

CHRISTINA E. STEPHENSON  
Labor Commissioner



JESSICA N. GIANNETTINO VILLATORO  
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:

**SUNSTONE ORGANICS, LLC**

and

**HUGH HOLIDAY aka NORMAN  
LUEBBERT,**

Respondents.

Case No. **15-20**

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

### SYNOPSIS

The Agency established by a preponderance of the evidence that the employer unlawfully discriminated against Complainant based on sexual orientation (gender identity) in violation of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C),(b). The forum concluded that Respondent Sunstone Organics, LLC was liable for H. Holiday's harassment of Complainant as its proxy pursuant to ORS 659A.030(1)(b) and OAR 839-005-0010(4)(c) and as a supervisor pursuant to ORS 659A.030(1)(b) and OAR 839-005-0010(4)(d)(D). Respondent H. Holiday, a member of the Sunstone limited liability corporation, violated ORS 659A.030(1)(g) by aiding and abetting Sunstone's violations. The forum concluded that Complainant was not discharged because of her sexual orientation (gender identity) or because she opposed an unlawful employment practice. The forum declined to award Complainant lost wages and out-of-pocket expenses but did award Complainant \$125,000 in emotional, mental, and physical suffering damages and ordered Respondents to cease and desist discriminating against employees based on sexual orientation (gender identity).



1 The above-entitled case came on regularly for hearing before Cynthia Domas,  
2 designated as Administrative Law Judge ("ALJ") by Val Hoyle, former Commissioner of  
3 the Bureau of Labor and Industries for the State of Oregon. The hearing was held on  
4 February 23, 2021, via video conference, with some witnesses appearing via telephone.

5 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by  
6 administrative prosecutor Rachel Diamond-Cuneo ("Diamond-Cuneo"), an employee of  
7 the Agency. David Wallace ("Wallace"), attorney at law, represented Respondents  
8 Sunstone Organics ("Sunstone") and Hugh Holiday aka Norman Luebbert ("H. Holiday")  
9 throughout the proceeding. Complainant, Raven Spezialy ("Spezialy"), was represented  
10 by Jennifer Middleton ("Middleton"), attorney at law.

11 The Agency called Senior Civil Rights Investigator Irm Coury ("Coury"); Spezialy;  
12 Crystal Doan ("Doan"), Spezialy's fiancée; Robert Andrews ("Andrews"); and Rikki  
13 Erwin ("Erwin") as its witnesses. Coury, Spezialy, and Doan appeared via video  
14 conference. Andrews and Erwin appeared via telephone.

15 Respondents called H. Holiday and Todd Holiday (T. Holiday) as its witnesses,  
16 both of whom appeared via video conference. Respondents called Zyanna Esparza  
17 ("Esparza"), as a rebuttal witness, and she appeared via video conference.  
18 Respondents also called Matthew Verdugo ("Verdugo") and Joshua Roach ("Roach") as  
19 rebuttal witnesses, both of whom appeared via telephone.  
20

21 The forum received into evidence: (a) Administrative exhibits X1-X19 and X21-  
22 X24; (b) Agency's exhibits A1-A15; and (c) Respondents' exhibits R1-R3. The Agency  
23 referenced exhibit A16 during its cross examination of H. Holiday, but did not offer the  
24 document as an exhibit for hearing. The addresses of those individuals listed in Exhibit  
25 A6 were redacted. Exhibit A20 was excluded as it did not pertain to this case.

1 Having fully considered the entire record in this matter, I, Christina Stephenson,  
2 Commissioner of the Bureau of Labor and Industries, hereby make the following  
3 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,<sup>1</sup> Conclusions  
4 of Law, Opinion, and Order.

5 **FINDINGS OF FACT – PROCEDURAL**

6 1) On October 26, 2018, Spezialy filed a complaint with the Agency's Civil  
7 Rights Division alleging Respondents engaged in "unlawful employment practices  
8 based on age, gender identity and for reporting unlawful discrimination" in that  
9 Respondents subjected [Spezialy] to a hostile work environment, retaliated against  
10 [Spezialy], and terminated [Spezialy's] employment." "Robert Spezialy" was the named  
11 complainant. (Ex. A1)

12 2) The complaint was subsequently amended to change the name of the  
13 complainant to "Raven Spezialy." (Ex. A2)

14 3) On June 18, 2019, the Agency's Civil Rights Division issued a Substantial  
15 Evidence Determination ("SED") in which it found substantial evidence of the following  
16 unlawful employment actions:

- 17 • Termination of Spezialy's employment based on sex (gender identity) in  
18 violation of ORS 659A.030(1)(a).
- 19 • Harassment of Spezialy based on sex (gender identity) in violation of ORS  
20 659A.030(1)(b).
- 21 • Termination of Spezialy's employment based on opposition to unlawful  
22 practices in violation of ORS 659A.030(1)(f)

23 (Ex. A13)

24 4) The Agency's Civil Rights Division did not find substantial evidence of  
25 harassment or termination based on age. (Ex. A13)

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<sup>1</sup> The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact – The Merits.



