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Labor Commissioner



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Deputy Labor Commissioner

BUREAU OF LABOR AND INDUSTRIES

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

In the Matter of:

THE WATER HOLE LLC,

Respondent.

Case Nos. **32-22, 37-22**
(Consolidated)

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The Forum concluded that Respondent unlawfully discriminated and retaliated against Complainant due to her opposition and complaints related to the Oregon Safe Employment Act ("OSEA"), in violation of ORS 654.062(5)(a),(b),(c) and OAR 839-004-0016(1)(a),(c),(e). The Forum also concluded that Respondent violated ORS 659A.199, ORS 659A.030(1)(f), and OAR 839-005-0125(1)(a)(A) when it reduced Complainant's work schedule due to her protected whistleblower activities. The Forum also concluded that Respondent violated ORS 653.641(1), and OAR 839-007-0000 through 839-007-0120 when Respondent reduced Complainant's work schedule due to her use of sick time. The Forum awarded complainant \$4,025 in lost wages and tips and \$25,000 in emotional and mental suffering damages.

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

1 the hearing to begin at 9:30 a.m., but as set forth below, the proceedings did not
2 commence until approximately 10:00 a.m.

3 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by
4 Chief Administrative Prosecutor Adam Jeffries, an employee of the Agency¹.
5 Complainant Jody Applegate (“Applegate”) was present throughout the hearing.

6 The hearing was delayed for approximately 30 minutes after Respondent did not
7 appear at the date and time set for hearing. Respondent The Water Hole, LLC,
8 (“Respondent”) did not appear nor did any other person appear on its behalf at hearing.
9 Respondent provided no notice to the forum explaining its failure to appear.
10 Nonetheless, the Agency presented its prima facie case, as required by OAR 839-050-
11 0330(3).

12 The Agency called Jessica Hollis (“Hollis”), f/k/a Jessica Smith, Senior
13 Investigator, Civil Rights Division, and Applegate as witnesses. The forum received into
14 evidence Administrative Exhibits X1-X10, and Agency Exhibits A1-A4, A6-A13 and A15-
15 A18 for both Case ## 32-22 and 37-22.²

16 Having fully considered the entire record in this matter, I, Christina Stephenson,
17 Commissioner of the Bureau of Labor and Industries, hereby make the following
18 Findings of Fact (Procedural and on the Merits), Ultimate³ Findings of Fact, Conclusions
19 of Law, Opinion, and Order.

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

23 ² The forum will cite to the exhibits in Case # 32-22 unless the exhibit is specific to Case # 37-22.

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

1 **FINDINGS OF FACT – PROCEDURAL**

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

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

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

21 4) On June 23, 2021, the Agency’s Civil Rights Division issued an SED for
22 Case No. OSEMOS200911-61728 in which it found “substantial evidence of an unlawful
23 practice based on whistleblowing and opposition to health and safety hazards in that
24

1 Respondent retaliated against her, reduced her shift hours, and refused to promote her
2 in violation of ORS 654.062.” (Ex. A15, Case # 37-22)

3 5) On July 21, 2022, the Forum issued a Notice of Hearing to the Agency, the
4 Complainant, and the Respondent in Case ## 32-22 and 37-22 that included notice th at
5 the hearing for each case would begin at 9:30 a.m. on October 18, 2022, and the
6 hearings would be held via video conference. Together with the Notice of Hearing, the
7 forum sent a copy of the Agency's Formal Charges; a document entitled “Summary of
8 Contested Case Rights and Procedures” containing the information required by ORS
9 183.413; a document entitled “Servicemembers Civil Relief Act (SCRA) Notification,” a
10 multi-language notice explaining the significance of the Notice of Hearing; and a copy of
11 the forum’s contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

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

14 The Water Hole, LLC
15 PO BOX 1003
Merrill, OR 976633

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

16 (Ex. A2a)

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

18 a. Respondent discriminated against Applegate because she opposed
19 an unlawful practice or what she reasonably believed was an
20 unlawful practice in violation of ORS 659A.030(1)(f) and/or OAR
21 839-005-125(2)(a)(A), (b) and/or (c).

