented:

- 6 • Wages Randolph earned from September 15-30, 2016, plus
- 7 • \$35 (amount HMS believed Randolph would be charged by his bank for a returned
8 check), minus
- Deduction of \$100 (to reimburse HMS for amounts paid on Randolph’s behalf for
body work on a car)⁷

9 At 2:25 p.m. on October 5, 2016, Dugger sent Randolph a text message informing him
10 that he had a replacement check for him. Dugger sent Randolph another text at 2:42
11 p.m. which stated, “[C]heck is in your box. Any fees that need to be covered just print out
12 the charges and I will cover them.” (Testimony of Dugger, Bakkensen; Exs. A9, R2, R4,
13 R12)

14 13) On October 5, 2016, Randolph telephoned an attorney because he thought
15 it was illegal for an employer to issue paychecks that bounced. He met with the attorney
16 on October 6, 2016. (Testimony of Randolph)

17 14) Randolph presented the replacement check to HMS’s bank (Chase) and
18 received cash in exchange for the check on October 5, 2016, the same day that Randolph
19 informed Dugger about the notice of insufficient funds. The original payroll advance
20 check from September 30, 2016, also cleared HMS’s bank on October 5, 2016.
21 (Testimony of Randolph, Bakkensen; Ex. R12)

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24 ⁷ This deduction was not authorized by Randolph in writing as required by ORS 652.610(3)(b). However,
there is no allegation in the Amended Formal Charges regarding this deduction.

1 15) In the late afternoon of October 5, 2016, Randolph arrived at the worksite.
2 He had not been at work that day, although Hamann had been expecting him to perform
3 a job for a customer. Randolph was upset⁸ and told Notz that HMS had issued a paycheck
4 to him that bounced. Randolph began speaking to Dugger in a loud voice. Dugger invited
5 him into his office upstairs so that they could talk privately away from other employees
6 and customers, but Randolph would not agree to go upstairs. Randolph clapped loudly
7 towards Dugger and made comments such as “bravo” and “amazing ownership” in a
8 sarcastic tone. The conversation was loud enough to be overheard by Hamann, Notz
9 and customers of HMS. Hamann asked Randolph what was going on, and asked him to
10 stay and perform work for a customer who was waiting. Randolph told Hamann that he
11 was sorry and that he was “f-ing done with this place.” Randolph slammed his toolbox
12 shut and left. It was unclear to Dugger and Hamann whether Randolph intended to keep
13 working at HMS. (Testimony of Randolph, Dugger, Hamann, Notz; Ex. A7)

14 16) After a customer observed Randolph speaking loudly and clapping at
15 Dugger, the customer told Hamann that he wanted to leave. Randolph’s behavior
16 embarrassed Dugger. He became concerned that customers who overheard Randolph
17 might post negative reviews online, causing HMS to lose work. Dugger spoke to his
18 business partners, and decided that he had no choice but to terminate Randolph for
19 yelling at Dugger in front of customers. Dugger decided to communicate his decision to
20 Randolph in person. (Testimony of Hamann; Dugger)

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24 ⁸ It is unclear if the interactions described in this paragraph occurred before or after Randolph received cash from Chase Bank for the replacement check.

1 17) The following day (October 6, 2016), Dugger learned that both the original
2 advance check and the replacement check had both been processed by HMS's bank and
3 that money had been deducted from HMS's account for both checks. Randolph was
4 scheduled to perform work for a customer that day. He did not show up to work and did
5 not tell Dugger in advance that he would not be there. Dugger texted Randolph at 12:15
6 p.m., saying that "my account is showing that check is going through that you said
7 bounced?" and pointed out that Randolph had received an extra check for \$250. Dugger
8 then texted "and you are a no show today?" (Testimony of Dugger; Exs. A3, A8, A9)

9 18) Approximately four and a half hours later, at 4:59 p.m., Randolph responded
10 to Dugger's text, stating:

11 "That check is being held [until] 10/12, if it goes through [I] will write you a check
12 for reimbursement. I'm not trying to take money from you unjustly.

13 "I can't trust you anymore to keep me fully employed, with full time hours. After
14 you telling me to do whatever [I] feel necessary yesterday, [I] don't feel respected
15 anymore.

16 "I can't handle you calling me crazy because you don't have money in your account
17 when [I] simpl[y] ask for a[n] advance and you say you want to help me out.

18 "It is apparent you don't want to keep me busy when you send me text messages
19 saying that you where [sic] slacking or ordering parts, but you will have work soon.
20 Of course [you're] on vacation during this time and I can't make money.

21 "I need a full time job, one that keeps me busy full time. That's why [I] work, to
22 make a living. I'm looking for new full time employment, in the mean time [sic] I
23 will finish projects for you part time if you like[.]"