1        5)        On December 17, 2019, the forum issued a Notice of Hearing stating the  
2 time and place of the hearing as May 5, 2020, beginning at 9:30 a.m., at the Workers  
3 Compensation Board, Delta Triad Building, Suite 38, 1142 Willagillespie Road, Eugene,  
4 OR 97401. Together with the Notice of Hearing, the forum sent a copy of the Agency's  
5 Formal Charges, a document entitled "Summary of Contested Case Rights and  
6 Procedures" containing the information required by ORS 183.413, a document entitled  
7 "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice  
8 explaining the significance of the Notice of Hearing, and a copy of the forum's contested  
9 case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

11        6)        The Formal Charges included the following allegations:

- 12        •        Respondents terminated Spezialy's employment because of her gender  
13        identity in violation of ORS 659A.030(1)(a).
- 14        •        Respondents subjected Spezialy to harassment because of her gender  
15        identity that was sufficiently severe or pervasive, such that it unreasonably  
16        interfered with her work performance and created an intimidating, hostile  
17        and offensive working environment in a hostile work environment because  
18        in violation of ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(b).
- 19        •        Respondent Sunstone was liable for the unlawful harassment because the  
20        harasser was H. Holiday, whose rank was sufficiently high that he served  
21        as the employer's proxy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c).
- 22        •        Respondent Sunstone was liable for the harassment by a supervisor with  
23        immediately or successively higher authority over Spezialy because she  
24        was removed from training to be a driver, not promoted to the driver  
25        position, and was terminated. ORS 659A.030(1)(b), OAR 839-005-  
0010(4)(a)(A)(B)(C),(d)(A), (C), (D).
- Respondents subjected Spezialy to different terms and conditions  
because she opposed Respondents' unlawful harassment pursuant to  
ORS 659A.030(1)(f). OAR 839-005-0125(1)-(3) and OAR 839-005-  
0010(4)(a)(A)(B)(C),(d)(A)
- H. Holiday was an aider and abettor pursuant to ORS 659A.030(1)(g).

(Ex. X2a)



1           7)     The Formal Charges sought the following damages:

2                   "a. Lost wages in an amount to be determined at hearing.

3                   "b. Out of pocket expenses in an amount to be determined at hearing.

4                   "c. Damages for emotional, mental, and physical suffering in the amount  
of least \$250,000.00."

5 (Ex. X2a)

6           8)     The Formal Charges also sought a Cease and Desist Order be entered  
7 against the Respondents that included "such other relief as is appropriate to eliminate  
8 the effects of the unlawful practices found both as to Complainant and as to others  
9 similarly situated." (Ex. X2a)

10          9)     On January 6, 2020, Respondents filed their Answer to the Formal  
11 Charges in which Respondents denied the allegations set forth in the Formal Charges.

12 (Ex. X3)

13          10)    On January 23, 2020, the forum issued its Interim Order Requiring Case  
14 Summaries to be Filed and Setting Case Deadlines setting the case summaries  
15 deadline for April 21, 2020. (Ex. X4)

16          11)    On March 19, 2020, the forum issued its Interim Order Re: Temporary  
17 Procedures setting forth the document filing procedures implemented as a result of the  
18 COVID-19 outbreak. (Ex. X5)

19          12)    On April 8, 2020, the forum conducted a telephone conference in this  
20 matter. Adriana Ortega ("Ortega") appeared on behalf of the Agency. Wallace  
21 appeared on behalf of Respondents. Middleton also appeared on behalf of Spezialy.  
22 As a result of that conference, the forum issued an Interim Order Re: New Hearing and  
23 Case Summary Dates setting the matter for hearing on July 28, 2020, with Case  
24 Summaries being due no later than June 30, 2020. (Ex. X6)  
25

