



BUREAU of LABOR & INDUSTRIES

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

In the Matter of:

Northwest Permanente, P.C.,

Respondent.

Case No. 93-23

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that the Complainant had been discriminated against because she had opposed and/or reported what she reasonably believed to be illegal activity in violation of ORS 659A.199(1) and ORS 659A.030(1)(f)¹, the Commissioner dismissed the Complaint and Formal Charges.

The above-entitled case came on regularly for hearing before Caroline Holien, designated as Administrative Law Judge by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 18, 19, and 21, 2025, at the Wy'East Conference Room at the offices of the Bureau of Labor and Industries ("BOLI" or the "Agency") and via the Zoom video conference application.

¹ ORS 659A.030 (2020), amended by Or Laws 2021, c. 367, § 35, eff. June 23, 2021; Laws 2021, c. 585, § 10, eff. Sept. 25, 2021, operative Jan. 2, 2022; Laws 2021, ch. 239, § 4, eff. Jan. 1, 2022; Laws 2025, c. 125, § 1, eff. Sept. 26, 2025. All statutory citations that follow are to the version of ORS 659A.030 effective from January 1, 2008, to June 22, 2021.

1
2 The Agency was represented by Administrative Prosecutor Rachel Diamond, an
3 employee of the Agency. Complainant Dr. Elaine Dischman ("Dr. Dischman" or the
4 "Complainant") was present throughout the hearing.

5 Respondent Northwest Permanente, P.C. ("NWP" or the "Respondent") was
6 represented by Jeanne Loftis, Attorney at Law. Dr. Anne Toledo ("Dr. Toledo") was
7 present on behalf of the Respondent throughout the hearing.

8 The Agency called Dr. Dischman, Fox Blackhorn-Delph ("Blackhorn-Delph")
9 BOLI's Civil Rights Division Senior Investigator; Muriel Moore ("Moore"); Alicia Sheprow
10 ("Sheprow"); Dr. Jesse Iwanski ("Dr. Iwanski"); and Clint Lewis ("Lewis") as witnesses.
11 The Agency and the Respondent called Dr. Dischman, Christy Daniels ("Daniels"), Dr.
12 Alicia Tonnies ("Dr. Tonnies"), and Dr. Toledo as witnesses.

13
14 The forum received into evidence Administrative Exhibits X1-X26. The
15 Respondent notified the forum that the Interim Order regarding its motion for summary
16 judgment was not included in the Administrative Exhibit List provided to the parties prior
17 to hearing. There was no objection to that interim order being marked and received as
18 Administrative Exhibit X27.

19 Agency Exhibits A1-A12, A14-A20, A24R-A25R² were admitted into evidence.
20 Respondent's Exhibits R1-R4, R6, R8-R10, R12-R14, R17, R19, R25, R33-R34, R37,
21 R40, R41, R43-R46, and R56 were admitted into evidence.

22 Respondent's Exhibits R5, R7, R15, R16, R18, R20, R21-R24, R27-R32, R35,
23 R38, R42, and R50 were admitted into evidence, with the Agency being granted a
24

25 ² The Agency withdrew Exs. A24-A25. Redacted versions of the exhibits were admitted as Exs. A24R
and A25R.

1 standing objection as to foundation. Respondent's Exhibits R55-R62 were admitted as
2 impeachment and/or rebuttal exhibits.

3 The parties agreed to submit post-hearing briefing in lieu of offering closing
4 statements at the conclusion of the evidentiary portion of the hearing. After requesting
5 and receiving extensions of the deadlines for filing, the last brief was received on
6 December 19, 2026.

7 Having fully considered the entire record in this matter, I, Caroline Holien,
8 Administrative Law Judge, hereby make the following Findings of Fact (Procedural and
9 on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.³

10 **FINDINGS OF FACT – PROCEDURAL**

11 1) On or about May 4, 2021, the Complainant, Dr. Dischman, filed a verified
12 complaint with the Agency's Civil Rights Division ("CRD") in which she alleged that
13 Respondent Northwest Permanente retaliated against and terminated her "based on
14 [her] whistleblowing activities about a violation of federal, state, or local law."
15 (Testimony of Complainant; Ex. A1)
16

17 2) On or about May 4, 2022, after investigation, CRD issued a Notice of
18 Substantial Evidence Determination ("SED") in which it found:

19 " * * * substantial evidence of an unlawful employment practice in that
20 Respondent discharged Complainant on the basis of reporting information
21 in good faith that she believed was evidence of a violation of state or
22 federal laws and rules, in violation of ORS 659A.199."

23 (Ex. A7)
24
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³ The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

3) On May 16, 2024, the forum issued a Notice of Hearing to the Respondent, the Agency, and the Complainant stating the hearing was to be held via the Zoom video meeting application on November 5, 2024, at 9:30 a.m. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges; a document entitled, "Summary of Contested Case Rights and Procedures," containing the information required by ORS 183.413; a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice of Hearing; and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2-X2h)

4) The Formal Charges included the following allegations:

“Unlawful Discrimination and/or Retaliation Because of Whistleblowing

18.

“Respondent unlawfully discharged, demoted, suspended, discriminated and/or retaliated against Complainant with regard to promotion, compensation or other terms, conditions or privileges of employment because Complainant, in good faith, reported information that Complainant believed was evidence of a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1) and OAR 839-010-0100(1).

“Unlawful Discrimination Because of Opposition to an Unlawful Practice”

19.

“Respondent unlawfully discharged, expelled, or otherwise discriminated against Complainant because Complainant opposed an unlawful practice in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(1),(2) and (3).

(Ex. X2b)

5) The Formal Charges sought “damages for lost wages and benefits, in an amount to be proven at hearing, estimated to be up to \$670,000.” The Formal Charges

1 also sought “non-economic damages for physical, mental and/or emotional distress in
2 an amount to be proven at hearing, estimated to be up to \$325,000” and “annual
3 training for a period of five years on preventing discrimination in the workplace including
4 discrimination based on whistleblowing.” (Ex. X2b)

5 6) On May 20, 2024, the forum issued an Interim Order Requiring Case
6 Summaries to be Filed and Setting Case Deadlines. The interim order noted that the
7 parties had consented to receiving forum filings electronically. (Ex. X3)

8 7) On June 5, 2024, NWP, by and through its attorney, filed Respondent’s
9 Answer and Affirmative Defenses in which it admitted that Complainant reported “what
10 she believed to be a violation of the Health Insurance Portability and Accountability Act
11 of 1996 (‘HIPPA’) in an email, which speaks for itself.” Respondent denied that its
12 decision to discontinue Complainant’s *locum tenens* contract was retaliation because of
13 Complainant’s whistleblowing and/or opposition to an unlawful practice as alleged in the
14 Formal Charges. (Ex. X5)

15 8) On October 29, 2024, the ALJ conducted a scheduling conference in this
16 matter in which the parties agreed to motion filing deadlines and scheduling the hearing
17 to begin on January 28, 2025. (Ex. X8)

18 9) On December 4, 2024, NWP filed a Motion for Summary Judgment in
19 which it argued that the alleged protected activity occurred after it had made its decision
20 to terminate the Complainant’s *locum tenens* physician contract. NWP argued that the
21 Agency could not establish that the Complainant’s alleged protected activity was a
22 substantial factor in its decision noting the Complainant’s prior performance issues.
23 Respondent further argued that the claims set forth in the Formal Charges were barred
24
25

1 by laches arguing that the Complainant failed to file a civil action within 90 days from
2 receiving Notice of Right to File a Civil Suit. (Ex. X9)

3 10) After requesting and receiving extensions for filing the Agency's response
4 to the Respondent's motion for summary judgment, the Agency filed its response on
5 February 12, 2025. The Agency argued that issues of material fact existed thereby
6 making the Respondent's motion for summary judgment improper. The Agency also
7 argued that the doctrine of laches is not a defense to the allegations made in the Formal
8 Charges as the defense is not available against the State of Oregon when it acts as a
9 sovereign to enforce a public right or to protect a public interest. (Exs. X10-X14)

10 11) On February 27, 2025, the ALJ issued an Interim Order Regarding
11 Respondent's Motion for Summary Judgment:

12 **"Procedural Background"**

13
14 "On May 4, 2021, the Civil Rights Division of the Bureau of Labor and
15 Industries ("CRD" or "BOLI") received a complaint from the Complainant in this
16 matter alleging that Respondent Northwest Permanente ('Respondent' or 'NWP')
17 discharged her from employment after she reported information in good faith that
18 she believed was evidence of a violation of state or federal laws or rules.
19 (Complainant ('Compl.') Decl., ¶ 1; NWP Ex. 1)

20 "On May 4, 2022, CRD, after conducting its investigation, issued a Notice
21 of Substantial Evidence Determination ('SED') finding substantial evidence that
22 NWP had discharged Complainant from employment in violation of ORS
23 659A.199(1). (NWP Ex. 15)

24 "On April 17, 2024, CRD issued Formal Charges in this matter that
25 included the following allegations:

26 **'Unlawful Discrimination and/or Retaliation Because of**
27 **Whistleblowing**

28 18.

29 'Respondent unlawfully discharged, demoted, suspended, discriminated
30 and/or retaliated against Complainant with regard to promotion,

1 compensation or other terms conditions or privileges of employment
2 because Complainant, in good faith, reported information that
3 Complainant believed was evidence of a violation of a state or federal law,
rule or regulation in violation of ORS 659A.199(1) and OAR 839-010-
0100(1).

4 Unlawful Discrimination Because of Opposition to an Unlawful Practice

5 19.

6 ‘Respondent unlawfully discharged, expelled, or otherwise discriminated
7 against Complainant because Complainant opposed an unlawful practice
in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(1), (2) and (3).’

8 “On May 16, 2024, the forum issued a Notice of Hearing setting the matter
9 for hearing on September 24, 2024. (NWP Ex. 2) On December 11, 2024, the
10 ALJ issued an interim order resetting the hearing to be held April 16-17, 2025,
with case summary deadline being set to April 2, 2025.

11 “On December 4, 2024, the Respondent filed its motion for summary
12 judgment. After requesting and receiving extensions for filing a response to the
motion, the Agency timely filed its response on February 12, 2025.

13 “Summary Judgment Standard

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

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

22 ORCP 47C. In reviewing a motion for summary judgment, this forum draws all
23 inferences of fact from the record against the participant filing the motion for
24 summary judgment and in favor of the participant opposing the motion. *In the*
Matter of WDSA INC., dba Gresham Schmizza Public House, dba Gresham
Pizza Schmizza Public House, 38 BOLI 146, 152 (2022).