24 Dugger asked, "Did you just quit?" Randolph replied, "No, [I] will work part time while
looking for something real." Dugger interpreted this statement as an insult to HMS.
(Testimony of Dugger; Ex. R4)

 19) Dugger still intended to terminate Randolph, but wanted to deliver the news

1 in person. At 5:06 p.m., he responded to Randolph's text, stating that they could "talk
2 tomorrow about that, what time would you like to talk[?]" Randolph replied, "Not sure, [I]
3 have a lot of thing[s] to take care of now. Spending lots of time on the phone[.]" Dugger
4 assumed that the reference to the phone pertained to calls involving Randolph's custody
5 dispute. Dugger texted, "[O]kay then we can do it over the phone." Randolph replied,
6 "After [I] talk with my attorney. I will also be recording any conversation we have[.]"
7 Dugger was confused as to why Randolph mentioned an attorney. Randolph had often
8 mentioned speaking to his child custody attorney and Dugger did not understand how
9 that pertained to their conversation. Dugger responded to Randolph, stating, "[Y]our
10 attorney? [P]lease explain." At 5:12 p.m., Randolph replied, "You said do whatever [I]
11 felt necessary. So [I] am." At 5:12 p.m.,⁹ Dugger texted, "[Y]our [sic] fired[.] [W]e can set
12 a time up when you would like to pick up your tool[s]." Although Dugger wanted to
13 terminate Randolph in person, he felt that he had to communicate the news by text
14 message because Randolph would not come in to work or talk to Dugger by telephone.
15 (Testimony of Dugger; Ex. R4)

16 20) Randolph's testimony and prior statements were often inconsistent with
17 other credible evidence or an exaggeration, suggesting that he was not able to provide
18 an accurate account of the events. Some examples of the inconsistencies and
19 exaggerations are as follows:

- 20 • In the questionnaire Randolph submitted to the Civil Rights Division, he stated that
21 HMS had "bounced payroll multiple times" and he told the investigator that the

22 ⁹ Dugger testified that he thought Randolph's text of 5:12 p.m. may have "crossed" with the text he sent at
23 5:12 p.m. firing Randolph, and that he may not have seen Randolph's text before sending the notification
24 that Randolph was fired. Because Dugger was not certain and the record does not conclusively
demonstrate when the text appeared on Dugger's cell phone, the forum has made no determination as to
whether Dugger saw Randolph's 5:12 p.m. text prior to sending his own text to Randolph at 5:12 p.m.

1 check issued on September 30, 2016, was the “4th check that bounced.” He also
2 testified that HMS bounced payroll checks on multiple occasions. However, at the
3 time he made those statements, he was aware that the September 30 advance
4 check had actually been honored by HMS’s bank and did not bounce, and that
5 HMS had only bounced a total of two checks, not four.

- 6 • Randolph asserted that HMS paid him in cash when checks bounced, but there
7 was no evidence to support this statement.
- 8 • Randolph testified that he did not “yell” at Dugger on the afternoon of October 5,
9 2016. However, Randolph admitted that he raised his voice because the
10 workplace is loud. Additionally, Hamann and Notz heard Dugger yelling, and a
11 customer told Hamann that he heard Dugger yelling. Moreover, since Randolph
12 was downstairs and communicating with Dugger upstairs, it seems reasonable that
13 Dugger, Hamann and Notz considered Randolph to be “yelling.”
- 14 • Randolph refused to accept Dugger’s invitation to talk privately in Dugger’s office
15 about his concerns.
- 16 • In text messages Randolph sent to Dugger on October 6, 2016, Randolph
17 mentioned being upset about HMS not providing him with sufficient work and
18 wanting to work for HMS on a part time basis while he looked for a “real” job. These
19 text messages conflicted with his testimony that he planned to work the same
20 number of hours after October 6, 2016, as he worked prior to his termination.

21 Due to the inconsistencies between Randolph’s testimony and other credible evidence in
22 the record, Randolph’s testimony was not credited when it conflicted with other credible
23 evidence. (Testimony of Randolph; Exs. A3, A5, R4)

24 21) As an owner of the business, Dugger had an inherent motivation to protect
the business interests. However, Dugger’s statements in his testimony and throughout
the investigation were generally consistent with other credible evidence. Moreover, when
Randolph contacted Dugger on October 5 and notified him that a check had allegedly
bounced, Dugger gave Randolph the benefit of the doubt and assumed the business was
responsible for the notice Randolph received from his bank. Dugger did not argue with
Randolph or delay replacing the check, but instead issued a replacement check within
hours. The forum considered these factors when evaluating the truthfulness of Dugger’s
testimony regarding the reasons for terminating Dugger. (Testimony of Dugger,
Bakkensen)

22) Hamann also had a financial interest in HMS, providing him with an inherent bias. However, he was not impeached with any credible evidence and the forum has credited his testimony in its entirety. (Testimony of Hamann)

23) Khoshnaw, Owen, Notz and Bakkensen were all credible witnesses. (Testimony of Khoshnaw, Owen, Notz, Bakkensen)

CONCLUSIONS OF LAW

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

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

3) Randolph, acting in good faith and while employed by HMS, reported information that he believed was evidence of a violation of a state law.

4) Randolph discussed, inquired and consulted an attorney about a wage claim.

5) Respondents did not violate ORS 659A.199(1), OAR 839-010-0100(1), ORS 6552.355(1)(a),(2), OAR 839-010-0100(4)(a) or ORS 659A.030(1)(g) by terminating Randolph's employment.

6) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful practices found. ORS 659A.800 to 659A.865.

7) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charges against any respondent not found

1 to have engaged in any unlawful practice charged.

2 **OPINION**

3 The Amended Formal Charges allege that HMS engaged in the following unlawful
4 employment practices:

- 5 • Retaliated against Randolph by terminating his employment because Randolph
6 made a good faith report of a violation of rule or law in violation of ORS 659A.199
and OAR 839-010-0100(1).
- 7 • Unlawfully discharged or discriminated against Randolph because Randolph made
8 a wage claim or discussed, inquired about or consulted an attorney or agency
about a wage claim in violation of ORS 652.355(1)(a), (2) and OAR 839-010-
0100(4)(a).

9 Additionally, the Agency alleges that Dugger aided and abetted the unlawful
10 employment actions in violation of ORS 659A.030(1)(g). The Agency seeks lost wages
11 and emotional distress damages for Randolph.