22 ⁴ After the Agency was unsuccessful in attempting to serve Respondent and Respondent’s registered
23 agent at her listed address, the Agency accomplished service by serving the Oregon Secretary of State
24 by certified mail on August 26, 2022, as provided in ORS 60.121. (Exs. X7, A18)

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

6 c. Respondent discriminated against and/or retaliated against
7 Applegate with regard to promotion, compensation or other terms,
8 conditions or privileges of employment because she reported what
9 she believed in good faith was a violation of a state or federal law,
10 rule or regulation in violation of ORS 659A.199(1) and OAR 839-
11 010-0100(1).

12 (Ex. X2b, Case # 32-22)

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

14 a. Respondent discriminated against Applegate because she opposed
15 a practice prohibited by OSEA, ORS 654.001 to ORS 654.295,
16 which she, in good faith, believed was prohibited by OSEA in
17 violation of ORS 654.062(5)(a) and OAR 839-004-0016(1)(e).

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

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

(Ex. X2b, Case # 37-22)

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

///

1 10) On August 2, 2022, the Forum issued an Interim Order Requiring Case
2 Summaries to be Filed and Setting Case Deadline. The interim order noted October 4,
3 2022, remained the deadline for filing Case Summaries. The Forum sent the
4 interim order to the parties by email. Lesh did not respond or have any other contact
5 with the forum. (Ex. X4, X5)

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

8 12) On August 26, 2022 the Forum again served Respondent by sending
9 notice of Formal Charges, Notice of Hearing, and supporting documentation by mail to
10 the Oregon Secretary of State, in conformance with ORS 63.121(3) after unsuccessfully
11 attempting to serve Respondent at the last known address of its registered agent. (Ex.
12 X18).

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

15 14) On October 11, 2022, the Agency filed a Motion for Consolidation arguing
16 that Case ## 32-22 and 37-22 qualified for consolidation pursuant to OAR 839-050-
17 0190, because the cases involved the same Respondent and common questions of law
18 and/or fact. (Ex. X9)

19 15) On October 12, 2022, the forum sent an email to the parties directing
20 Respondent to file its response to the Agency's motion no later than noon, Friday,
21 October 14, 2022, due to the hearing being set to begin on October 18, 2022. (Forum
22 File)

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

1 7) On May 14, 2020, Executive Order 20-25 was issued, which set forth a
2 phased reopening process that allowed food and drink establishments in certain
3 counties, including Klamath County, to begin the reopening process. The phased
4 reopening included various restrictions such as limiting the number of patrons allowed in
5 the business; prohibiting patrons from sitting at the bar unless certain requirements
6 were met; placing tables six feet apart; and requiring patrons and employees to wear a
7 face mask when inside the building. Other requirements included disinfecting customer
8 areas and common work areas and prohibiting pool table use. (Testimony of
9 Applegate; Ex. A17, pp. 15-30)

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

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

1 10) Applegate missed her next regularly scheduled shift due to illness.

2 Applegate and Lesh had the following text message exchange:

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

5 Lesh: "K will ask Elaine to cover!"

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

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

11 (Testimony of Applegate; Ex. A9, pp. 13-14)

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

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

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

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

21 13) Lesh responded with the following text message:

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

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

2 14) Applegate responded with the following text message:

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

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

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

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

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

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

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

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

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

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

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

20 21) On June 9, 2020, Smith conducted a follow-up inspection. Smith's report
21 indicated continuing issues with food storage, sanitation, and a lack of staff knowledge
22 regarding safe food handling. Smith's report also included: "Tables are not 6ft apart.
23 Employees are not wearing masks or face shields. Customers are being allowed to sit
24

1 at the bar even though the space between the bar and the wall prohibit bar seating.”

2 (Ex. A10, pp. 4-6)

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

6 Lesh: “Want a note from...our doctor”

7 Applegate: “What?”

8 Lesh: “Want a note from your doctor!”

9 Applegate: “Sure. That’s required if I’m out 3 days.”

10 “Just saw doc. I have been referred for another covid test
for tomorrow.”