1 “The record considered by the forum in deciding this motion consists of
2 the following documents:

- 3 • Formal Charges, dated April 17, 2024
- 4 • Respondent’s motion for summary judgment with supporting
5 documents, dated December 4, 2024
- 6 • The Agency’s response to the motion for summary judgment and
7 supporting documents, dated February 11, 2025

8 **“Discussion**

9 “NWP seeks dismissal on two grounds. First, NWP argues that the
10 Complainant’s alleged protected activity occurred after NWP made the adverse
11 employment decision, which NWP argues was unrelated to the alleged protected
12 activity. Second, NWP argues that the Formal Charges are time-barred and
13 should be dismissed based on the doctrine of laches.

14 “The Agency contends that the close temporal proximity between the
15 alleged protected activity and the adverse employment decision made by NWP is
16 sufficiently close as to defeat NWP’s motion for summary judgment. The Agency
17 further contends that “the defense of laches is not available against the State of
18 Oregon when it acts as a sovereign to enforce a public right or protect a public
19 interest.” (Agency Response, p. 5, internal citations omitted)

20 **Factual Background**⁴

21 “The Complainant began working for NWP as a *locum tenens* physician
22 under contract beginning on March 1, 2029. As a temporary employee who fills
23 in for other physicians and practices on an as-needed basis, the Complainant
24 was subject to NWP’s policies. (NWP Ex. 3) Prior to beginning work for NWP,
25 the Complainant was required to complete an onboarding process, which
included training on NWP’s policies and procedures. (NWP Exs. 3,4)

 “Beginning in December 2019, NWP received various complaints
regarding the Complainant’s behavior. (NWP Ex. 5) There were also complaints
regarding the Complainant’s response to feedback from NWP leadership. (Exs.
6, 7)

 “In November 2020, the Complainant transferred an urgent care patient
with a nosebleed to the emergency room. The patient required the
administration of Afrin, which the Complainant did not administer due to her

⁴ The facts presented in this interim order are based on the exhibits submitted by the participants related to the NWP’s motion for summary judgment. The facts are being discussed solely for purposes of this motion. The parties should not assume that these will be the factual findings adopted in the proposed and final orders.

1 having an allergy to Afrin. (NWP Ex. 8) During the transfer, the doctor who saw
2 the patient noted in the patient's medical chart that 'provider was unable to use
Afrin' as the reason for the transfer to the emergency room. (NWP Ex. 8)

3 "On December 8, 2020, Dr. Anne Toledo, the Complainant's supervisor,
4 learned of the incident and sent an email to the Complainant at 11:11 a.m.,
5 counseling her that the transfer was unnecessary and listed alternative
6 treatments. (NWP Ex. 9) At 11:38 a.m., the Complainant responded that her
allergy to Afrin was so severe that she could not be near the drug. The
Complainant's email to Dr. Toledo also indicated that the Complainant would
decline nosebleed patients in the future. (NWP Ex. 10)

7 "At 5:29 p.m., on December 8, 2020, Dr. Toledo sent an email to Human
8 Resources Business Partner Christy Daniels with the subject line, 'Follow up
9 confidential locum question.' The email begins with, 'The one with problem
10 behavior (explosive anger, interrupting, ranting angrily to clinic manager or in
11 back office, not accepting feedback and following directions,' and provides the
12 Complainant's name. The email goes on to say, 'Just confirming in writing that
we give Locums 30 days [sic] notice.' Dr. Toledo concludes the email with
questions about how to handle any issues that should arise with the
Complainant's behavior during the 30-day notice period. (NWP Ex. 10; Dr.
Toledo Decl., ¶ 2)

13 "At 10:36 p.m., on December 8, 2020, the Complainant sent an email to
14 Dr. Toledo that included: 'I've come to realize my severe allergic reaction to
15 decongestants is now part of a stranger's chart. And I no longer have control of
16 my own medical history.' (NWP Ex. 9; Agency Ex. A-1) The information was
subsequently removed from the patient's chart. (NWP Ex. 11, Dr. Toledo Decl.,
¶ 3).

17 "At 12:26 p.m., on December 10, 2020, Dr. Toledo sent an email to the
18 Complainant informing her that she needed to have a phone call with her that
19 afternoon or the next day. (Agency Ex. A-2) Dr. Toledo subsequently sent an
email notice to the Complainant that NWP was discontinuing her *locum tenens*
contract. The email notice included:

20 'This is a written notification to inform you that the Northwest Permanente
21 Urgent Care department will be discontinuing your locum contract effective
22 Saturday, January 9, 2021.

23 'The reasons for this discontinuation are as follows:

- 24 1. There have been multiple episodes of disruptive behavior in the
25 workplace reported to leadership[; and]

- 1 2. You have not been receptive to feedback on your behavior or feedback
2 on adherence to appropriate process for patient workflows in the
3 medical system on multiple occasions[.]”

4 “(NWP Ex. 12)

5 “On January 4, 2021, NWP terminated the Complainant’s contract after
6 she failed to report for several shifts and notified NWP that she did not intend to
7 report for any of her remaining shifts. (NWP Exs. 13, 14)

- 8 1. A genuine issue of material fact exists as to the timing of NWP’s
9 decision to terminate the Complainant’s *locum tenens* contract.

10 “Respondent contends that the evidence in this matter shows that ‘the
11 employment decision made was based on legitimate, non-discriminatory reasons
12 and was in motion prior to [Complainant] asserting any violation of the Health
13 Insurance Portability and Accountability Act (‘HIPAA’) as cited in her Complaint.’
14 (Resp. Motion, p. 2) In support, Respondent submits several emails, as well as
15 the sworn declaration of Dr. Toledo in which she contends the decision to
16 terminate the Complainant’s *locum tenens* physician contract was made prior to
17 the Complainant’s alleged complaint regarding a potential HIPAA violation
18 concerning her personal health care information.

19 “The Agency argues that a close temporal proximity between the protected
20 activity and the adverse employment action can serve to establish a causal
21 connection. The Agency points to Dr. Toledo’s Declaration in which she states,
22 ‘The decision to terminate the [Complainant] was made prior to my December 8,
23 2020, 5:29 p.m. email to Christy Daniels’ and that Complainant’s report ‘was
24 received after the decision to terminate.’ (Dr. Toledo Decl., ¶¶ 2, 4) The Agency
25 argues that the declaration was written in the third person and offers no factual
 basis for the assertion that the employment decision was made prior to
 Complainant’s report of the inclusion of her allergy in a patient’s medical record.
 The forum is required to draw all inferences of fact from the record against the
 participant filing the motion for summary judgment and in favor of the participant
 opposing the motion. *In the Matter of WDSA INC.*, 38 BOLI at 152. Viewing the
 evidence presented in a manner most favorable to the non-moving party, a
 genuine issue of material fact exists as to the timing of the decision to terminate
 the Complainant’s *locum tenens* contract. Dr. Toledo’s declaration does not
 state with any specificity as to when the decision to discontinue the
 Complainant’s contract was made. Further, the timing of the decision to
 terminate Complainant’s contract is sufficiently close in time to the alleged
 protected activity so as to raise at the very least an inference of a causal
 connection. The timing issue is best addressed at hearing where counsel may
 question the witnesses, and the ALJ can assess the credibility of the testimony of
 the witnesses. Therefore, NWP’s motion for summary judgment on this issue is
 DENIED.

1 2. The defense of laches is not applicable, and the Agency's action is not
2 time-barred.

3 "NWP argues that the doctrine of laches requires the dismissal of this
4 matter as being time-barred. The Complainant filed her complaint on May 4,
5 2021. (Compl. Decl., ¶ 1; NWP Ex. 12) CRD issued SED one year later on May
6 4, 2022. (NWP Ex. 15) Included with the SED was a Notice of Right to File a Civil
7 Suit, which included notice that the Complainant had 90 days after the date of
8 mailing to file a civil action ("90-day notice"). (NWP Ex. 15)

9 "Approximately two years later, on April 17, 2024, the Agency issued the
10 Formal Charges at issue in this matter. NWP argues that the Agency
11 unreasonably delayed issuing the Formal Charges despite both the Complainant
12 and the Agency having full knowledge of the relevant facts since 2021. NWP
13 contends that it would be unduly prejudiced if it was required to defend an
14 employment claim beyond the one-year statute of limitations for civil actions
15 between private parties and the 90-day notice accompanying the SED.

16 "The Agency counters that the Agency is acting to enforce provisions of
17 ORS Chapter 659A for the purpose of protecting the public interest in maintaining
18 workplaces free of unlawful discrimination. The Agency argues that the defense
19 of laches is not available against the State of Oregon acting in this capacity. The
20 Agency further argues that there is no time limit for the Agency to issue Formal
21 Charges, and, if such a time limit did exist, the Complainant should not be
22 penalized for the Agency's delay in the issuance of the Formal Charges.

23 "ORS 659A.820(2) requires an individual alleging an unlawful practice to
24 file a complaint with the Agency within one year of the alleged unlawful practice.
25 If, after investigation and a finding of substantial evidence, the Agency shall
 prepare Formal Charges if settlement efforts prove unsuccessful. ORS
 659A.845(a). Unlike the rule governing the filing of complainants, ORS 659A.845
 does not include a statute of limitations or any other timeline establishing when
 the Agency is required to issue Formal Charges.

26 "Many of NWP's arguments focus on the rules governing civil suits between private
27 parties. However, this proceeding is governed by the Administrative Procedures Act
28 ('APA')(ORS 183.310 to ORS 183.690), and the Agency's procedural rules in OAR
29 Chapter 839, Division 50. The Complainant's choice not to file a civil suit pursuant to
30 the 90-day notice is not relevant as to whether the Agency can proceed with Formal
31 Charges prepared and issued two years after the issuance of the SED. The passage of
32 two years is not such a great span of time as to result in undue prejudice for the
33 Respondent in defending against the claim. Therefore, Respondent's motion for
34 summary judgment on this issue is DENIED. **"IT IS SO ORDERED."** (Ex. X27⁵)

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⁵ The Interim Order Regarding Respondent's Motion for Summary Judgment was marked and received

1 12) On March 18, 2025, the Agency filed an Unopposed Motion for
2 Postponement seeking to reschedule the hearing due to the unavailability of the
3 Administrative Prosecutor. (Ex. X15)

4 13) On March 31, 2025, the ALJ issued an Interim Order re Unopposed
5 Motion for Postponement setting the matter for hearing on April 16, 2025. (Ex. X16)

6 14) On April 21, 2025, the ALJ issued an Interim Order Scheduling Hearing
7 and Deadline for Filing Case Summaries after conducting a scheduling conference with
8 the parties. The hearing was rescheduled to begin on July 29, 2025, based upon the
9 agreement of the parties. (Ex. X17)

10 15) On July 14, 2025, the Agency filed an unopposed motion for
11 postponement of the hearing on the grounds that the parties were participating in a
12 judicial settlement conference. (Ex. X18)

13 16) On July 15, 2025, the ALJ issued an Interim Order Granting the Agency's
14 Unopposed Motion for Postponement setting August 13, 2025, as the deadline for filing
15 a written status report. (Ex. X19)

16 17) After receiving notice that the parties' efforts at settlement were
17 unsuccessful, the ALJ issued an Interim Order Setting Contested Case Hearing Dates
18 and Case Summary Filing Deadline on August 19, 2025. The hearing was scheduled to
19 begin on November 18, 2025, with case summaries being due no later than November
20 4, 2025. (Ex. X20)

21 18) On November 4, 2025, the Agency filed its Case Summary. (Ex. X21)

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into evidence without objection as Ex. X27. As a result, the numbering of the administrative exhibits were
corrected beginning with the Agency's Addendum to its Case Summary (Ex. X28).