12 The Agency has the burden of proof to establish the causal link in a civil rights
13 case and the standard of proof is a preponderance of the evidence. *In the Matter of*
14 *Kenneth Wallstrom*, 32 BOLI 63, 82-83 (2012). “Preponderance of evidence means ‘more
15 probably true than false.’” *In the Matter of Sunnyside Inn*, 11 BOLI 151, 165 (1993)
16 (quoting from *State v. Jackson*, 313 Or 189, 832 P2d 443 (1992) and *Cook v. Marshall*,
17 214 Or 513, 527, 330 P2d 1026 (1958).

18 In viewing the evidence presented at hearing, it appears that the “Insufficient
19 Funds” notice Randolph received from his bank on October 5, 2016, led to a series of
20 misunderstandings between the parties, in particular when Dugger learned that HMS
21 actually had sufficient funds in its account and the advance check was honored by the
22 bank.

1 **LIABILITY OF HMS FOR VIOLATION OF ORS 659A.199**

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

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

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

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

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

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 *Vision International Petroleum LLC & Hai Chheng Gov*, 37 BOLI 187, __ (2019).

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

22 Elements 1, 2 and 4 are not in dispute. Accordingly, the forum must determine
23 whether Randolph made a good faith report of a violation and, if so, whether HMS
24

1 discharged Randolph because of his reports.

2 *Report of a Legal Violation*

3 Under ORS 659A.199, an employee “report[s]” information when the employee
4 communicates information to “anyone” that the employee believes is evidence of a
5 violation of state law. The Agency asserts that Randolph reported a violation to Dugger
6 and his attorney. In response, HMS argues that HMS’s September 30 check did not
7 bounce and that on October 6, 2016, Randolph knew that he had actually been overpaid.

8 The forum first examines Randolph’s belief that HMS violated state law¹⁰ with
9 respect to the September 30 advance check. Notably, the check was not a regular
10 paycheck, but rather was an advance issued at Randolph’s request. Additionally,
11 although Randolph received an insufficient funds notice from his bank, HMS had sufficient
12 funds in its account at all relevant times and the advance check was honored by HMS’s
13 bank on October 5, 2016. Accordingly, the forum is unable to conclude that the
14 September 30 check was issued in violation of state law. Nevertheless, the Agency does
15 not need to prove that an actual violation occurred, only that Randolph had a good faith
16 belief that there had been a violation of state or federal law.

17 The forum concludes that the following constituted “reports” for purposes of ORS
18 659A.199:

- 19 • Randolph’s text messages to Dugger on October 5, 2016, telling him that the check
20 issued on September 30, 2016, bounced.
- 21 • Randolph’s inquiries with his attorney on October 5 and 6, 2016, regarding whether
22 he had a wage claim.

23 ¹⁰ In the section of the Amended Formal Charges discussing this alleged violation, there is no mention of
24 which state or federal law was arguably violated. However, the second alleged violation provides
notification that the alleged legal violation was a “wage claim” under state law. Accordingly, the forum finds
that the charging document provides sufficient notice of the statutes and rules involved pursuant to ORS
183.415(3)(c).

1 Respondents argue that Dugger did not have a good faith belief because the
2 advance check cleared and did not actually bounce. However, HMS had previously
3 issued two paychecks in 2015 that were returned due to insufficient funds. After Randolph
4 received the notice from his bank on October 5, 2016, it was reasonable for him to
5 conclude that another payroll check was being returned due to insufficient funds.

6 Respondents also argue that Randolph did not have a good faith belief of a
7 violation on October 6 because HMS had issued a replacement check to him and,
8 because the September 30 check did not actually bounce, Randolph had actually been
9 overpaid. However, although Randolph was aware he had been fully compensated with
10 a replacement check, he still had a good faith belief that his employer may have done
11 something unlawful when he contacted his attorney. Accordingly, the forum finds that
12 Element 3 (good faith report) was satisfied.

13 *Causation – Discharge Because of Reports*

14 To show causation, the Agency “must prove that [a respondent’s] unlawful motive
15 was a substantial factor in his termination, or, in other words, that [Randolph] would have
16 been treated differently in the absence of the unlawful motive.” *Harper v. Mt. Hood Cmty.*
17 *Coll.*, 283 Or App 207, 214, 388 P3d 1170, 1174 (2016) (citing *LaCasse v. Owen*, 278 Or
18 App. 24, 32–33, 373 P3d 1178 (2016)). See also *Ossanna v. Nike, Inc.*, 365 Or 196, 214,
19 445 P3d 281, 292 (2019) (recognizing that the causation standard for assessing violations
20 of ORS 659A.199(1) is “the substantial-factor standard of causation”). See also *Atlas Bolt*
21 *& Screw Company LLC*, 37 BOLI __, __ (2018) (using the “substantial factor” analysis when
22 examining allegations of retaliation).

23 The following evidence in the record suggests a possible unlawful motive caused
24

1 the termination:

- 2 • During the text message exchanges on October 5, Dugger referred to Randolph as “crazy.”
- 3 • Dugger’s text terminating Randolph at 5:12 p.m. was sent immediately after Randolph texted that he was speaking to an attorney.
- 4 • Randolph was scheduled to do a fabrication job on October 6, 2016.
- 5 • In spite of the evidence of Randolph’s difficult attitude and behavior, Dugger did not terminate him until after he sent a text about talking to an attorney.