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

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

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

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

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

2 Lesh:

3 “Hi. So, when I went to see my doc the other week, she found something
4 concerning. She just called and wants me to go to the hospital
5 Wednesday morning for surgery. If I don’t do it Wednesday, she can’t do
6 it till September and she wants it done ASAP.

7 Elaine is willing to trade me shifts next week, Friday for Wednesday, if that
8 is okay with you.”

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

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

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

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

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

20 29) Applegate’s working relationships with Lesh and her co-workers became
21 more strained at or near the time she filed her complaints with Klamath County and she
22 took her sick leave. Applegate felt isolated from her co-workers, who ignored her and
23 did not speak to her. Customers were allowed to treat Applegate in a hostile and
24 aggressive manner without any comment by her supervisor or Water Hole
25 management. (Testimony of Applegate)

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

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

8 (Ex. A8)

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

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

1 discriminated against Complainant with respect to any term or condition of
2 employment because the employee inquired about the provisions of ORS
3 653.601 to ORS 653.661, submitted a request for sick time, took sick time,
and/or invoked any provision of ORS 653.601 to 653.661 in violation of
ORS 653.641(2) and OAR 839-007-0065(2)(a),(b),(c), and/or (e).

- 4 • Respondent unlawfully discriminated against Applegate because she
5 opposed an unlawful practice or because she filed a complaint, testified,
6 or assisted in any proceeding under this chapter or had attempted to do so
in violation of ORS 659A.030(1)(f) and OAR 839-005-0125(2)(a)(A), (b)
and/or (c).
- 7 • Respondent retaliated against Applegate, because she, in good faith,
8 reported information that she believed was evidence of a violation of state
or a federal law, rule, or regulation in violation of ORS 659A.199(1) and
9 OAR 839-010-0100(1).

10 (Findings of Fact – Procedural ## 7,8)

11 **DISCRIMINATION FOR ENGAGING IN A PRACTICE PROVIDED FOR BY OSEA**

12 The Agency asserts that Respondent reduced Applegate's work schedule by
13 50% and did not offer her the manager position, because she complained about or
14 opposed unsafe practices under the OSEA, which provides:

15 "Every employer shall furnish employment and a place of employment
16 which are safe and healthful for employees therein, and shall furnish and
17 use such devices and safeguards, and shall adopt and use such practices,
18 means, methods, operations and processes as are reasonably necessary
to render such employment and place of employment safe and healthful,
and shall do every other thing reasonably necessary to protect the life,
safety and health of such employees."

19 ORS 654.010. The OSEA requires that employers comply with all applicable rules "in
20 any way relating to or affecting safety and health in employments or places of
21 employment." ORS 654.022.

22 Under the OSEA, it is an unlawful employment practice for any person to bar or
23 discharge from employment or otherwise discriminate against any employee or
24 prospective employee because the employee or prospective employee has:

1 (a) Opposed any practice forbidden by ORS 654.001 to 654.295, 654.412
2 to 654.423 and 654.750 to 654.780;

3 (b) Made any complaint or instituted or caused to be instituted any
4 proceeding under or related to ORS 654.001 to 654.295, 654.412 to
5 654.423 and 654.750 to 654.780; or

6 (c) Exercised on behalf of the employee, prospective employee or others
7 any right afforded by ORS 654.001 to 654.295, 654.412 to 654.423 and
8 654.750 to 654.780.

9 ORS 654.062(5).

10 OAR 839-004-0016 provided, in pertinent part:

11 "(1) ORS 654.062(5) prohibits discrimination against an employee or
12 prospective employee ("individual") because the individual:

13 (a) Made any complaint or instituted or caused to be instituted any
14 proceeding under or related to the Oregon Safe Employment Act (OSEA);
15 [or]

16 * * *

17 (c) Exercised on behalf of the individual or others any right afforded by
18 OSEA; [or]

19 (e) Opposed any practice prohibited by OSEA or which the individual in
20 good faith believed was prohibited by OSEA[.]"