1           13) On April 29, 2020, the Agency filed a Notice of Change in Assigned  
2 Prosecutor. (Ex. X7)

3           14) On May 11, 2020, the forum issued an Interim Order Re: New Hearing  
4 and Case Summary Dates setting the matter for an in-person hearing on November 10,  
5 2020, with Case Summaries being due no later than October 28, 2020. (Ex. X8)

6           15) On June 11, 2020, the Agency filed a Notice of Change in Assigned  
7 Prosecutor reassigning the case to Diamond-Cuneo. (Ex. X9)

8           16) On June 22, 2020, the forum conducted a telephone conference in this  
9 matter to discuss hearing options going forward, in light of the COVID-19 pandemic.  
10 Diamond-Cuneo appeared on behalf of the Agency. Wallace appeared on behalf of the  
11 Respondents. Middleton appeared on behalf of Spezialy. The parties and Middleton  
12 agreed that an in-person hearing was preferred, and a new hearing date was selected.  
13 The matter was set for hearing for November 10, 2020, with Case Summaries being  
14 due no later than October 28, 2020. (Ex. X10)

15           17) On October 2, 2020, the forum issued an Interim Order Re: Prehearing  
16 Conference Date and Time and sent an email to the parties with instructions for  
17 participating via video conference. (Exs. X11, X12)

18           18) On October 19, 2020, the forum issued an Interim Order Re: Cancelling  
19 Hearing and Setting New Hearing Date in which the matter was reset for hearing on  
20 February 23, 2021, with Case Summaries being due no later than February 9, 2021.  
21 The Interim Order included notice that the hearing would be held via video conference if  
22 a hearing location meeting social distancing requirements was not located. (Ex X13).  
23  
24  
25

1           19)    On October 21, 2020, the forum issued an Interim Order Correcting  
2 Caption to conform with the Formal Charges issued on December 17, 2019. (Ex. X14)

3           20)    On October 23, 2020, Respondents filed Respondents' Amended Formal  
4 Objections to Videoconference Hearing. (Exs. X15, X16)

5           21)    On November 17, 2020, the forum issued an Interim Order Ruling on  
6 Respondents' Formal Objections to Video Conference Hearing as set forth below:

7                   “A prehearing telephone conference was held on Friday, October 2, 2020,  
8 to discuss the hearing date of November 10, 2020. Present by telephone were  
9 Rachael Diamond-Cuneo for the Agency, David Wallace attorney for  
Respondent, and Jennifer Middleton, counsel for Complainant.

10                  “The prehearing conference was held to discuss the November 10, 2020,  
11 hearing date and to consider holding the hearing by video because of the  
12 continuing restrictions in place due to the COVID-19 pandemic. Mr. Wallace  
13 stated his preference for an in-person hearing. I stated that staff would attempt to  
14 find an alternate location for an in-person hearing because all state offices were  
15 closed to the public until the end of the year. Those attempts were unsuccessful.  
In my interim order dated October 19, 2020, I set the new hearing date of  
February 23, 2021. In the order, I stated that if restrictions were still in place at  
that time, the hearing would be held by video.

16                  “I further stated that if anyone objected to the virtual hearing, they should  
17 put their objections in writing no later than November 6, 2020. On October 23,  
2020, Respondent submitted a document titled Respondents' Amended Formal  
Objections to Video Conference Hearing.

18                  “Pursuant to OAR 839-050-0150, the Agency, as the nonmoving  
19 participant, had seven days after Respondent filed his objections to respond. The  
20 forum has not received any documentation from the Agency regarding the interim  
order issued on October 19, 2020.

21                  “Respondent put forth three arguments in support of its desire for an in-  
22 person hearing. Respondent states that because of the dollar amount involved,  
23 there is a greater need for an in-person hearing. Respondent cites to possible  
24 technical difficulties, the possible inability to read body language and facial  
25 expressions, the possible inability to see if Complainant is shifting in her seat or if  
she is being coached, etc. Respondent further cites to the possible number of  
and sharing of exhibits in support of its position that the matter should be held in  
person.



1 "Respondent also argues that a video hearing would rob Respondent of its  
2 due process right to a full and fair hearing. Respondent did expand on how it  
3 feels that it would be robbed of due process if this matter was held be video  
4 rather than in person. Respondent is being provided with a hearing in which it  
5 may cross examine Agency witnesses and put on its case in chief.  
Although the Agency did not file a response regarding an in-person hearing  
verses a video hearing, the Agency previously stated a preference for an in-  
person hearing.