6 In contrast, the following evidence tends to show a *lack* of unlawful motive:

- 7 • On October 5, 2016, when Randolph told Dugger that a check had bounced, Dugger immediately issued a replacement check.
- 8 • On the afternoon of October 5, 2016, and on previous occasions, Randolph had been disruptive in the workplace.
- 9 • On October 6, 2016, Dugger understood that the September 30 check did not bounce and that Randolph had been overpaid.
- 10 • Randolph did not show up to work on October 6, 2016.
- 11 • In his text messages to Dugger on October 6, 2016, Randolph said he was not receiving enough work and intended to look for employment elsewhere.
- 12 • In response to Dugger’s October 6 text saying “we can talk tomorrow about that. What time would you like to talk,” Randolph did not offer a time. Instead, he responded, “Not sure, I have a lot of thing[s] to take care of now. Spending lots of time on the phone.”
- 13 • Throughout his employment, Randolph missed work to meet with an attorney about his child custody case. This supports Dugger’s testimony that he did not consider Randolph’s reference to an “attorney” to be in regards to a wage claim.
- 14 • Dugger planned to terminate Randolph in person on October 6, but Randolph would not come in to work.

17 Given all of this information, Randolph seemed to be conveying an intent to end
18 his employment or, at the very least, to reduce his work hours to when he saw fit.
19 Furthermore, he was not cooperative with Dugger’s request to meet with him to discuss
20 the arrangement. Randolph’s text messages support Respondents’ contention that
21 Dugger was frustrated with Randolph’s uncooperative behavior. The Agency asks the
22 forum to consider two text messages in isolation: Randolph’s text about an attorney and
23 Dugger’s text informing Randolph that he was “fired.” However, there is additional
24 evidence that supports Respondents’ contention that there were other reasons for

1 terminating Randolph for his disruptive behavior in the workplace. Some of the evidence
2 is corroborated by the text messages and by Randolph's own testimony. Additionally, the
3 forum found Dugger, Hamann and Notz to be credible when they described Randolph's
4 behavior in the workplace. Taking all of the above factors into consideration, the forum
5 concludes that the Agency was unable to prove by a preponderance of the evidence that
6 Dugger's reports of a violation of state law were a substantial factor in Dugger's decision
7 to terminate him.

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

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

15 As set forth above, Dugger was the president and secretary of HMS, an Oregon
16 corporation. Accordingly, if the termination was unlawful, he would be an aider and
17 abettor in violation of ORS 659A.030(1)(g). Because the termination was not unlawful,
18 Dugger is not liable as an aider and abettor.

19 **LIABILITY OF HMS FOR VIOLATION OF ORS 652.355(1)(A)**

20 ORS 652.355 provides, in pertinent part:

21 “(1) An employer may not discharge or in any other manner discriminate against
22 an employee because:

23 “(a) The employee has made a wage claim or discussed, inquired about or
consulted an attorney or agency about a wage claim.”

24 OAR 839-010-0100(4) interprets this statute as follows:

1 “(4) ORS 652.355 prohibits any employer with one or more employees in Oregon
2 from discriminating or retaliating against a current, former, or any other employer's
employee because:

3 “(a) The employee has made a wage claim or has discussed with anyone, inquired
4 of anyone, or consulted an attorney or agency about a wage claim[.]”

5 The prima facie case for this alleged violation is similar to that of ORS 659A.199(1)
6 analyzed above, except that for Element 3, the Agency must prove that Randolph “made
7 a wage claim or has discussed with anyone, inquired of anyone, or consulted an attorney
8 or agency about a wage claim.” The forum concludes that this element is satisfied.

9 However, as with the previous alleged violation, the Agency did not establish
10 causation and did not prove that Randolph was terminated because he “made a wage
11 claim or has discussed with anyone, inquired of anyone, or consulted an attorney or
12 agency about a wage claim.”

13 **AGENCY’S EXCEPTIONS**

14 The Agency filed 42 pages of exceptions to the Proposed Order, which are
15 addressed below. In weighing the evidence in this case, it is important to note that the
16 Agency had the burden of proof to establish that violations occurred. If the evidence on
17 a required element is in conflict, then the Agency did not satisfy that burden.

18 **EXCEPTIONS TO PROPOSED FINDINGS OF FACT**

19 *Exception 1*

20 In Exception 1, the Agency objects to the forum’s conclusion that “Dugger’s
21 statements in his testimony and throughout the investigation were generally consistent
22 with other credible evidence.” “[A]n ALJ’s credibility findings are accorded substantial
23 deference and absent convincing reasons for rejecting those findings, they are not
24 disturbed.” *Gordy’s Truck Stop, LLC.*, 28 BOLI 200, 216 (2007)). See also *Wallstrom*,

1 *Kenneth*, 32 BOLI 63, 92-93 (2012) (“exceptions to the ALJ’s credibility findings are
2 denied because those findings are supported by substantial evidence in the record”). In
3 the exception, the Agency asserts that Dugger gave inconsistent reasons for terminating
4 Randolph.

5 The Agency first contends that in the position statement submitted to BOLI on
6 October 18, 2017, Dugger said that he terminated Randolph because he did not show up
7 for work. Actually, the statement was much more detailed and stated as follows:

8 “Owner Robbie Dugger states the follow[ing] for the reason [Randolph’s]
9 employment with [HMS] was terminated: Over the last few months of his
10 employment with [HMS], [Randolph] would make excuses and reasons to leave or
11 not come into work. He also was rounding up his hours per job. If the job paid 2.5
12 hours, he would put 3. On his last day of employment, he got angry and started
13 shouting up the stairs to my office where I was standing. I asked him several times
14 to come up to my office if he wants to talk, and [I] told him that yelling was not okay
with multiple employees and customers around the business. I asked him to stop
and please come up to my office and I turned and walked into my office. At that
point[,] he started clapping very loud for about a minute or two while making
negative comments. Then he left work in the middle of a job and then failed to
show up to work the following day. When he did not show up to work on October
6[,] 2016[,] he was then terminated from employment.”