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2 19) On November 5, 2025, NWP filed its Case Summary. (Ex. X22)

3 20) On November 14, 2025, NWP filed its Motion to Quash Agency Witness
4 Subpoenas seeking to quash subpoenas issued by the Agency to witnesses employed
5 by Respondent and others working in the health care industry. (Exs. X23, X24)

6 21) On November 17, 2025, the Agency filed its response to the NWP's
7 motion to quash. (Ex. X25)

8 22) On November 17, 2025, the ALJ issued an Interim Order Denying
9 Respondent's Motion to Quash Subpoenas for Health Care Workers:

10 "On May 4, 2021, the Complainant filed a complaint alleging that
11 Respondent committed an unlawful employment practice in that they
12 discriminated and/or retaliated against her for whistleblowing and opposing an
13 unlawful practice. On May 16, 2024, the Agency issued Formal Charges and a
14 Notice of Hearing setting the matter for hearing to begin on November 5, 2024.
15 After granting four unopposed motions to postpone the hearing, the ALJ issued
an interim order on August 19, 2025, rescheduling the hearing to begin on
November 18, 2025. On November 4, 2025, the parties timely filed their Case
Summaries.

16 "On November 14, 2025, the Respondent filed a motion to quash
17 subpoenas served upon various employees of the Respondent and Kaiser Health
18 Plan arguing the witnesses were served the previous day, which thereby denied
19 the witnesses sufficient time to prepare for hearing. Respondent also points to
the strain on the witnesses, their employers, and the patients that they serve
caused by timing of the service of the subpoenas. Respondent requests that, if
the forum declines to grant its motion to quash the subpoenas, the forum strike
the testimony of the witnesses.

20
21 "On November 17, 2025, the Agency filed its response to the motion after
22 requesting and receiving permission to file its response no later than noon on
that date.

23 "ORS 651.060(1) grants the Commissioner of the Bureau of Labor and
24 Industries the authority to issue subpoenas in any case arising under the
25 authority of the Agency and 'when the information sought is relevant to a lawful
investigative purpose and is reasonable in scope. The testimony shall be taken in
some suitable place in the vicinity to which testimony is applicable.'

1 “OAR 137-003-0585(2) provides guidance on the issuance of subpoenas
2 in contested case proceedings:

3 “(1) Subpoenas for the attendance of witnesses or the production
4 of documents at the hearing may be issued as follows:

5 (a) By an agency on its own motion or by an Assistant
6 Attorney General on behalf of the agency;

7 (b) By the agency or administrative law judge upon the
8 request of a party to a contested case upon a showing of
9 general relevance and reasonable scope of the evidence
10 sought; and

11 (c) By an attorney representing a party on behalf of that
12 party.

13 (2) A motion to quash a subpoena must be presented in writing to
14 the administrative law judge, with service on the agency and any
15 other party in the manner required by OAR 137-003-0520.’

16 “OAR 137-003-0585(2) does not require that a subpoena directing a
17 witness to appear at hearing be served at a specific time; nor does Rule 55 of the
18 Oregon Rules of Civil Procedure,⁶ which requires only that ‘the subpoena must
19 be served sufficiently in advance to allow the witness a reasonable time for
20 preparation and travel to the place specified in the subpoena.’

21 “While the forum is mindful of the Respondent’s arguments as to the strain
22 potentially caused for the witnesses, the forum has not been presented with any
23 evidence showing that the subpoenas and/or service of the subpoenas are
24 deficient. Respondent has failed to establish that the Agency is not in
25 compliance with the requirements set forth above. It appears that the
subpoenaed witnesses are in the Portland vicinity and should be available to
testify either in person or via Zoom. Therefore, the Respondent’s motion to quash
Agency subpoenas served upon its employees and/or Kaiser Health Plan
employees is DENIED. Similarly, the Respondent has failed to offer a legitimate
basis to strike the testimony of any of the witnesses subject to its motion.
Therefore, Respondent’s motion to strike the testimony of the witnesses subject
to Respondent’s motion is DENIED.

“The parties are advised that ‘[i]f a person fails to comply with a properly
issued subpoena, the agency, administrative law judge or party may apply to any

⁶ OAR 839-050-0200(9) allows participants to issue subpoenas in support of discovery in the same manner as subpoenas that are issued in civil actions in accordance with the Oregon Rules of Civil Procedure.

1 circuit court judge to compel obedience with the requirements of the subpoena.’
2 OAR 137-003-0585(3).

3 **IT IS SO ORDERED. “**

4 (Ex. X26)

5 23) On November 17, 2025, the Agency filed an Addendum to the Agency
6 Case Summary (Ex. X28)

7 24) On November 18, 19, and 21, 2025, the contested case hearing was held
8 in this matter at the Wy’East Conference Room at the offices of the Bureau of Labor and
9 Industries and via the Zoom video conference application.

10 25) At the start of the hearing, the ALJ orally advised the Agency and NWP of
11 the issues to be addressed, the matters to be proved, and the procedures governing the
12 conduct of the hearing. (Statement of ALJ)

13 26) On November 25, 2025, the ALJ issued an Interim Order Re Post Hearing
14 Briefing Schedule:

15 “The above-entitled case came on regularly for hearing before Caroline
16 Holien, designated as Administrative Law Judge by the Commissioner of the
17 Bureau of Labor and Industries for the State of Oregon. The hearing was held on
18 November 18, 19, and 21, 2025, at the Wy’East Conference Room at the offices
of the Bureau of Labor and Industries (‘BOLI’ or the ‘Agency’) and via the Zoom
video conference application.

19 “The Agency was represented by Administrative Prosecutor Rachel
20 Diamond, an employee of the Agency. Complainant Dr. Elaine Dischman (“Dr.
Dischman”) was present throughout the hearing.

21 “Respondent Northwest Permanente, P.C. (‘Northwest Permanente’) was
22 represented by Jeanne Loftis, Attorney at Law. Dr. Anne Toledo (‘Dr. Toledo’)
was present on behalf of the Respondent throughout the hearing.

23 “The Agency called Dr. Dischman, Fox Blackhorn-Delph (‘Blackhorn-
24 Delph’) BOLI’s Civil Rights Division Senior Investigator; Muriel Moore (Moore’);
Alicia Sheprow (‘Sheprow’); Dr. Jesse Iwanski (‘Dr. Iwanski’); and Clint Lewis
25 (‘Lewis’) as witnesses. The Agency and the Respondent called Dr. Dischman,

Christy Daniels ('Daniels'), Dr. Alicia Tonnies ('Dr. Tonnies'), and Dr. Toledo as witnesses.

"The forum received into evidence Administrative Exhibits X1-X26. The Respondent notified the forum that the Interim Order regarding its motion for summary judgment was not included in the Administrative Exhibit List provided to the parties prior to hearing. There was no objection to that interim order being marked and received as Administrative Exhibit X27.

"Agency Exhibits A1-A12, A14-A20, A24-A25 were admitted into evidence. Respondent's Exhibits R1-R4, R6, R8-R10, R12-R14, R17, R19, R25, R33-R34, R37, R40, R41, R43-R46, and R56 were admitted. Respondent's Exhibits R5, R7, R15, R16, R18, R20, R21-R24, R27-R32, R35, R38, R42, and R50 were admitted, with the Agency being granted a standing objection to the admission of those exhibits. Respondent's Exhibits R55-R62 were admitted as impeachment and/or rebuttal exhibits.

"The parties agreed to the following filing deadlines for submitting written closing statements:

Agency's First Brief	December 5, 2025
Respondent's Response	December 12, 2025
Agency's Reply	December 19, 2025

"The parties are asked identify in their written closing statements any discrepancies between the exhibits listed as having been admitted above and what may be reflected in their notes or their review of the hearing recordings that were sent to the parties via a Dropbox link after the close of hearing.

"After receiving the Agency's Reply, the ALJ will prepare and issue a Proposed Order. Exceptions to the Proposed Order challenging any of the facts or legal conclusions that are in the proposed order must be filed within ten days of the issuance of the proposed order. OAR 839-050-0380."

IT IS SO ORDERED."

(EX. X29)

27) On December 5, 2025, the Agency filed its written closing argument. Respondent filed its response on December 19, 2025. (Exs. X29, 30)

28) On December 19, 2025, the Agency filed its reply argument. (Ex. X31)

29) On September 15, 2026, the ALJ issued a Proposed Order that notified the participants that they were entitled to file exceptions of the Proposed Order within 10 days of its issuance. The Agency filed exceptions on September 24, 2026. NWP did not file exceptions.

30) On October 20, 2026, BOLI's Commissioner issued a memorandum to ALJ Caroline Holien delegating the authority to enter a final order in this proceeding, pursuant to ORS 183.411, 651.060(3) and OAR 839-050-0420(6). (Forum File)

FINDINGS OF FACT – THE MERITS

Northwest Permanente Urgent Care Clinics

1) Northwest Permanente, P.C., (“NWP”), a domestic professional corporation, “is an independent, physician-owned medical group of approximately 1,700 to 1,800 employees in Oregon and Southwest Washington * * * * NWP works with [Kaiser Foundation Health Plan] to provide specialized services from its physicians * * * NWP physicians are credentialed or privileged at Kaiser facilities and treat Kaiser members * * * .” (Ex. A6)

2) NWP employs *locum tenens* physicians as temporary employees who fill in for other NWP physicians and practices as needed, including at its Urgent Care Clinics (“UCC”). NWP UCC staff changes regularly, unlike at NWP’s primary care clinics. *Locum tenens* physicians are not eligible for NWP benefits but are subject to NWP’s policies and expectations for workplace conduct. (Testimony of Dr. Tonnies; Exs. A6, R22)

3) Patients seeking treatment at NWP's UCCs typically require a higher acuity of care but may not require emergency services. UCC physicians must be able

1 to identify those patients who require emergency services and to act quickly to ensure
2 the patient is transferred to the appropriate facility. (Testimony of Dr. Tonnies)

3 NWP Requirements for Locum Tenens Physicians

4 4) *Locum tenens* physicians treat patients of all ages with a variety of
5 medical needs. As a result, *locum tenens* physicians must be familiar with various
6 medical procedures and be proficient in identifying the appropriate treatment plan for a
7 patient. (Testimony of Dr. Tonnies)