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

///

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

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

6 To prove a violation, the Agency need not establish that Applegate opposed
7 conditions that actually violated a statute or rule; rather, the Agency need only prove
8 that Applegate was discriminated against for expressing safety concerns “under or
9 related to” the OSEA. *In the Matter of Atlas Bolt*, 37 BOLI at 75, quoting ORS
10 654.062(5)(a). The purposes of the OSEA “could too easily be frustrated and chilled if
11 employees reported unsafe conditions or avoided life and limb threatening hazards in
12 the workplace only at risk of being right, of being procedurally correct and of ‘deserving’
13 recognition of their concerns.” *Id.* at 84 (quoting *In the Matter of Snyder Roofing &*
14 *Sheet Metal, Inc.*, 11 BOLI 61, 82 (1992)).

15 The Forum finds that Applegate was an employee of Respondent who opposed
16 and/or complained about conduct under or related to the OSEA when she reported her
17 concerns to Lesh that Respondent was not complying with the reopening requirements
18 on or about May 20, 2020. (Findings of Facts – the Merits, ## 12-14).⁷ The Forum
19 further finds that Applegate caused a complaint to be filed when she filed complaints
20 regarding Respondent’s failure to comply with the reopening requirements with Klamath
21 County and OSHA. (Findings of Fact – the Merits ## 15-16). The Forum concludes that

22 _____
23 ⁷ The nature of Applegate’s separation from her employment with Respondent in November 2020 is not at
24 issue in these matters.

1 the Agency has, therefore, satisfied the first element of its prima facie case.

2 Element 2: Adverse Employment Action

3 The Agency alleged one of the adverse employment actions in this case was the
4 50% reduction in Applegate's work schedule beginning on or about June 25, 2020.
5 Applegate denied requesting the reduction in her work hours and testified that the
6 reduction resulted in a 50% reduction in her tips, which she relied upon to support
7 herself and her family. The Agency alleged the second adverse action was Lesh's
8 decision to promote another employee rather than Applegate to the manager position.

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

19 Element 3: Causation

20 To show causation, the Agency must prove that a respondent's unlawful motive
21 was a "substantial factor" in the adverse employment action, or, in other words, that the
22 complainant "would have been treated differently in the absence of the unlawful motive."
23 *In the Matter of Horizontal Motorsports, Inc.*, 37 BOLI 205, 217 (2020) (citing *Harper v.*

1 *Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d 1170 (2016)). “[T]he
2 discrimination or discharge may still be retaliatory if the employer’s knowledge of the
3 employee’s opposition to safety hazards played a key role in the employer’s decision.”
4 *In the Matter of Atlas Bolt*, 37 BOLI at 78.

5 “ORS 654.062(5) requires both knowledge and action upon that knowledge to
6 constitute retaliation; oftentimes the analysis involved requires reasonable inferences
7 from the specific facts of a case.” *Id.* “[T]here is a rebuttable presumption that a
8 violation of ORS [654.062(5)] has occurred if a person bars or discharges an employee
9 * * * or otherwise discriminates against an employee * * * within 60 days after the
10 employee” has engaged in any activities protected by ORS 654.062(5)(a)-(d). ORS
11 654.062(7)(a).

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

22 The Agency has satisfied each of the three elements of its prima facie case. The
23 forum concludes that the Respondent discriminated against Applegate because she
24

1 opposed, complained about or caused a complaint to be instituted about conduct
2 forbidden under or related to the OSEA in violation of ORS 654.062(5)(a), (b), (c), and
3 OAR 839-004-0016(1).

4 **RETALIATION AND/OR DISCRIMINATION BECAUSE OF USE OF SICK TIME**

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

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

9 (2) Retaliate or in any way discriminate against an employee with respect
10 to any term or condition of employment because the employee has
11 inquired about the provisions of ORS 653.601 (Definitions for ORS
12 653.601 to 653.661) to 653.661 (Preemption), submitted a request for sick
13 time, taken sick time, participated in any manner in an investigation,
proceeding or hearing related to ORS 653.601 (Definitions for ORS
653.601 to 653.661) to 653.661 (Preemption), or invoked any provision of
ORS 653.601 (Definitions for ORS 653.601 to 653.661) to 653.661
(Preemption)."