15 (Ex. A6)

16 The Agency next contends that Dugger “added a new reason for terminating
17 Randolph in his declaration,” dated April 24, 2018, when he stated that, among other
18 things, Dugger terminated Randolph for not “coming into the shop to discuss his status.”
19 Again, the Agency neglected to include the entirety of the paragraph, which read:

20 “Horizontal did not retaliate against Mr. Randolph for making a wage inquiry,
21 consulting with an attorney, or reporting or opposing employment practices.
22 Rather, he was terminated for his bad attitude and particularly for the incident on
23 October 5 when he yelled at me in front of employees and customers, refused to
24 come upstairs to talk to me in my office with the door shut, and for not showing up
for work, or coming into the shop to discuss his status.”

(Ex. R8) This paragraph contains generally the same content as the statement in the

1 position statement cited above. The forum interprets the reference to not “coming into
2 the shop” to simply further elaborate on the phrase “not showing up to work.”

3 The Agency also asserts that Dugger’s testimony about text messages that were
4 both sent at 5:12 p.m. possibly “crossing” “is inconsistent with the documentary evidence
5 in the record showing the sequence of the texts and also inconsistent with the logical plain
6 language of the text messages.” The Agency bases the bulk of its case on two text
7 messages that were both sent at 5:12 p.m. In the text chain, Dugger’s 5:12 p.m. text
8 terminating Randolph comes immediately after Randolph’s 5:12 p.m. text stating: “You
9 said do whatever [I] felt necessary. So [I] am.” It is entirely possible that Dugger typed
10 his 5:12 p.m. text and hit the send button before receiving Randolph’s text. Accordingly,
11 the forum does not find Dugger’s testimony about two text messages both sent at 5:12
12 p.m. potentially “crossing” to be inconsistent with the sequence of the text messages.

13 Because the Agency has not demonstrated “convincing reasons for rejecting” the
14 ALJ’s credibility findings, Exception 1 is OVERRULED.

15 *Exception 2*

16 In Exception 2, the Agency also asserts that Dugger provided inconsistent reasons
17 for terminating Randolph. As stated above, the forum does not find there to be relevant
18 or significant differences in the statements. Accordingly, Exception 2 is OVERRULED.

19 *Exception 3*

20 In Exception 3, the Agency asks the forum to add a finding of fact “stating that
21 Respondents withheld relevant text messages exchanged between Dugger and
22 Randolph on October 6, 2016, including Dugger’s text at 5:12 [p.m.] firing Randolph,
23 during the course of the investigation conducted by the * * * Civil Rights Division.” Based
24

1 on arguments made at hearing, the forum understands the Agency's use of the term
2 "withheld" to suggest that Respondents purposely failed to turn over all of the text
3 messages requested by BOLI's investigators because Respondents were trying to
4 conceal or hide the messages. However, the forum is unable to draw that conclusion.
5 The Agency correctly points out that Respondents did not provide all of the text messages
6 exchanged between Dugger and Randolph to BOLI's investigators. Bakkensen testified
7 that she gathered the information requested by BOLI and asked Dugger to provide her
8 with copies of the text messages he exchanged with Randolph. Dugger testified that he
9 used the "screenshot" function on his cell phone to copy the text messages and did not
10 know why all of the messages were not included. Dugger was not necessarily meticulous
11 in making sure to capture all of the messages in the conversation. However, in the
12 absence of other supporting evidence, the forum is unable to conclude that Dugger
13 purposely withheld messages from the investigation. The forum notes that Ex. R4 offered
14 by Respondents at hearing appears to be a more thorough capturing of the text messages
15 exchanged. Accordingly, Exception 3 is OVERRULED.

16 *Exception 4*

17 Exception 4 pertains to the text that Randolph sent to Dugger at 5:12 p.m., stating:
18 "you said do whatever I felt necessary. So I am." With this exception, the Agency requests
19 that the forum add a finding of fact "that states that [Randolph]'s reference to 'do whatever
20 I felt necessary' referred to [Randolph's] understanding that [Dugger] told him to do
21 whatever was necessary about Dugger's issuance of checks with insufficient funds." The
22 Agency's primary reason for adding this fact is that it would be consistent with Conclusion
23 of Law, #4, which states, "Randolph discussed, inquired and consulted an attorney about
24

1 a wage claim.” The forum declines to add this finding of fact. There is already evidence
2 in the record to support Conclusion of Law, #4. See Finding of Facts – The Merits, ##9-
3 11, 13. Additionally, there is conflicting evidence in the record as to what “do whatever
4 [I] felt necessary” means. Randolph asserted that it referred to the check being returned,
5 and Dugger testified that he did not know what Randolph meant in the text. Given the
6 vagueness of the phrase and, as previously stated, that Randolph often referred to
7 contacting an attorney for child custody and other matters, the forum finds that the Agency
8 did not satisfy its burden in proving that an additional finding of fact should be added.

9 *Exception 5*

10 With Exception 5, the Agency requests that a finding of fact be added, which states
11 “that there is no evidence in the record showing that Respondents ever disciplined
12 [Randolph] for missing work, rounding up his hours, or for his attitude at work during this
13 employment with Respondents.” However, Finding of Fact – The Merits, #4 already
14 addresses this issue, reading, “HMS did not discipline Randolph for any performance
15 issues prior to his termination.” Exception 5 is GRANTED, in part, to include a reference
16 to “Dugger” after HMS in Finding of Fact, #4, but is otherwise OVERRULED.