8 5) NWP requires *locum tenens* physicians to work approximately 16 hours
9 per month, unless shifts are not available. *Locum tenens* physicians typically work 1-2
10 shifts per week and can choose which shifts they wish to work. (Testimony of Dr.
11 Tonnies; Ex. R22)

12 6) NWP requires *locum tenens* physicians to provide their availability to NWP
13 schedulers and indicate that they would like to be added to the schedule before the
14 schedule is published. *Locum tenens* physicians are required to regularly check their
15 NWP emails and to review work schedules that are posted to MySchedule, NWP's
16 internal scheduling program. (Testimony of Dr. Tonnies; Ex. R21)

17 7) *Locum tenens* physicians, who are unable to work a scheduled shift, are
18 required to arrange for a replacement and to contact their supervisor. If a *locum tenens*
19 physician is unable to work due to illness or unexpected emergency, they are required
20 to call a centralized system to notify call staff that they are unavailable for their shift so
21 coverage for the shift can be arranged. (Testimony of Dr. Tonnies)
22
23
24
25

1 8) NWP *locum tenens* physicians are required to be part of the “UCC Back-
2 up Call” group on the GroupMe application where they can communicate with UCC staff
3 about available shifts. (Testimony of Dr. Tonnies; Exs. R21-R22)

4 Dr. Dischman’s Professional Experience

5 9) Dr. Dischman obtained her medical degree from Temple University School
6 of Medicine in Philadelphia, Pennsylvania. Dr. Dischman is Board Certified in Family
7 Medicine and holds an active medical license in Pennsylvania. (Testimony of Dr.
8 Dischman; Ex. A8)

9 10) Dr. Dischman has worked as a physician in both full-time, permanent roles
10 and as a *locum tenens* physician for small group medical practices and urgent care
11 clinics in Pennsylvania, Indiana, Ohio, West Virginia and New York. (Testimony of Dr.
12 Dischman; Ex. A8)

13 11) From September 2017 through August 2018, Dr. Dischman worked as an
14 urgent care physician at an emergency center in Hamilton Waikato, New Zealand.
15 (Testimony of Dr. Dischman; Ex. A8)

16 Dr. Dischman’s Employment at NWP

17 12) In November 2018, NWP offered Dr. Dischman employment as a *locum*
18 *tenens* physician. (Exs. A6, R1)

19 13) On January 12, 2019, Dr. Dischman and NWP entered into an “At Will
20 *Locum Tenens* Physician Service Agreement.” This agreement outlined the terms and
21 conditions of Dr. Dischman’s employment, including assigning Dr. Dischman to work at
22 the Mt. Talbert Medical Office and other locations in the Portland area on an as needed
23 basis. The agreement included the following provisions:
24
25

1 “Locum Tenens Physician agrees to abide by the Code of Conduct, policies set
2 forth by the NWP Board of Directors and practices as directed, including
3 completing training and other administrative duties. Locum Tenens Physician
4 agrees to support the Kaiser Permanente Quality Resource Program and
5 maintain the confidentiality of patient information and records in accordance with
6 applicable state and federal law as well as in compliance with NWP policies.”

7 * * * * *

8 “The parties understand and acknowledge that Locum Tenens Physician Service
9 is at will and that either Locum Tenens Physician or NWP may terminate the
10 employment at any time, with cause or by a sixty (60) day prior written notice
11 without cause, at the sole discretion of either Locum Tenens Physician or NWP.”

12 (Ex. R1)

13 14) On March 3, 2019, Dr. Dischman completed her first day of work with
14 NWP. (Testimony of Dr. Dischman; Ex. A1)

15 15) From March 3, 2019, through January 2020, Dr. Dischman worked
16 between 4 and 18 shifts each month at NWP’s Beaverton UCC, Interstate UCC, Mt.
17 Talbert UCC, and Salem UCC, for a total of approximately 130 shifts. (Ex. R57)

18 Dr. Tonnies and Dr. Toledo

19 16) Dr. Tonnies served as NWP’s UCC Chief at the beginning of Dr.
20 Dischman’s employment with NWP. The UCC Chief is not a full-time position but is in
21 addition to the other clinical duties performed by the physician serving in that role. The
22 UCC Chief helps oversee the work of the *locum tenens* physicians. (Testimony of Dr.
23 Tonnies, Dr. Toledo)

24 17) Dr. Tonnies worked in Salem, Oregon, and did not work personally with
25 Dr. Dischman, who typically worked in NWP’s Portland area UCCs. (Testimony of Dr.
Tonnies)

18) Dr. Toledo was the Assistant UCC Chief during the initial period of Dr.
Dischman’s employment. Dr. Toledo would step in if Dr. Tonnies was unavailable. Dr.

1 Toledo eventually took over the role of UCC Chief in May 2020. Dr. Toledo served as
2 NWP's Director of Operations – Specialty Care at the time of hearing. (Testimony of Dr.
3 Tonnies, Dr. Toledo)

4 19) Dr. Tonnies and Dr. Toledo both relied upon reports from clinic staff and
5 conversations with the *locum tenens* physician to monitor the *locum tenens* physician's
6 work performance. Dr. Tonnies and Dr. Toledo, as UCC Chief and Assistant UCC
7 Chief, were responsible for responding to patient complaints regarding the performance
8 of a *locum tenens* physician. (Testimony of Dr. Tonnies and Dr. Toledo)

9 20) NWP's standard practice when addressing workplace issues involving a
10 *locum tenens* physician is to first address the matter informally and in person if the UCC
11 Chief or Assistant UCC Chief are on site at the time of the incident. If a report is
12 received, the UCC Chief works to gather the facts from the staff involved and the
13 patient, if a patient complaint was received, and decide whether the matter requires the
14 involvement of NWP's human resources. Given the sporadic nature of *locum tenens*
15 work, Dr. Tonnies and Dr. Toledo tended to give the *locum tenens* physician the benefit
16 of the doubt in most cases and handle issues as they arose in an informal manner.
17 (Testimony of Dr. Tonnies, Dr. Toledo)

18 Reports Regarding Dr. Dischman's Workplace Behavior

19 21) Dr. Dischman was required to complete a two-day orientation with another
20 UCC physician before being allowed to work unsupervised at a UCC. During this two-
21 day period, the *locum tenens* physician is typically walked through NWP's procedures
22 and introduced to EPIC, NWP's patient Electronic Medical Record ("EMR") system.
23 (Testimony of Dr. Tonnies)

1 22) On March 5, 2019, Dr. Tonnies received an email from Dr. Barbara de la
2 Torre, MD ("Dr. de la Torre"), who was the Provider in Charge ("PIC") at NWP's
3 Beaverton UCC. Dr. de la Torre requested that Dr. Dischman be removed from the
4 morning schedules from March 25-26, 2019, because she was "not ready to work in the
5 morning due to speed as a new locums learning multiple new systems." Dr. de la Torre
6 also requested that Dr. Yee Chang ("Dr. Chang") be made Dr. Dischman's supervising
7 physician so Dr. Yee could further assist Dr. Dischman with "efficiency and signing lab
8 results." (Testimony of Dr. Tonnies; Ex. R2)

9 23) On March 5, 2019, Dr. Chang reported to Dr. Tonnies that Dr. Dischman
10 continued having trouble navigating EPIC, which is the electronic health record used by
11 NWP. Dr. Yee recommended that Dr. Dischman receive additional training and/or
12 assistance from NWP's Information Technology ("IT") help desk. (Testimony of Dr.
13 Tonnies; Ex. R2)

14 24) On March 5, 2019, Dr. Dischman sent an email to Dr. Tonnies asking that
15 her work schedule not be changed as a result of Dr. de la Torre's email. Dr. Dischman
16 reported that she had seen approximately 13 patients in one day and 15 patients
17 another day, and she was keeping up with the workload on the day of her email. Dr.
18 Tonnies replied that there would be no changes made to her schedule. Dr. Tonnies
19 informed Dr. Dischman that both Dr. Chang and Dr. Jan Weichsel ("Dr. Weichsel") had
20 reported that Dr. Dischman appeared to be learning the new system but could benefit
21 from additional training. (Testimony of Dr. Tonnies, Dischman; Exs. A5, R3-R4)

22 25) Dr. Tonnies had sent an email to Dr. Weichsel on March 5, 2019, asking if
23 she had any concerns about Dr. Dischman's performance. Dr. Weichsel responded,
24
25

1 “No concerns on my end.” Dr. Weichsel reported that Dr. Dischman had seen “plenty of
2 patients including a few more challenging cases (due to acuity and logistics).” Dr.
3 Weichsel noted that Dr. Dischman seemed to have some issues navigating EPIC but
4 “overall did fine with that (we worked next to each other so I was able to help with
5 computer/EMR. Seemed like she interacted well with staff as well.” (Ex. R4)

6 26) On March 7, 2019, Dr. de la Torre sent an email to Dr. Tonnies in
7 response to Dr. Dischman’s March 5, 2019, email. Dr. de la Torre questioned Dr.
8 Dischman’s representation as to the number of patients she saw and indicated that she
9 thought Dr. Dischman seemed “burned out already at the gate.” Dr. de la Torre
10 expressed concern about Dr. Dischman’s “flippant and negative” reaction when she
11 received correction. Dr. de la Torre described an incident in which she had suggested
12 to Dr. Dischman that she should include greater detail in her chart notes so other
13 providers could follow her thought process. Dr. de la Torre relayed a situation in which
14 she expressed concerns to Dr. Dischman about Dr. Dischman having prescribed an
15 antibiotic to a patient without evidence of infection:
16

17 “She defended it by saying she would be reprimanded either way in the past, and
18 seemed fine with her decision. She was not very receptive to feedback on this.
19 I’m concerned about how she will be a good fit for NWP, and will continue to
20 update you if I continue to have concerns.”