14 The Agency's prima facie case is similar to that required under for a claim under
15 ORS 654.062(5). The Agency must show that Respondent was Applegate's employer
16 and subjected Applegate to an adverse action because of her use of sick time. The
17 Agency has succeeded in establishing its prima facie case regarding this allegation.
18 The primary evidence supporting the Agency's charge of discrimination and/or
19 retaliation is the timing of Respondent's decision to reduce Applegate's work schedule.
20 Within two days of Applegate's use of sick time, Applegate returned to work to find her
21 work schedule cut in half without any prior warning or explanation by Respondent.
22 Even if the surrounding circumstances did not support a finding that Applegate's use of
23 sick time and the reduction in her work schedule was related, the temporal proximity
24

1 between Applegate's use of sick time and the reduction in her work schedule is
2 sufficiently close so as to establish the requisite causal link. See *Boynton-Burns v.*
3 *University of Oregon*, 197 Or App 373, 381, 105 P3d 893, 897-898 (2005), citing *Clark*
4 *County School District v Breeden*, 532 US 268, 273 (2001).

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

8 **DISCRIMINATION AND/OR RETALIATION FOR COMPLAINTS**

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

15 "It is an unlawful employment practice for an employer to discharge * * * or in any
16 manner discriminate or retaliate against an employee * * * for the reason that the
17 employee has in good faith reported information that the employee believes is evidence
18 of a violation of a state or federal law, rule or regulation." ORS 659A.199(1). OAR 839-
19 010-0100(1) interprets ORS 659A.199 as:

20 "(1) ORS 659A.199 prohibits any employer with one or more employees in
21 Oregon from discharging * * * or in any manner discriminate against or retaliate
22 against an employee * * * for the reason that the employee has in good faith
23 reported information to anyone that the employee believes is evidence of a
24 violation of any state or federal law, rule or regulation."

The Agency's prima facie case consists of the following elements: (1)
Respondent was an employer as defined by statute; (2) Respondent employed

1 Applegate; (3) Applegate, in good faith, reported information to someone that they
2 believed was evidence of a violation of a state rule; (4) Respondent reduced
3 Applegate's work schedule because of her report. *In the Matter of Oregon Truck*
4 *Painting, LLC*, 37 BOLI 87, 113 (2018).

5 There is no dispute as to Elements 1 and 2.

6 With respect to Element 3, the "good faith" requirement of ORS 659A.199 is met
7 when the whistleblower has a reasonable belief that the information reported has
8 occurred and that the information, if proven, constitutes evidence of a violation of a state
9 or federal law, rule or regulation. *In the Matter of Vision International Petroleum LLC.*,
10 37 BOLI 187, 199 (2019). Under ORS 659A.199, an employee "report[s]" information
11 when the employee communicates information to "anyone" that the employee believes
12 is evidence of a violation of state law. *In the Matter of Vision International Petroleum*
13 *LLC.*, 37 BOLI at 199. There is no dispute that Applegate reasonably believed
14 Respondent was not in compliance with the COVID-19 reopening requirements and
15 other health and safety rules when she filed her complaints with Klamath County and
16 OSHA. The Agency has established the first three elements of its prima facie case.

17 The final element the Agency must show is that the adverse employment action
18 was because of Applegate's complaints. As discussed above, the forum finds that
19 Respondent reduced Applegate's work schedule due, in part, to her complaints to
20 Klamath County and OSHA. Accordingly, the Agency has established that Respondent
21 discriminated and/or retaliated against Applegate by reducing her work schedule
22 because she had, in good faith, reported information to local and state health authorities
23 that she believed was evidence of a violation of any state or federal law, rule or
24

1 regulation in violation of both ORS 659A.199(1).

2 **DISCRIMINATION BECAUSE OF OPPOSITION TO UNLAWFUL EMPLOYMENT PRACTICE**

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

6 "It is an unlawful employment practice:

7 For any person to discharge, expel or otherwise discriminate against any
8 other person because that other person has opposed any unlawful
9 practice, or because that other person has filed a complaint, testified or
10 assisted in any proceeding under this chapter or has attempted to do so."