6 "The scheduling of hearings is within the purview of the ALJ as set out in  
7 OAR 839-050-0240(1)(d). Consideration has been given to the following factors:  
8 Respondents' concerns; the Agency's preference for an in-person hearing; the  
pandemic and the need to adhere to safety measures and government  
mandates; and the age of the case.

9 "Therefore, the forum will attempt to find a physical location in which  
10 safety precautions and mandates can be followed if safety precautions and  
11 mandates are still in place on February 23, 2021. If not, the hearing will be  
12 conducted via video with instructions given to the parties regarding witnesses  
that should address most of the concerns raised by Respondent regarding  
witnesses.

13 "The parties are reminded that temporary procedures are now in effect  
14 allowing for email filings. All email filings must be sent to all parties, the ALJ  
15 (Cynthia.Domas@state.or.us) and BOLI's Contested Case Coordinator  
16 (diane.anicker@state.or.us). Parties may still file documents in the manner  
17 provided in BOLI's contested case rules, but must also provide courtesy email  
copies to the other parties and the ALJ. Any documents filed by email must be  
submitted no later than 11:59 p.m. on the due date in order to be considered  
timely filed.

18 **"IT IS SO ORDERED."**

19 (Ex. X19)

20 22) On January 25, 2021, the forum issued an Interim Order Re: Video  
21 Hearing advising the parties that the hearing would be conducted via video on February  
22 23, 2021, due to ongoing COVID-19 restrictions. (Ex. X21)

23 23) On August 31, 2021, the forum issued an Interim Order Re: Reassignment  
24 of ALJ transferring the matter to ALJ Kari Furnanz. (Forum File)  
25

1           24) On January 31, 2022, the forum issued an Interim Order Re:  
2 Reassignment of ALJ transferring the matter to ALJ Caroline Holien. (Forum File)

3                                   **FINDINGS OF FACT – THE MERITS**

4           **Sunstone Operations**

5           1) At all times material herein, Respondent Sunstone was an Oregon  
6 domestic limited liability company employing at least one employee with its principal  
7 place of business located in Springfield, Oregon. (Ex. A3)

8           2) Sunstone manufactures Kratom for wholesale to retail establishments.  
9 (Testimony of T. Holiday)

10          3) H. Holiday and T. Holiday founded the business in 2017. T. Holiday had  
11 worked on developing what became Sunstone with a friend prior to H. Holiday  
12 becoming involved in the operations. (Testimony of T. Holiday, H. Holiday)

13          4) T. Holiday and H. Holiday are the only members listed in the Secretary of  
14 State's Business Registry. H. Holiday is listed by his legal name, "Norman Luebbert."  
15 (Ex. A3)

16          5) H. Holiday changed his name "mostly for marketing" purposes several  
17 years ago. H. Holiday petitioned the district court to change his name, but, for reasons  
18 purportedly unknown to H. Holiday, the federal government has never accepted nor  
19 recognized his name change. (Testimony of H. Holiday)

20          6) T. Holiday was primarily responsible for overseeing production and  
21 distribution. H. Holiday was primarily responsible for overseeing sales. (Testimony of T.  
22 Holiday, H. Holiday)

23          7) T. Holiday had a "relaxed approach" to managing Sunstone operations. T.  
24 Holiday began by hiring friends or friends of friends to work in production without having  
25 to advertise or go through a formal hiring process. (Testimony of T. Holiday)

1           8)     Sunstone did not have an employee handbook or corporate policies  
2 regarding hiring and firing during the first several months of operations. (Testimony of  
3 Spezialy, T. Holiday, Esparza, Roach, Erwin)

4           9)     Sunstone experienced rapid growth during its first several months of  
5 operations. In March 2017, Sunstone moved into a larger facility and began hiring new  
6 production associates. (Testimony of T. Holiday and H. Holiday)

7           10)    At the time of hearing, Sunstone was selling its products in 40 stores  
8 throughout Oregon and employed approximately 24 workers. T. Holiday was no longer  
9 involved in Sunstone's operations at the time of hearing. (Testimony of T. Holiday, H.  
10 Holiday)

11 **Spezialy's Employment with Sunstone**

12           11)    On or about November 2, 2017, Sunstone hired Spezialy as a production  
13 associate. Spezialy generally worked noon to 8:00 p.m. for an average of 30 hours per  
14 week. Spezialy's hourly wage was \$12.00. (Testimony of Spezialy; Ex. A7)