17 *Exception 6*

18 In Exception 6, the Agency requests that the forum remove the following sentence
19 from Finding of Fact – The Merits, # 16: “Dugger spoke to his business partners, and
20 decided that he had no choice but to terminate Randolph for yelling at Dugger in front of
21 customers.” The Agency contends that this statement “is inconsistent with the original
22 reason Respondents provided for the termination of [Randolph] in the position
23 statement[,] dated October 18, 2017. As previously stated when discussing Exception 1,
24

1 Respondents did reference the October 5 yelling incident when explaining the reasons
2 for termination. See Ex. A6, p. 2. Accordingly, Exception 5 is OVERRULED.

3 *Exception 7*

4 Exception 7 asks the forum to replace the citations to exhibits in Proposed Finding
5 of Fact – The Merits, # 18 with a reference to Ex. R4 instead. The forum agrees that Ex.
6 R4 is the exhibit that appears to contain the most complete copies of the text messages
7 at issue. Accordingly, Paragraph 18 has been amended to cite to that exhibit and
8 Exception 7 is GRANTED.

9 *Exception 8*

10 In Exception 8, the Agency objects to the portion of Finding of Fact - The Merits, #
11 9, which states: “Dugger still intended to terminate Randolph, but wanted to deliver the
12 news in person.” The Agency asserts that “Dugger’s testimony on this issue should not
13 be found as credible” because it conflicts with Respondents’ position statement provided
14 to BOLI. As explained above, the forum disagrees. The position statement includes
15 reference to the yelling incident of October 5 as a reason for the termination. Moreover,
16 Dugger’s testimony is consistent with Hamann’s credible testimony on this same topic.
17 Accordingly, Exception 8 is OVERRULED.

18 *Exception 9*

19 Exception 9 requests that the forum remove the citation to Ex. A9 from Finding of
20 Fact – the Merits, # 19. The forum agrees that Ex. R4 contains the most complete
21 recitation of the text messages between Dugger and Randolph. Accordingly, Exception 9
22 is GRANTED, and the reference to Ex. A9 is removed as reflected in Finding of Fact- The
23 Merits, #19.

1 *Exception 10*

2 In Exception 10, the Agency takes exception with Proposed Finding of Fact – The
3 Merits, # 19 at footnote 9, which states that no determination was made regarding whether
4 the text messages sent at 5:12 p.m. “crossed” and asks that the forum find that the texts
5 at 5:11 p.m. and 5:12 p.m. be “determined to be the true sequence of texts.” The forum
6 notes that the footnote does not address the order in which text messages were
7 exchanged, but rather whether Dugger actually saw the text Randolph sent at 5:12 p.m.
8 prior to the text Dugger sent at 5:12 p.m. telling Randolph that he was fired. Exception
9 10 is GRANTED, in part, to clarify that it is meant to address whether Dugger saw
10 Randolph’s text before sending his own text, and is otherwise OVERRULED.

11 *Exception 11*

12 With Exception 11, the Agency disagrees with the portion of Proposed Finding of
13 Fact – The Merits, # 8 at footnote 6, which states: “HMS actually did have sufficient funds
14 in its account to honor the check.” The Agency requests that the sentence be amended
15 to reflect that HMS did *not* have sufficient funds “at all times between September 30,
16 2016, and October 5, 2016.” The forum disagrees with the accuracy of the Agency’s
17 requested language, but agrees that the footnote should be supplemented to include
18 additional evidence in the record. Accordingly, Exception 11 is GRANTED, in part, as
19 reflected in footnote 6 and is otherwise OVERRULED.

20 *Exception 12*

21 In Exception 12, the Agency takes exception to the fifth bullet point in Proposed
22 Finding of Fact – The Merits, # 20, which provided examples of inconsistencies and
23 exaggerations in Randolph’s testimony that were considered when assessing his
24

1 credibility. The section objected to by the Agency reads:

2 “In text messages Randolph sent to Dugger on October 6, 2016, Randolph
3 mentioned being upset about HMS not providing him with sufficient work and
4 wanting to work for HMS on a part time basis while he looked for a ‘real’ job. These
text messages conflicted with his testimony that he planned to work the same
number of hours after October 6, 2016, as he worked prior to his termination.”

5 The Agency points to evidence in the record that Randolph had worked part-time hours
6 in his last weeks of employment and, thus, Randolph’s testimony that he would work a
7 part- time schedule was consistent with that. However, when testifying about potential
8 lost wages, the amount Randolph sought was dependent upon him working a significantly
9 higher amount of hours than 15 hours per week. See Ex. 15, p. 2.¹¹ Accordingly,
10 Exception 12 is OVERRULED.

11 *Exception 13*

12 In Exception 13, the Agency takes exception to a portion of Proposed Finding of
13 Fact, # 20. Paragraph 20 provided examples of inconsistencies and exaggerations in
14 Randolph’s testimony that were considered when assessing his credibility. The full
15 section referenced by the Agency is reprinted below, with the specific language the
16 Agency objects to in italics and underlined:

17 “In the questionnaire Randolph submitted to the Civil Rights Division, he stated
18 that HMS had “bounced payroll multiple times” and he told the investigator that the
19 check issued on September 30, 2016, was the “4th check that bounced.” He also
20 testified that HMS bounced payroll checks on multiple occasions. However, at the
time he made those statements, he was aware that ***the September 30 advance
check had actually been honored by HMS’s bank and did not bounce, and
that HMS had only bounced a total of two checks, not four.***”

21 The Agency argues that it is irrelevant that the check eventually cleared the bank because

23 ¹¹ Since Ex. 15 is subject to a protective order, the forum has not included the exact figures referenced in
24 the exhibit.