21 (Ex. R5)

22 27) On March 25, 2019, Dr. Cindy Hursk (“Dr. Hursk”) reported to Dr. Tonnies
23 that Dr. Dischman had expressed frustration when Dr. Hursk provided her with direction
24 regarding NWP’s procedure for patients presenting with cardiac issues. (Ex. R7)

25 28) On April 10, 2019, Dr. Dischman sent an email to Dr. Toledo from her
personal email regarding a patient who had reported to the UCC complaining of chest

1 pain. Dr. Dischman wrote, "The PCP [Primary Care Physician] called RTMC [Regional
2 Telehealth Medical Center] who told the patient to be seen here so that we could order
3 the troponin and take care of her. Are we really now just a dumping ground so PCP can
4 get home and ED [Emergency Department]/RTMC can dictate my management? And
5 they can take a dinner break?" (Ex. R8)

6 29) On April 28, 2019, a patient submitted a complaint through NWP's
7 customer service portal regarding an interaction with Dr. Dischman at NWP's Sunnyside
8 UCC. The patient reported that he had made an appointment at Sunnyside UCC after
9 injuring his back. Unable to drive or to sit comfortably, the patient took a Lyft to the
10 clinic where he encountered Dr. Dischman. The patient complained that Dr. Dischman
11 failed to provide him with adequate care and made him feel like a "drug seeking
12 patient." The patient wrote that Dr. Dischman told him that she would not be prescribing
13 narcotics when he asked for help in controlling his pain until he was able to see his
14 chiropractor. (Ex. R10)

15
16 30) On May 3, 2019, Dr. Dischman sent an email to Dr Tonnies and Dr.
17 Toledo complaining about the level of care received by a 14 year old patient who
18 presented with a suspected testicular torsion. There was an error made by staff in
19 identifying the level of care required by the patient, who had been waiting for
20 approximately two hours to be seen by a doctor. Dr. Dischman wrote that she believed
21 the patient needed to be sent to the emergency room and that UCC triage staff needed
22 to know that this type of patient needed to be seen first. Dr. Dischman wrote:

23 "Today we had 14 y/o boy strong susp of torsion, get labs, sit in waiting room,
24 wait for male provider....blah...blah...for 2 hours. Mother knew this was
25 emergency. Several issues RAN needs to know...this goes to ED, no bullshit
about the Urgent Care being faster....shame on ED if they are not expected to

1 see EMERGENCIES URGENTLY. Our triage needs to know this is a BLACK
2 DOT...even if he wants male provider...he needs to be first!! By whoever is
around....Yeah . . . I'm a bit upset . . . Hopefully I don't get sued for being the
only one to worry about him and have my name in the chart."

3 (Ex. R11)

4 31) Dr. Dischman was upset because she felt that UCC staff had failed to
5 properly mark the patient as requiring immediate care, which led to him waiting an
6 unnecessarily long time. Due to the dangers posed by a suspected testicular torsion,
7 Dr. Dischman felt that it was inappropriate for the patient to be seen at the UCC rather
8 than at the emergency room. (Testimony of Dr. Dischman)
9

10 32) On June 14, 2019, Dr. Dischman saw a male juvenile patient whose
11 mother had grown upset at the length of time that her son had to wait before being seen
12 by a doctor and to get his x-rays reviewed. Dr. Dischman grew frustrated with the
13 mother, who was described as "ranting" during the examination, after the mother told
14 her that she had been recording patient check-ins on her personal cell phone so she
15 knew how long it took a patient to check in, wait and be seen. Dr. Dischman went to a
16 nearby office and dropped her clipboard hard enough for the clipboard to break. The
17 mother claimed that Dr. Dischman threw the clipboard at her child, who was still in the
18 exam room. (Testimony of Dr. Dischman, Dr. Tonnies; Ex. R13)
19

20 33) On June 17, 2019, Dr. Toledo sent an email to Dr. Dischman regarding
21 the June 14, 2019, incident to arrange for a time to discuss the matter by telephone. Dr.
22 Toledo and Dr. Dischman discussed the matter a short time later. Dr. Dischman did not
23 receive any formal discipline related to the June 14, 2019, incident. (Testimony of Dr.
24 Dischman, Dr. Toledo; Ex. R14)
25

1 34) On July 3, 2019, Dr. Tonnies received a report forwarded to her by NWP's
2 Member Relations in which a patient complained about the treatment she received from
3 Dr. Dischman, who she described as "discriminating, disrespectful and [arrogant]." The
4 patient indicated that she would like an apology from the provider and educated on
5 patient interactions. A case manager with NWP Member Relations reached out to the
6 patient, who reported she went to urgent care because she had chronic asthma and
7 allergies but was unable to get any further refills on her breathing medications. The
8 patient reported that Dr. Dischman told her that, "it is not my job to give you refills." The
9 patient reported that she observed Dr. Dischman talking to another patient in a kind,
10 soft, and respectful tone, which was different than the short and accusatory tone she
11 experienced in her interaction with Dr. Dischman. (Testimony of Dr. Dischman, Dr.
12 Tonnies; Ex. R15)

13 35) On August 8, 2019, Dr. Tonnies received an email from Kazuo-Joseph K.
14 Oishi, NWP's Quality Management Coordinator, informing her that there was a peer
15 review case sent to Dr. Dischman's NWP email, and the "read receipt" showed that the
16 email had not been opened and read. Dr. Tonnies confirmed Dr. Dischman was still an
17 active *locum tenens* physician with NWP and suggested the peer review case be sent to
18 Dr. Dischman's personal email address. (Testimony of Dr. Dischman; Ex. R 16)

19 36) Dr. Tonnies grew concerned that, based on the number and nature of the
20 complaints that she had received regarding Dr. Dischman, that Dr. Dischman was "burnt
21 out." On August 17, 2019, Dr. Tonnies sent the following email to Christy Daniels,
22 Human Resources Director:
23
24
25

1 "I have received several complaints about Dr. Dischman, who is a new locums
2 provider in urgent care. Would it be possible to get a report of any CIDARS that
3 have been submitted so that I can get a better overall picture of the care she is
4 providing?"

5 (Testimony of Dr. Tonnies; Ex. R19)

6 37) During this same period, Dr. Tonnies received a call from Dr. Rahul
7 Rastogi ("Dr. Rastogi"), who was working in Regional Telephonic Medical Center
8 ("RTMC"). RTMC is a centralized service that UCC physicians must contact prior to
9 transferring a patient to the emergency room or if they have questions regarding the
10 care of a patient. Dr. Rastogi reported that Dr. Dischman had called to transfer a
11 patient to the emergency room, who he felt could have been treated at UCC. Dr.
12 Rastogi reported that Dr. Dischman refused to treat the patient at the UCC and advised
13 the patient to call 911 from the lobby so she could be taken to the emergency room for
14 pain control. (Testimony of Dr. Tonnies; Ex. R20)

15 38) On August 26, 2019, Dr. Tonnies sent Dr. Dischman an email welcoming
16 her and providing her a copy of "Department Expectations for Urgent Care Locums,"
17 which outlined the requirements for requesting additional compensation for direct
18 patient care delivered at the end of a shift and how to report missed shifts. Dr. Tonnies
19 sent the email to Dr. Dischman, in part, due to her concerns about the reports she was
20 receiving regarding Dr. Dischman's interactions with patients and UCC staff. The
21 expectations included:

22 "All UC providers, including locums, are held to departmental standards for
23 throughout, chart completion, results signoff, chronic condition refresh, HEDIS
24 measures, patient satisfaction, and appropriate use of consultants/resources.
25 Locums will be instructed on these standards during orientation and will be
periodically reviewed."

(Testimony of Dr. Tonnies; Ex. R21)

1 39) In September 2019, Dr. Tonnies received a letter detailing a visit Dr.
2 Dischman had in which she told the author of the letter and her daughter that she did
3 not believe her symptoms were related to her gallbladder. The mother wrote that Dr.
4 Dischman proceeded to “shame [her daughter] and [her] for abusing the use of ER and
5 Urgent care for this issue.” The mother detailed her efforts to receive care for her
6 daughter who was unable to keep food down for several days from various NWP
7 facilities. The letter mentioned Dr. Dischman having been rude and dismissive of their
8 concerns. (Ex. R39, p. 28-32)

9 40) On September 2, 2019, Dr. Tonnies sent an email to Dr. Dischman
10 requesting that she not forward a patient’s urgent care chart to the patient’s primary
11 care provider. Dr. Dischman responded:

12 “Frankly feeling damned if I do and damned if I don’t. Could the PCP and
13 specialists make up their minds? I get written up for referring Ortho via the
14 website and being told I should have called, then when I call, the Ortho yells at
15 me for wasting her time. The PCP’s send them to UCC cause they have no
16 openings, so I see them the same day. But follow up appointments are weeks
out, and I don’t want the patient to wait. So I send a note...and yes again, get a
slap on the wrist....Seriously finding this increasingly difficult.”

17 (Testimony of Dr. Tonnies, Dr. Dischman; Ex. R24)

18 41) On October 7, 2019, NWP received an appeal of a bill from a patient who
19 complained about an interaction he had with Dr. Dischman on August 16, 2019, at
20 NWP’s Interstate UCC. The patient wrote that he waited over two hours to be seen for
21 a swollen finger. The patient reported that Dr. Dischman indicated that the finger
22 needed to be lanced and drained but was too busy to perform the procedure and no one
23 else was available to perform the procedure at the UCC. Dr. Dischman directed him to
24 go to the emergency room, and told him not to wait as his issue was the type that could
25

1 “turn serious very quick.” The patient reported that he went to the emergency room the
2 next day and the doctor who saw him told him that the finger did not need to be lanced
3 and offered an antibiotic. The patient reported that the first round of antibiotics solved
4 the infection. (Testimony of Dr. Dischman, Dr. Tonnies; Exs. A5, R25)

5 42) On October 11, 2019, Dr. Tonnies received a copy of the patient’s October
6 7, 2019, grievance from Dr. Jean Ross (“Dr. Ross”), Physician in Charge at the
7 Interstate UCC, with the note, “Another Elaine complaint. Elaine seems to have a habit
8 of declining to do minor procedures and insists on an ER visit.” (Testimony of Dr.
9 Tonnies; Ex. R. 25)

10 43) Included in the email chain that was sent to Dr. Tonnies was the following
11 message from Kea Phan, Assistant Department Administrator, Urgent Care, which had
12 been sent to Dr. Ross on October 11, 2019:

13
14 “Can this help us with not getting her back? I understand that our core team
15 won’t start till January 2020 from the template created, but before then....I’m
16 hoping we can move on from this locum (forgive me for not sounding too nice
17 about it).”

18 (Testimony of Dr. Tonnies; Ex. R25)

19 44) On January 17, 2020, Dr. Tonnies received a report from Patient Access
20 Representative (“PAR”) expressing concerns about an interaction with Dr. Dischman
21 that affected a patient and was witnessed by other staff. The PAR reported:

22 “I had an encounter up at triage with a Doctor Elaine Dischman from UC. She
23 had brought a patient * * * over by wheelchair around 6pm. When she had
24 arrived I had an older couple walking up to check in, but the doctor ran ahead
25 and cut off the patients. I told the doctor I am sorry but these patients were in
front of you to check in so I will have you wait a moment and then I will get your
patient checked in. The doctor refused and demanded I check in her patient
now, I could tell the older lad that was walking up before the doctor was in
distress so I again asked the doctor to please wait while I get these patients
checked in. The doctor then rolled the wheelchair backwards with the patient,

1 and told her patient, 'I'm sorry you have to come here, this is why I hate this
2 place! Hope everything goes okay' then immediately left the patient alone in the
3 lobby. When the other PAR was ready to check in the doctor's patient she had
4 no way to be wheeled to the desk and the other patient's family came over and
5 helped push her to the desk. We did get her checked and she ended up being
6 brought in for dehydration, the patients I took ahead ended up being here for
7 SOB. The doctor's patient was also not expected at the [Emergency Department]
8 and [Regional Telephonic Center] had not been contacted."