11 The analysis used in determining that Respondent violated ORS 659A.199
12 applies equally to the Agency's ORS 659A.030(1)(f) claim. See *In the Matter of Vision*
13 *International Petroleum LLC.*, 37 BOLI 287, 199 (2019). Accordingly, the forum's
14 conclusion that Respondent violated ORS 659A.199 necessarily leads to the conclusion
15 that Respondent also violated ORS 659A.030(1)(f) because Respondent was more
16 likely than not aware of Applegate's complaints to Klamath County and OSHA when it
17 made the decision to reduce her work schedule in half on or about June 25, 2020.

18 **DAMAGES**

19 Lost Wages

20 Applegate is eligible for a back pay award because Respondent committed an
21 unlawful employment practice when it cut her work schedule in half because of her use
22 of sick time and her complaints regarding Respondent's failure to follow the COVID-19
23 related reopening requirements to not only Lesh, but also to Klamath County and
24 OSHA, in violation of ORS 653.641(2); ORS 654.062(5); ORS 659A.030(1)(f) and ORS
659A.199(1). *In the Matter of Atlas Bolt*, 37 BOLI at 79. The purpose of a back pay

1 award is to compensate a complainant for the lost wages they would have received but
2 for the unlawful employment practice. *Id.* Back pay awards are calculated to make a
3 complainant whole for injuries suffered as a result of the unlawful employment action.
4 *Id.*

5 Applegate typically worked approximately 20 hours per week, with an hourly
6 wage of \$15. Applegate averaged \$100 in tips each week prior to the start of the
7 COVID-19 pandemic and \$50 per week during the pandemic. The agency seeks “Lost
8 wages, tips, and/or other benefits in an amount estimated to be at least \$3,800 to be
9 proven at hearing.” (Ex. X2b, p. 7) At hearing, the Agency argued that Applegate’s lost
10 tips should be calculated at the rate of \$100 per week during the period beginning June
11 25, 2020, through November 30, 2020, when Applegate’s employment ended. The
12 Forum finds calculating lost wages using pre-pandemic tip averages too speculative
13 given that the operating restrictions continued during the remaining weeks and months
14 of Applegate’s employment with the Water Hole. Therefore, the Forum will calculate
15 the lost tips based upon Applegate’s average of \$50 per week.

16 There are approximately 23 weeks during the period of June 25, 2020, through
17 November 30, 2020. Applegate worked approximately ten hours each week at an
18 hourly wage \$15 for a total of \$3,450 (23 weeks x 10 hours x \$15). But for
19 Respondent’s unlawful employment action, Applegate would have received twice that if
20 she had retained her work schedule of approximately 20 hours per week. Therefore,
21 Applegate is entitled to lost wages in the amount of \$3,450. Applegate received
22 approximately \$25 less each week in tips as a result of Respondent’s unlawful
23 employment action for a total of \$1,150 (23 weeks x \$25 = \$575). Therefore, Applegate

1 is further entitled to lost tips in the amount of \$575. Accordingly, the Forum finds that
2 the Agency has sustained its burden of showing Applegate is entitled to lost wages in
3 the amount of \$4,025, which includes both her lost wages and lost tips for the
4 period of June 25, 2020, through November 30, 2020.

5 Emotional Distress Damages

6 The Agency seeks damages on behalf of Applegate in the amount of “at least”
7 \$25,000 for emotional, mental and physical suffering. Pursuant to ORS 659A.850, the
8 Commissioner of the Bureau of Labor and Industries has the authority to award money
9 damages for emotional, mental, and physical suffering sustained. *In the Matter of*
10 *Grand Management Services, Inc.*, 38 BOLI ___ (2021) The Commissioner has
11 the authority to fashion a remedy adequate to eliminate the effects of unlawful
12 employment practices. *Id.*