1 Randolph had received a notice from his bank that the check was being held due to
2 insufficient funds. The forum disagrees and finds it relevant when assessing Randolph's
3 credibility that he told BOLI's investigator and testified under oath at hearing that the
4 September 30 check had bounced when, at the time he made those statements, he knew
5 that it had not.¹² Therefore, Exception 13 is OVERRULED.

6 **EXCEPTIONS TO PROPOSED OPINION**

7 *Exception 14*

8 Exception 14 states that the Agency takes exception to the Proposed Opinion at
9 page 19, lines 11-16. That section of the Proposed Opinion lists evidence that suggests
10 a possible unlawful motive for termination. While the Agency objects to those particular
11 lines, it does not ask for those lines to be removed. Instead, the Agency asks the forum
12 to add or insert what it describes as "inconsistencies" "between Respondents' asserted
13 non-retaliatory reasons for terminating [Randolph] and other evidence in the record as
14 support for finding that an unlawful motive caused the termination." The Agency lists five
15 "inconsistencies" in which it argues that Respondents asserted one reason for termination
16 that is allegedly contradicted by other evidence. Unfortunately, the Agency does not
17 provide the forum with citations or references to the record where each "assertion" and
18 "contradiction" can be found. Moreover, the forum finds that the Agency's descriptions of
19 some of the "contradictions" are not accurate. For example, the Agency asserts that
20 evidence of Randolph's "bad attitude is contradicted by documentary evidence or the lack
21

22
23 ¹² As previously stated, HMS's bank account had sufficient funds when the check was issued. It is not clear
24 why Randolph's bank issued an insufficient funds notice and the forum declines to speculate as to why the
bank issued the notice.

1 thereof.” However, Randolph’s own text messages to Dugger stating that he would be
2 looking for a “real job” are evidence of a bad attitude. Additionally, there was testimony
3 of Randolph and others describing that Randolph refused to come upstairs to speak with
4 Dugger on October 5, and instead yelled from downstairs up towards Dugger in front of
5 customers. At hearing, the testimony was consistent that Randolph was terminated
6 primarily for the yelling incident on October 5 and that it was essentially the last straw.
7 While there was reference in the record to Randolph’s performance issues leading up to
8 the termination (prior bad attitude, missing work and “rounding up” of hours), those
9 performance issues were not documented in writing and were not used by Dugger as the
10 justification for ultimately terminating Randolph’s employment. Accordingly, Exception 14
11 is OVERRULED.

12 *Exception 15*

13 In Exception 15, the Agency asks the forum to include a statement that
14 “Respondents withheld key text messages during the course of the Civil Rights Division
15 Investigation including the text message in which Dugger fires Randolph at 5:12 [p.m.] or
16 Randolph’s reference to seeing an attorney at 5:11 [p.m.]” This exception is substantially
17 the same as Exception 3. For the same reasons discussed with regard to Exception 3,
18 Exception 15 is OVERRULED.

19 *Exception 16-19*

20 Exceptions 16 – 19 are directed towards the evidence identified in the Proposed
21 Opinion that “tends to show the lack of an unlawful motive.” In each of these exceptions,
22 the Agency requests that some of the individual pieces of evidence be removed from the
23 Opinion. Before discussing these exceptions individually, it is important to note that
24

1 Oregon law requires that “[t]he officer presiding at the hearing shall ensure that the record
2 developed at the hearing shows a full and fair inquiry into the facts necessary for
3 consideration of all issues properly before the presiding officer in the case and the correct
4 application of the law to those facts.” ORS 183.417(8). Accordingly, regardless of the
5 forum’s ultimate conclusions, it is important for an Opinion to include all relevant evidence
6 that supports both the Agency’s and Respondents’ cases. Therefore, in a general sense,
7 the forum is hesitant to remove evidence from an Opinion. Each specific exception is
8 discussed individually below.

9 In Exception 16, the Agency requests that the following evidence be removed from
10 the list of evidence tending to show a lack of an unlawful motive in the Proposed Opinion:
11 “On October 5, 2016, when Randolph told Dugger that a check had bounced, Dugger
12 immediately issued a replacement check.” The Agency argues that the amount of time it
13 took to issue a replacement check is not relevant. The forum disagrees. This evidence
14 showed that Dugger did not display annoyance or hesitancy to issue a replacement
15 check, which indicates a lack of hostility towards Dugger when he raised the issue. It is
16 not determinative, by itself, in showing Dugger’s motivation for terminating Randolph.
17 However, it is a piece of evidence, considered along with others, that suggests the lack
18 of an unlawful motive. Accordingly, Exception 16 is OVERRULED.

19 The Agency also takes exception to the following evidence being identified as
20 tending to show the lack of an unlawful motive in Exception 17: “On the afternoon of
21 October 5, 2016, and on previous occasions, Randolph had been disruptive in the
22 workplace.” The Agency argues that this evidence does not tend to show the lack of an
23 unlawful motive because Randolph had never been disciplined for his behavior in the past
24

1 and that, in the absence of an unlawful motive, Randolph would have been treated the
2 same as he had been on prior occasions and Dugger would not have terminated him.
3 The Agency's argument ignores the fact that the disruption on October 5, 2016, involved
4 Randolph yelling at Dugger (his boss) in front of customers. There is no evidence in the
5 record that a disruption of this magnitude occurred on previous occasions. Moreover, the
6 Agency asks the forum to make an assumption that Dugger would have ignored
7 Randolph's behavior. The forum declines to make this assumption. Exception 17 is
8 OVERRULED.