9 (Testimony of Dr. Tonnies; Ex. R26)

10 45) The PAR also reported that the patient brought to triage by Dr. Dischman
11 apologized for Dr. Dischman's behavior and sought assurance that her treatment would
12 not be delayed as result. The PAR copied another NWP employee who observed the
13 incident involving Dr. Dischman; the charge nurse who spoke with Dr. Dischman after
14 she left the triage area; and Dr. Dischman's supervisor, Clint Lewis, in her email to Jess
15 Almelda, Nursing Director, who forwarded the email to Dr. Tonnies. (Testimony of Dr.
16 Tonnies, Dr. Dischman; Ex. R26)

17 46) On January 20, 2020, Dr. Tonnies forwarded the report to Emily Arion,
18 NWP Practice Director, Convenient Care, to determine whether a formal counseling
19 session was possible. Dr. Tonnies determined that given Dr. Dischman's status as a
20 *locum tenens* physician, a formal counseling session would not be appropriate as it
21 would be with a core provider. (Testimony of Dr. Tonnies; Ex. R26)

22 47) On January 29, 2020, Dr. Tonnies received a report from a Case Manager
23 with NWP's Customer Concern Resolution Center, that a patient wished to speak to her
24 directly regarding an interaction he had with Dr. Dischman on September 11, 2019,
25 when he went to NWP's Sunnyside Medical Office to seek treatment for his torn knee.
The Case Manager relayed that the patient described Dr. Dischman as being "very
rude, and did not properly treat his torn knee." The Case Manager reported that the

1 patient was complaining that Dr. Dischman ordered an x-ray instead of an MRI and had
2 several other concerns about the level of care he received in the emergency room.

3 (Testimony of Dr. Tonnies)

4 Dr. Dischman's Break in Employment with NWP

5 48) Dr. Dischman returned to New Zealand after working her last scheduled
6 shift for NWP in January 2020. Dr. Dischman intended to stay in New Zealand but grew
7 concerned after countries began closing their borders during the COVID-19 pandemic.
8 Dr. Dischman decided to return to the Portland area and resume working as a *locum*
9 *tenens* physician for NWP. (Testimony of Dr. Dischman)

10 49) In January 2020, NWP reduced UCC staff due to the reduction in the
11 number of patients visiting UCC's due to the COVID-19 pandemic shutdown. As a
12 result, there was no work available for *locum tenens* physicians. (Testimony of Dr.
13 Tonnies, Dr. Dischman)

14 50) In early August 2020, Dr. Dischman received an email that NWP was
15 opening the work schedule to *locum tenens* physicians. The email outlined the
16 procedures they were to follow, including ensuring they had NWP intranet and email
17 access at home to ensure they were able to get COVID-19 updates, and access to the
18 GroupMe chat. (Testimony of Dr. Tonnies and Dr. Dischman; Ex. A5, p. 27-28)

19 51) In August 2020, Dr. Dischman began reaching out to other NWP staff after
20 she was unable to reach Dr. Toledo, whom she understood that she needed to speak to
21 prior to returning to work. (Testimony of Dr. Dischman; Ex. A5, p. 27-28)

22 52) Dr. Tonnies had told Dr. Dischman via email that she and other physicians
23 were required to follow a plan established by NWP to ensure that workers could safely
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25

1 return to work. Dr. Tonnies also directed other NWP employees, who Dr. Dischman
2 had contacted about returning to work, saying that she had already explained the
3 requirements to Dr. Dischman and that someone with NWP onboarding would be in
4 contact with Dr. Dischman. (Testimony of Dr. Tonnies, Dr. Dischman; Ex. R31)

5 53) On September 1, 2020, Dr. Toledo sent an email to Dr. Dischman
6 outlining conversation topics she wished to cover during a scheduled telephone call.
7 Those topics included onboarding issues, as well as a “refresher of professional
8 behavior expectations when practicing with NWP.” One was regarding general
9 expectations for all NWP employees. The remaining two expectations included
10 interactions with nurses and the “appropriate method and volume of contacting leaders
11 in our department.” (Testimony of Dr. Toledo, Dr. Dischman; Ex. R33)

12 54) Dr. Dischman did not believe that she had acted inappropriately toward a
13 nurse while working at NWP. Dr. Dischman approached Clinic Manager Clint Lewis
14 (“Lewis”) after receiving Dr. Toledo’s email and was assured that he was not aware of
15 any complaints made about her interactions with UCC nurses. (Testimony of Dr.
16 Dischman; Ex. A5)

17 *Final Incidents Involving Dr. Dischman*

18 55) On November 12, 2020, a 67-year-old man, with a history of atrial
19 fibrillation and taking blood thinners, reported to the Mt. Talbert UCC with a nosebleed.
20 Dr. Dischman initially tried silver nitrate, which was not effective. Dr. Dischman asked
21 two other physicians in the clinic to treat the patient and both reported that they were
22 not good with nosebleeds. Dr. Dischman called the RTMC and spoke with Dr. Devin M.
23 Smith (“Dr. Smith”). Dr. Smith advised Dr. Dischman that the patient would benefit from
24
25

1 a "rhino rocket placement," which is a sponge type implement inserted in the nose that
2 is used to stop nosebleeds. Dr. Dischman told Dr. Smith that she did not feel
3 comfortable placing the "rhino rocket placement," because she would have to use Afrin
4 to decongest the nose before completing the placement. (Testimony of Dr. Dischman;
5 Ex. R34, R36)

6 56) Dr. Smith confirmed for Dr. Dischman that she could send the patient to
7 the emergency department if she was unable or unwilling to perform the procedure. Dr.
8 Smith noted, "[p]rovider is unable to use Afrin," in the patient's medical record, which
9 was entered at 3:46 p.m. on November 12, 2020, by Dr. Smith. (Testimony of Dr.
10 Dischman; Exs. A4, R34, R36)

11 57) Dr. Dischman transferred the patient to the emergency department, which
12 was noted at 3:48 p.m. Dr. Dischman accessed the patient's record at approximately
13 5:48 p.m. Both her note and the note made by Dr. Smith would have been visible at
14 that time. (Testimony of Dr. Dischman; Ex. R34, R60)

15 58) Dr. Dischman had experienced allergic reactions with unknown causes
16 when she was 19 and 20 years old. When she was in college, a dermatologist
17 suggested to her that she may be allergic to pseudoephedrine, which is typically labeled
18 Afrin or Sudafed. Dr. Dischman has never had an allergy test to confirm that she is
19 allergic to pseudoephedrine or related medications. Dr. Dischman has avoided
20 exposure to pseudoephedrine and related medications and has not experienced any
21 further allergic reactions of the type that she experienced when she was 19 and 20.
22 (Testimony of Dr. Dischman; Ex. R61)
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1 59) On December 8, 2020, Dr. Toledo sent Dr. Dischman an email at
2 approximately 11:11am informing her that she had received a report regarding the
3 November 12, 2020, incident at the Mt. Talbert UCC. Dr. Toledo wrote:

4 “Our Mt. Talbert team recently received some feedback from the ER teams about
5 this epistaxis case. I recognize that although we ask our core clinicians to be
6 comfortable attempting nasal packing there may be a bit more variability amongst
7 locums. I want to reassure you that we have a number of options for managing
8 epistaxis in addition to Afrin such as a couple types of packing and TXA available
9 at the UC sites.

10 “If you encounter a challenging epistaxis case in the future please check in with
11 your core UC colleagues to see if any of them are comfortable helping with
12 packing prior to transfer so long as the patient is hemodynamically stable.

13 “If you’d like any resources on the use of TXA (relatively recent – past couple years) in
14 UC or training resources on nasal packing I’m sure Ryan, the PIC cc’d here, would be
15 happy to help provide them. We’ll also be having a nasal packing CME session coming
16 up and we’ll make sure to extend that opportunity to the locum listserve.”(Ex. R36)

17 60) Dr. Dischman replied to Dr. Toledo’s email at approximately 11:38 am:

18 “I spoke with my core team that day. No one was comfortable with the situation. I
19 cannot use Afrin or basically touch Afrin. And my future response is to decline
20 epistaxis patients. A CME will not alleviate my medical condition.”

21 (Ex. R38)

22 61) Dr. Toledo decided after receiving Dr. Dischman’s response that she was
23 going to speak with human resources about terminating Dr. Dischman’s contract. Dr.
24 Toledo felt that Dr. Dischman had repeatedly shown an unwillingness to accept
25 feedback and had engaged in a “pervasive pattern” of conduct that was disruptive of
UCC operations. (Testimony of Dr. Toledo)

 62) At approximately 5:29 pm on December 8, 2020, Dr. Toledo sent
the following email to Daniels with the subject line, “Follow up confidential locum
question”:

1 "The one with problem behavior (explosive anger, interrupting, ranting angrily to
2 clinic manager or in back office, not accepting feedback and following directions)
3 is named Elaine Dischman.

4 "I will forward prior emails in which we have tried to direct her to more
5 appropriate behavior.

6 "Just confirming in writing that we give Locums 30 days' notice.

7 "Also – does that change if we give 30 day notice and then on future shifts in that
8 time span behavior such as the above continues or the other physician is
9 retaliatory toward leadership who made the decision? I will have clinical shifts
10 with this doctor I believe and I am admittedly nervous that she might react by
11 publicly berating me in the back office."

12 (Ex. R37)

13 63) On December 9, 2020, at approximately 1:40 pm, Dr. Toledo pulled a
14 Provider Complaint Report, which outlined the various complaints received regarding
15 Dr. Dischman's patient interactions. Dr. Toledo sent the report in an email to Daniels
16 and Arion, with the subject line: "PHI overall Dischman summary." Also included in the
17 email was the following message:

18 "Here I have attached her patient complaint history (some seem valid, a couple
19 she actually appears to have provided appropriate treatment and guidance – i.e..
20 No opiates as first line for back pain).

21 It does seem there is a pattern or commentary surrounding her patient
22 communication but different providers have all been the ones responding
23 because she is a locum at different sites so I suspect no one really noticed a big
24 pattern."

25 (Ex. R39)

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1 64) On December 8, 2020, Dr. Dischman worked her scheduled shift at Mt.
2 Talbert UCC, which ended at approximately 10 pm. At approximately 10:36 pm⁷, Dr.
3 Dischman sent the following email to Dr. Toledo:

4 “In addition I’ve come to realize my severe allergic reaction to decongestants is
5 now part of a stranger’s chart. And I no longer have control of my own medical
6 history. I expect that to be reviewed and REMOVED by the RTMC/Any ER
7 records immediately.”