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

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

1 Applegate suffers from serious health issues that make it more likely that she
2 could develop serious symptoms of COVID-19 that would require her hospitalization.
3 Applegate worried about dying alone in the Intensive Care Unit if she were to contract
4 COVID-19. Applegate's concerns were real and were ignored by Respondent, who
5 failed to adhere to the reopening requirements in the weeks following the issuance of
6 Executive Order No. 20-27. (Findings of Fact – the Merits ## 18, 20, 21, and 23)

7 Based on the record in this case, the forum concludes that \$25,000 is an
8 appropriate award of emotional distress damages given the emotional distress
9 Applegate experienced as a result of Respondent's failure to appropriately address
10 Applegate's reported concerns and for reducing Applegate's hours for her complaints
11 related to OSEA and use of OSTL. See, e.g. *In the Matter of Grand Management*, 38
12 BOLI at ___ (awarding \$60,000 in emotional distress damages to complainant who was
13 discharged for opposition and complaints related to OSEA); *In the Matter of Atlas Bolt*,
14 37 BOLI at 80 (awarding \$60,000 in emotional distress damages to a complainant who
15 was terminated after voicing safety concerns and, among other things, worried about his
16 ability to provide housing for his family).

17 **OTHER REQUESTED RELIEF**

18 In the Formal Charges for each case, the Agency asked that Respondent and its
19 managers, supervisors and human resources professionals be trained, at the expense
20 of Respondent, "on the OSEA and whistleblower protections under Oregon law" by "the
21 Bureau of Labor and Industries Technical Assistance Unit, or another trainer agreeable
22 to and approved by the Agency." BOLI's Commissioner is authorized to issue an
23 appropriate cease and desist order reasonably calculated to eliminate the effects of any
24

1 unlawful practice found. ORS 659A.850(4). Among other things, that may include
2 requiring a respondent to:

3 “(a) Perform an act or series of acts designated in the order that are reasonably
4 calculated to:

5 “(A) Carry out the purposes of this chapter;

6 “(B) Eliminate the effects of the unlawful practice that the respondent is found to
7 have engaged in, including but not limited to paying an award of actual damages
8 suffered by the complainant and complying with injunctive or other equitable
9 relief; and

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

11 This statute also gives the Commissioner the authority to require the Agency's
12 Technical Assistance for Employers Unit or another trainer agreeable to the Agency.

13 The forum finds that this requirement is appropriate in this case.

14 EXCEPTIONS TO THE PROPOSED ORDER

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

18 ORDER

19 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
20 659A.850(4), and to eliminate the effects of the violations of ORS 654.062(5)(a),(b),(c);
21 OAR 839-004-0016(1)(a),(c),(e); ORS 653.641(2); OAR 839-007-0065(2)(a),(b),(c),(e);
22 ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A),(b),(c); ORS 659A.199(1); and OAR
23 839-010-0100(1) by Respondent **The Water Hole, LLC**, and as payment of the
24 damages awarded, the Commissioner of the Bureau of Labor and Industries hereby
orders Respondent **The Water Hole, LLC** to deliver to the Administrative Prosecution
Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon


1 Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor
2 and Industries in trust for **Jody Applegate** in the amount of:

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

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

10 3) Interest at the legal rate on the sum of TWENTY NINE THOUSAND
11 TWENTY FIVE DOLLARS (\$29,025), until paid.

12 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and
13 659A.850(4), and to eliminate the effects of Respondent's unlawful employment
14 practices found herein, the Commissioner of the Bureau of Labor and Industries hereby
15 orders Respondent **The Water Hole, LLC** to train all of its managers, supervisors, and
16 human resources personnel on the correct interpretation and application of the Oregon
17 laws pertaining to the OSEA, specifically ORS 654.062, and whistleblower protections
18 under Oregon law, either through a training offered by the Bureau of Labor and
19 Industries Technical Assistance for Employers Unit or another trainer agreeable to the
20 Agency, with the first training to be completed by December 31, 2023 and by
21 December
22 31st of each successive year for the next five years.

23 
24 _____
Christina Stephenson, Commissioner
Bureau of Labor and Industries

ISSUED ON: _____

February 2, 2023