9 *Exception 18*

10 With Exception 18, the Agency takes exception to the Proposed Opinion, page 19,
11 lines 22-23, which lists the following as evidence tending to show the lack of an unlawful
12 motive: "In his text messages to Dugger on October 6, 2016, Randolph said he was not
13 receiving enough work and intended to look for employment elsewhere." The Agency
14 asserts that these text messages were not cited in the position statement Respondents
15 submitted to BOLI or in Dugger's declaration dated April 22, 2018. The Agency further
16 asserts that the sequence of the messages "suggests that Randolph's desire to look for
17 employment elsewhere was not a motivating factor in Dugger's decision to terminate
18 Randolph's employment." The Agency is incorrect in this assertion. Dugger's declaration
19 stated that Randolph "said he was looking for full-time employment and in the meantime
20 was willing to finish projects for Horizontal 'if you like.'" See Ex. R8, p. 4. In the
21 declaration, Dugger further stated that he interpreted that statement to mean that
22 Randolph intended to look for a new position and would be quitting, and that he hoped
23 Randolph would come into the office so that he could terminate him. The text message
24

1 provides context to the other messages between the parties. The forum further finds that
2 it is logical that Dugger interpreted Randolph's intent to seek other work as an intention
3 to quit at some point, which further supported his reasons to terminate him. Accordingly,
4 Exception 18 is OVERRULED.

5 *Exception 19*

6 In Exception 19, the Agency requests that the evidence referenced in the Proposed
7 Opinion, page 20, lines 1 – 2 “be removed from the list of evidence tending to show a lack
8 of unlawful motive in the Proposed Opinion.” The evidence listed is as follows:
9 “Throughout his employment, Randolph missed work to meet with an attorney about his
10 child custody case. This supports Dugger's testimony that he did not consider Randolph's
11 reference to an ‘attorney’ to be in regard to a wage claim.” The forum finds this evidence
12 to be important in determining Dugger's understanding of what Randolph may have
13 meant when he referenced talking with his “attorney,” and whether Dugger had an
14 unlawful motive when he told Randolph he was fired. Because Randolph often discussed
15 meeting with an attorney on other matters, the record is not sufficient to prove by a
16 preponderance of the evidence that Dugger understood that Randolph spoke to an
17 attorney about a wage claim and decided to terminate him for that reason. Therefore,
18 Exception 19 is OVERRULED.

19 *Exception 20*

20 In Exception 20, the Agency argues that the forum should “infer causation”
21 because of the timing of Dugger's text to Randolph informing him that he was fired. The
22 Agency is correct that Dugger told Randolph that he was “fired” shortly after Randolph
23 mentioned talking with an attorney. Absent other evidence, that timing may be sufficient
24

1 to create an inference of causation. However, the forum must also consider the events
2 occurring during that same time frame, which included Randolph yelling at Dugger in the
3 workplace on the previous day and Randolph not coming in to work on the day of his
4 termination. As well, Randolph had mentioned speaking to his attorney about other
5 matters, including a child custody issue and a traffic ticket. Accordingly, the forum
6 declines to draw the inference requested by the Agency and Exception 20 is
7 OVERRULED.

8 *Exception 21*

9 Exception 21 requests that the forum conclude in its Opinion that the element of
10 causation was met. For the same reasons discussed with respect to Exception 20,
11 Exception 21 is also OVERRULED.

12 **EXCEPTIONS TO PROPOSED CONCLUSIONS OF LAW**

13 *Exception 22*

14 Exception 22 asks the forum to change the Proposed Conclusions of Law in
15 Paragraphs 5 and 7 to state that Respondents violated ORS 659A.199(1), OAR 839-010-
16 0100(1), ORS 652.355(1)(a),(2), OAR 839-010-0100(4)(a) and ORS 659.030(1)(g).
17 Because the forum did not conclude that causation was established, Exception 22 is also
18 OVERRULED.

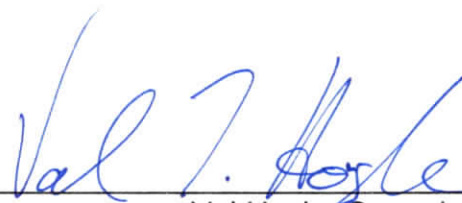
19 **EXCEPTIONS TO PROPOSED DAMAGES**

20 *Exceptions 23-25*

21 Exceptions 23 – 25 pertain to damages. Since the forum concluded that there
22 were no violations, no damages will be awarded and the discussion of damages will not
23 be included this Final Order. Accordingly, Exceptions 23 -25 are OVERRULED.

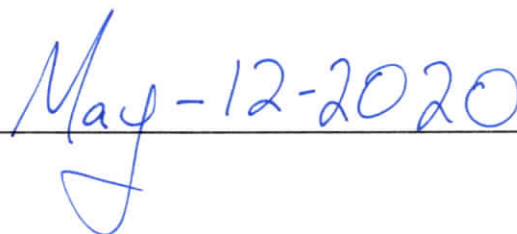
1 **ORDER**

2 NOW, THEREFORE, the charges against all Respondents are DISMISSED.

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6 Val Hoyle, Commissioner
Bureau of Labor and Industries

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9 ISSUED ON: _____

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