8 (Testimony of Dr. Dischman, Dr. Toledo; Exs. R38, R57)

9 65) On December 10, 2020, at approximately 12:02 pm, Dr. Toledo sent a
10 draft of an email that she intended to send to Dr. Dischman informing her of the
11 termination of her contract to Daniels and Arion asking that Daniels vet the email before
12 Dr. Toledo sent it to Dr. Dischman. (Testimony of Dr. Toledo; Ex. R40)

13 *NWP Terminates Dr. Dischman’s Employment as a Locum Tenens Physician*

14 66) On December 10, 2020, Dr. Toledo sent the following email to Dr.
15 Dischman:

16 “This is a written notification to inform you that the Northwest Permanente Urgent
17 Care department will be discontinuing your locum contract effective Saturday
18 January 9, 2021.

19 “The reasons for this discontinuation are as follows:

- 20 1. There have been multiple episodes of disruptive behavior in the workplace
21 reported to leadership
- 22 2. You have not been receptive to feedback on your behavior or feedback on
23 adherence to appropriate process for patient workflows in the medical
24 system on multiple occasions.

25 ⁷ Agency’s Ex. A5 shows an email time of 12:36 am. Given that Dr. Dischman’s shift ended at 10 pm,
and she would be unable to access the chart outside of the UCC, the forum finds it more likely than not
that the email was sent at 10:36 pm as noted in Respondent’s Ex. R36 rather than the time noted in Ex.
A5, p. 43.

1 "I have attached Northwest Permanente's Non-Retaliation policy here. If during
2 future shifts that fall in the 30 day time period you engage in disruptive or
3 retaliatory behavior of any kind your contract will be terminated effective
immediately. If this occurs during a shift and you refuse to leave the premises
you will be escorted from the building."

4 (Testimony of Dr. Toledo; Ex. R41)

5 67) It is NWP's standard procedure to provide a copy of its retaliation policy to
6 an individual whose employment is ending with NWP. Dr. Toledo also felt it was
7 important to include the policy, because she would be working at the same clinic as Dr.
8 Dischman and did not want to risk a confrontation. (Testimony of Dr. Toledo)

9 68) On or about December 10, 2020, Dr. Dischman sent a message to the
10 GroupMe chat essentially saying good-bye and good luck to UCC staff. (Ex. R45)

11 69) Dr. Dischman had planned time off from December 11 - 27, 2020. Dr.
12 Dischman had planned to return to work at NWP on December 28, 2020. (Testimony of
13 Dr. Dischman)

14 70) On December 23, 2020, Clinic Manager Clint Lewis called Dr. Dischman
15 and asked her what her plan was due to concerns that she may not report for the
16 remainder of her shifts. Lewis understood, based upon his conversation with Dr.
17 Dischman, that she did not intend to report for any of her remaining shifts. Dr.
18 Dischman had expressed concern to Lewis that she could be forcibly removed from the
19 clinic based on Dr. Toledo's email and felt that it would be futile for her to report for her
20 scheduled shifts. (Testimony of Dr. Dischman; Ex. R46)

21 71) On December 28, 2020, Dr. Dischman was scheduled to work 12 pm to 10
22 pm. Dr. Dischman was a "no call, no show" for her shift. Dr. Dischman did not report
23 for any of her remaining shifts. (Testimony of Dr. Dischman, Dr. Toledo; Ex. R46)
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1 72) On January 4, 2021, Dr. Toledo sent an email to Dr. Dischman informing
2 her that her termination would be effective that day due to her being a no call, no show
3 for her shifts on December 28, 29, 2020, and January 2, 2021. Dr. Toledo also included
4 a list of interpersonal conflicts reported during Dr. Dischman's employment at NWP,
5 which Dr. Dischman had requested that Dr. Toledo produce. That list included:

6 "Fall 2019 – patient complaint – raised voice and broke clipboard in response to
7 frustration with [patient] present

8 "Winter 2019-20 – conflict with ER physician during patient transfer process

9 "Sept 2019 – poor response to polite feedback on process in our system

10 "October 2019 – patient complaint for unnecessary ER transfer – finger cellulitis

11 "Jan 2020 – Disruptive (by clinician) transfer of patient to ER reported

12 "August 2020 – poor response to feedback from leadership and direction on
13 process

14 "Nov 2020 – poor response to direction from leadership on process

15 "Dec 2020 – poorly received feedback and offer for support on an unnecessary
16 epistaxis transfer"

17 (Testimony of Dr. Dischman, Dr. Toledo; Ex. R46)

18 73) On January 29, 2021, Dr. Dischman contacted Daniels to report that she
19 had been unfairly terminated. Daniels referred Dr. Dischman to Muriel Moore, NWP
20 Human Resource Business Partner, to address Dr. Dischman's concerns regarding her
21 termination. (Testimony of Dr. Dischman; Exs. R47-R51)

22 74) On February 9, 2021, Moore sent an email to Dr. Dischman confirming
23 receipt of Dr. Dischman's written statement regarding her termination and that her
24 personal health information had been removed from the patient's chart as requested.

25 (Ex. R50)

1 75) NWP human resources staff reviewed the termination and ultimately
2 concluded that the decision to terminate Dr. Dischman's locum tenens contract was
3 proper according to NWP's policies and procedures. (Testimony of Dr. Toledo; Exs.
4 R47-R50)

5 76) In February 2021, Dr. Dischman returned to working as a locum tenens in
6 New Zealand. Dr. Dischman returned to the U.S. after the COVID-19 pandemic related
7 travel restrictions were lifted. (Testimony of Dr. Dischman)

8 Credibility of the Witnesses

9 77) The forum found the testimony of all witnesses credible. However, many
10 of the Agency's witnesses had faulty memories and were unable to testify with any
11 detail in response to the Agency's questions. That is not reflective on the credibility of
12 the individual witnesses but, rather, a recognition of the effect the passage of time has
13 on the quality of the testimony of a witness and what weight should be accorded to the
14 testimony of such a witness.
15

16 78) The forum relied upon the testimony offered by Dr. Dischman, Dr.
17 Tonnies, Dr. Toledo, and Daniels, to the extent that the testimony was consistent with
18 the documentary evidence that was created at or near the time of the alleged incident.
19 The forum finds that the documentary evidence, in combination with the sworn
20 testimony of Dr. Dischman, Dr. Tonnies, Dr. Toledo, and Daniels, is sufficiently reliable
21 as to be credible evidence regarding the events leading to NWP's decision to terminate
22 Dr. Dischman's locum tenens contract.
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1 79) The forum found Dr. Dischman's testimony that she believed the inclusion
2 of her personal health information was a violation of HIPAA when she made her report
3 to Dr. Toledo. The forum further finds that Dr. Dischman had a sincere belief that her
4 behavior was appropriate when tending to the patients at the UCC, which is generally
5 an emotionally charged and stressful work environment. However, the forum credits the
6 testimony of Dr. Toledo and Dr. Tonnies that Dr. Dischman's behavior was not
7 conducive to maintaining a positive and efficient workplace. The forum further credits
8 Dr. Toledo's testimony that she did not believe that Dr. Dischman's behavior was
9 consistent with NWP's policies for *locum tenens* physicians.⁸

10 80) The forum found the testimony of Blackhorn-Delph, the Agency's CRD
11 investigator credible.

12 81) The forum found the testimony of Sheprow, Dr. Iwanski, and Lewis
13 credible. However, the witnesses did not demonstrate a clear recollection of the events.
14 Therefore, the forum relied on their testimony to the extent it was consistent with other
15 credible evidence of record.
16

17 **OPINION AND CONCLUSIONS OF LAW**

18 The Agency's Formal Charges included the following allegations:

- 19 1. Respondent unlawfully discharged, demoted, suspended,
20 discriminated and/or retaliated against Complainant with regard to
21 promotion, compensation or other terms, conditions or privileges of
22 employment because Complainant, in good faith, reported information
23 that Complainant believed was evidence of a violation of a state or
24 federal law, rule or regulation in violation of ORS 659A.199(1) and
25 OAR 839-010-0100(1).

⁸ The forum was not asked to or intends this order to weigh in on the level of care Dr. Dischman provided to her patients while employed at NWP. Dr. Toledo and Dr. Tonnies both testified that Dr. Dischman's level of care was appropriate and that their concerns were regarding her behavior at work and her receptiveness to feedback and direction.

1 2. Respondent unlawfully discharged, expelled, or otherwise
2 discriminated against Complainant because Complainant opposed an
3 unlawful practice in violation of ORS 659A.030(1)(f) and OAR 839-005-
0125(1),(2) and (3).

4 (Findings of Fact – Procedural #4)

5 ORS 659A.199(1) provides that “[i]t is an unlawful employment practice for an
6 employer to discharge * * * or in any manner discriminate or retaliate against an
7 employee * * * for the reason that the employee has in good faith reported information
8 that the employee believes is evidence of a violation of a state or federal law, rule or
9 regulation.” OAR 839-010-0100(1) interprets ORS 659A.199 as follows:

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

14 The Agency's prima facie case consists of the following elements: (1) NWP was
15 an employer as defined by statute; (2) NWP employed Dr. Dischman; (3) Dr. Dischman
16 had in good faith reported what she believed to be evidence of a violation of a state or
17 federal law, rule or regulation; (4) NWP subjected Dr. Dischman to adverse treatment
18 and (5) there is a causal connection between the protected activity and the adverse
19 treatment. *See In the Matter of Your House, LLC*, 39 BOLI 134, 141-42 (2024).

20 *Elements 1 and 2*

21 There is no dispute that NWP was an employer, as defined by statute, and that
22 employed Dr. Dischman as a *locum tenens* physician during the relevant time period.
23 The Agency has established the first two elements of its prima facie case.
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1 *Element 3 (good faith report)*

2 The third element of the Agency's prima facie case requires the Agency to
3 establish that Dr. Dischman had in good faith reported information that she believed to
4 be evidence of a violation of a state or federal law, rule or regulation. ORS 659A.199(1)
5 requires "a subjective, good-faith belief that the reported information is evidence of
6 unlawful activity." *Folz v. ODOT*, 287 Or App 667, 673, 404 P.3d 1036 (2017), *rev. den.*,
7 362 Or. 482, 412 P.3d 197 (2018). "[A]n employee has engaged in protected activity
8 under [ORS 659A.199] if the employee has reported information that he or she
9 subjectively believes is a violation of a state or federal law, rule, or regulation and has a
10 good faith basis for that belief." *Boyd v. Legacy Health*, 318 Or App 87, 98-99, 507 P 3d
11 715, 72 (2022).

12 NWP admitted in its Answer and Affirmative Defenses that " * * * on or about
13 December 9, 2020, Complainant reported what she believed to be a [HIPAA violation] in
14 an email that speaks for itself * * *." (Proposed Findings of Fact – Procedural #7). NWP
15 did not argue that Dr. Dischman's report was not made in good faith until hearing. NWP
16 waived this affirmative defense by failing to raise it in its answer. OAR 839-050-0130(3).

17 Even if the forum was to conclude that NWP had not waived this affirmative
18 defense, the forum need not decide whether the information included in Dr. Dischman's
19 report constituted a violation of HIPAA. The evidence shows that Dr. Dischman had
20 subjective, good faith belief that the inclusion of her personal health information in a
21 patient's medical record violated a state or federal law or rule. See *McClusky v. City of*
22 *North Bend*, 332 Or App 1, 13-14, 549 P 3d 557, 565 (2024). Therefore, the Agency
23 has established the third element of its prima facie case.
24
25

1 *Element 4 (adverse treatment)*

2 NWP provided notice to Dr. Dischman on December 10, 2020, of its intent to
3 terminate her contract effective January 9, 2021, and, later, on January 4, 2021,
4 informed Dr. Dischman that her contract was being terminated effective that day.
5 (Findings of Fact – The Merits ## 66, 72). The Agency has established the first four
6 elements of its prima facie case.

7 *Element 5 (causation)*

8 The final element of the Agency's prima facie case requires the Agency to
9 establish that Dr. Dischman's report of what she believed to be a violation of state or
10 federal law or rule was a substantial factor in NWP's decision to terminate her contract.
11
12 *Crosbie v. Asante*, 322 Or App 250, 255 519 P3d 551, 556 (2022).

13 To show causation, the Agency "must prove that [a respondent's] unlawful motive
14 was a substantial factor in [her] termination, or, in other words, that [Dr. Dischman]
15 would have been treated differently in the absence of the unlawful motive." *Harper v.*
16 *Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d 1170, 1174 (2016) (citing *LaCasse*
17 *v. Owen*, 278 Or App. 24, 32–33, 373 P3d 1178 (2016)). See also *Ossanna v. Nike,*
18 *Inc.*, 290 Or App 16, 27-32, 415 P3d 55, 63 (2018) (recognizing that the causation
19 standard for assessing violations of ORS 659A.199(1) is "the substantial-factor standard
20 of causation" and approving jury instruction describing that "a substantial factor is a
21 factor that made a difference.").

22 Proof of a causal connection may be established through circumstantial
23 evidence. See *In the Matter of Trees*, 28 BOLI 218, 249 (2007), citing *In the Matter of*
24 *Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002). "Evidence includes inferences. There
25

1 may be more than one inference to be drawn from the basic fact found; it is the forum's
2 task to decide which inference to draw." *In the Matter of Income Property Management*,
3 31 BOLI 18, 39 (2010). "[T]he absence of direct evidence of [respondent's] specific
4 intent is not determinative because such intent may be shown by the circumstantial
5 evidence referred to herein." *In the Matter of Sierra Vista Care Center*, 9 BOLI 281,
6 296-97 (1991) (citations omitted).

7 The Oregon Court of Appeals has held that:

8 "Proof of a causal connection can be established [1] indirectly, by showing that
9 the protected activity was followed closely by discriminatory treatment or through
10 other evidence such as disparate treatment of fellow employees who engaged in
11 similar conduct, or [2] directly, through evidence of retaliatory animus directed
12 against a [complainant] by the [respondent]").

13 *Boyd*, 318 Or App at 105, 507 P 3d 715, citing *Boynton-Burns v. University of Oregon*,
14 197 Or App 373, 380-381, 105 P3d 893, 897-898 (2005).

15 The Agency contends that NWP terminated Dr. Dischman's *locum tenens*
16 contract because she reported the inclusion of her personal health information in a
17 patient's chart. NWP denies that Dr. Dischman's report was a factor in the decision to
18 terminate her contract and contends the decision was based upon the various patient
19 and staff complaints received regarding Dr. Dischman's attitude and demeanor at work.

20 There is no direct evidence showing that NWP's decision to terminate Dr.
21 Dischman's *locum tenens* contract was based upon Dr. Dischman's report. The Agency
22 argues that "[t]he timing of Dr. Dischman's discharge – immediately after Dr. Dischman
23 notified Respondent of a potential HIPAA violation – leads to an inference that the two
24 were connected." *Agency Closing Argument*, p. 3.

1 Dr. Dischman first reported what she considered to be a HIPAA violation on
2 December 8, 2020, at 10:36 pm.⁹ On December 9, 2020, Dr. Toledo provided NWP
3 Human Resources with the complaints that had been received regarding Dr.
4 Dischman's behavior at work. The next day, December 10, 2020, Dr. Toledo, with the
5 approval of NWP's Human Resources department, provided Dr. Dischman with notice
6 of termination of her contract effective January 9, 2021. The temporal proximity – a
7 period of mere hours - between Dr. Dischman's report of the alleged HIPAA violation
8 and the email from Dr. Toledo to Dr. Dischman informing her of NWP's decision to
9 terminate her contract raises an inference that Dr. Dischman's report and NWP's
10 decision to terminate her contract were related. *See Tomlinson v. Jackson County*, 345
11 Or App 637, 644, 583 P3d 576, 582 (2025) (proof of a causal connection can be proven
12 indirectly by showing that protected activity was followed closely by adverse
13 employment action).

14
15 However, a closer look at the timing of the events between the “nosebleed
16 incident” and NWP's notice of termination of Dr. Dischman's *locum tenens* contract
17 negates that inference. On November 12, 2020, the following occurs:

- 18 • At 3:44 pm, Dr. Dischman calls RTMC regarding a patient who reported to
19 the Mt. Talbert UCC with a nosebleed that will not stop.
- 20 • At 3:46 pm, Dr. Smith notes that Dr. Dischman is sending the patient to
21 the emergency department. Dr. Smith notes, “Provider is unable to use
22 Afrin.”
- 23 • At 5:48 pm, Dr. Dischman accesses the patient's electronic medical
24 record.

25 (Findings of Fact – The Merits ## 55-57)

⁹ See Findings of Fact – The Merits #64. The forum finds that Dr. Dischman's sent her email at 10:36 pm and not 12:36 am as noted in Ex. A5, p.43.

1 On December 8, 2020, the following email communications occurred:

- 2 • At 11:11 am, Dr. Toledo sends email to Dr. Dischman inquiring about the
3 “nosebleed incident.”
- 4 • At 11:38 am, Dr. Dischman responds to Dr. Toledo’s email.
- 5 • At 5:29 pm, Dr. Toledo sends email to Daniels entitled, “Follow up
6 confidential locum question,” referring to Dr. Dischman as, “[t]he one with
7 problem behavior * * *.”
- 8 • At 10:36 pm, Dr. Dischman sends an email to Dr. Toledo and Dr. Golden
9 demanding that her personal health information be removed from the
10 patient’s medical record.

11 (Findings of Fact – The Merits ## 59, 60, 62, 64)

12 Dr. Toledo testified that she made the decision to approach human resources
13 about terminating Dr. Dischman’s contract after receiving Dr. Dischman’s response to
14 her email regarding the “nosebleed incident.” Dr. Toledo’s testimony is consistent with
15 the subject line of her email to Daniels and Arion, ““Follow up confidential locum
16 question,” in which she refers to Dr. Dischman as, “[t]he one with problem behavior.”

17 (Finding of Fact – the Merits #62).

18 Contrary to the Agency’s assertion that the complaints regarding Dr. Dischman
19 were gathered only to bolster the decision to terminate Dr. Dischman’s contract, the
20 evidence shows that Dr. Tonnies, as UCC Chief, had been concerned about the
21 complaints received regarding Dr. Dischman’s behavior and had acted to assemble the
22 complaints as early as August 2019. (Findings of Fact – the Merits #36) Dr. Toledo
23 testified that she was “peripherally aware” of the issues when she was Assistant UCC
24 Chief and began receiving the complaints directly after becoming Chief UCC. Further, a
25

1 review of the emails about Dr. Dischman show a longstanding dissatisfaction with her
2 behavior by UCC staff. (See Ex. R39)

3 The evidence does not support the Agency's argument that the complaints
4 received were not the basis for NWP's decision to terminate Dr. Dischman's contract.
5 In discussing what constitutes a substantial factor, the Oregon Court of Appeals has
6 explained that an employer's wrongful purpose must be a factor that "made a difference"
7 in the adverse employment decision. See *Estes v. Lewis and Clark College*, 152 Or
8 App 372, 381, 954 P 2d 792 (1998)("To be a substantial factor, the employer's wrongful
9 purpose must have been 'a factor that made a difference' in the discharge decision.")
10 The evidence shows that the decision to terminate Dr. Dischman's contract was made
11 after she responded to Dr. Toledo's email regarding the "nosebleed incident" and not
12 when Dr. Dischman reported her concerns regarding the inclusion of her personal
13 health information in a patient's medical record. Further, there is no evidence of record
14 showing that the reasons offered for the termination were pretext for discrimination.
15 More specifically, the Agency has failed to establish that NWP terminated Dr.
16 Dischman's contract because Dr. Dischman had in good faith reported information that
17 she believed was evidence of a violation of state or federal law. See *Ossanna v. Nike,*
18 *Inc.*, 290 Or. App. 16, 27, 415 P.3d 55, 62 (2018), *aff'd*, 365 Or. 196, 445 P.3d 281
19 (2019)(stating that "for the reason that" is synonymous with "because"). Therefore, the
20 Agency has failed to establish the final element of its prima facie case.
21

22 **ORS 659A.030(1)(f) Claim**

23 The causation analysis used in determining the Agency failed to establish that
24 NWP violated ORS 659A.199 also applies to the Agency's ORS 659A.030(1)(f) claim.
25

1 *In the Matter of Vision International Petroleum LLC & Hai Chheng Gov*, 37 BOLI 187,
2 199 (2019). See also *Cuddigan-Placito v. State Accident Insurance Fund*, 335 Or App
3 663, 677, 560 P 3d 715, 724-725 (2024)(recognizing that the causation standard for
4 assessing violations of ORS 659A.199 is the same as that required for ORS
5 659A.030(1)(f)). Accordingly, the forum's conclusion that the Agency failed to establish
6 that NWP violated ORS 659A.199(1) due to a lack of causation, also leads here to the
7 conclusion that NWP did not violate ORS 659.030(1)(f) when it terminated Dr.
8 Dischman's contract.

9 The Agency has failed to show that NWP discriminated against and/or terminated
10 Dr. Dischman's contract in violation of ORS 659A.199(1) or ORS 659A.030(1)(f).

11 **EXCEPTIONS TO THE PROPOSED ORDER**

12 After consideration of the Agency's Exceptions, the forum grants the Exceptions
13 as reflected above, as appropriate. Any exception not expressly addressed or
14 incorporated is denied.
15

16 **ORDER**

17 NOW, THEREFORE, as Respondent has not been found to have engaged in any
18 unlawful practice charged, the Complaint and Formal Charges filed against Respondent
19 are hereby dismissed according to the provisions of ORS 659A.850(3).

20
21 

22 _____
23 Caroline Holien, Administrative Law Judge
24 Bureau of Labor and Industries

24 ISSUED ON: October 22, 2024
25