15           12)    Sunstone manager Michael Perren ("Perren") hired Spezialy, whom he  
16 knew from a previous job. Spezialy is friends with Perren, who is the godfather of her  
17 daughter. Neither T. Holiday nor H. Holiday were involved in Spezialy's hire or were  
18 aware she had been hired until after the fact. (Testimony of T. Holiday, H. Holiday)

19           13)    Spezialy's duties as a production associate included preparing and  
20 measuring Kratom before capsulating the product and packaging the capsules for  
21 distribution, which included labeling boxes with Sunstone's information and the  
22 customer's name. Spezialy also packaged sample packs for drivers to distribute to  
23 retailers. (Testimony of Spezialy, Esparza)



1 14) Spezialy also maintained and loaded delivery vehicles. Spezialy  
2 understood that she would also be trained to work as a driver and ultimately be  
3 assigned to work as a driver in the Portland area. (Testimony of Spezialy)

4 15) Spezialy identified as "Robert" and went by he/him pronouns at the start of  
5 her employment at Sunstone. (Testimony of Spezialy; Ex. B1, pp. 8-18)

6 16) Approximately one month after she began working for Sunstone, Spezialy  
7 "came out as transgender" and told her supervisor and co-workers that she wished to  
8 be identified as "Raven," with she/her pronouns. Spezialy also began wearing more  
9 feminine clothing to work. Spezialy's co-workers and supervisor were generally  
10 respectful of her request and referred to her as "Raven" and used she/her pronouns  
11 when speaking with her or referencing her at work. (Testimony of Spezialy, Andrews,  
12 Erwin)

13 17) Although Spezialy "came out" to her supervisor and co-workers, she  
14 continued signing her timecards "Robert Spezialy" until May 2018. Spezialy offered no  
15 formal notice to either T. Holiday or H. Holiday that she no longer wished to be identified  
16 as "Robert Spezialy." However, both T. Holiday and H. Holiday became aware Spezialy  
17 wanted to be referred to as Raven with she/her pronouns. (Testimony of Spezialy, H.  
18 Holiday, T. Holiday, Erwin, Andrews; Ex. B1, pp. 8-18)

19 **Spezialy's Performance Issues**

20 18) Spezialy received a "handful" of warnings regarding her performance and  
21 failing to clock out for breaks throughout her employment. Spezialy took the warnings  
22 seriously and attempted to correct the issues. (Testimony of Spezialy)

23 19) Spezialy did not work the same shift as her co-workers, who generally  
24 worked 8:00 a.m. to 4:00 p.m. or 4:00 p.m. to midnight. Spezialy typically clocked in  
25 and went outside to speak to her co-workers, who were often on break when she

1 arrived at work, to get an idea of what she needed to do during her shift. (Testimony of  
2 Spezialy)

3 20) Esparza trained Spezialy on production associate duties, but she was not  
4 Spezialy's supervisor. Esparza found Spezialy's performance acceptable at the  
5 beginning of Spezialy's employment, but found it worsened as her employment  
6 continued. Esparza noticed Spezialy spent a significant portion of her shift chatting with  
7 her co-workers or looking at her phone. Esparza also noticed Spezialy was not clocking  
8 out for her breaks, and her breaks were excessively long. Esparza was also concerned  
9 about the quality of Spezialy's work and her speed. (Testimony of Esparza)

10 21) In early- to mid-January 2018, Esparza reported her concerns to T.  
11 Holiday at a meeting held at her home. Esparza considered T. Holiday her friend and  
12 felt more comfortable sharing her concerns outside of the workplace. (Testimony of  
13 Esparza)

14 22) T. Holiday had observed some of the same behaviors identified by  
15 Esparza. T. Holiday was generally reticent to confront employees whom he felt had  
16 performance issues. T. Holiday preferred the employee correct their behavior rather  
17 than be subject to discipline. (Testimony of T. Holiday)

18 23) After meeting with Esparza, T. Holiday observed Spezialy clock in at the  
19 start of her shift and immediately leave the production area to join her co-workers  
20 outside. T. Holiday checked Spezialy's timecard and confirmed she had clocked in for  
21 her shift. T. Holiday confronted Spezialy and told her that she could not clock in and  
22 then go on break. (Testimony of T. Holiday)

23 24) T. Holiday decided, after speaking with Esparza and observing Spezialy's  
24 behavior at work, that he did not want her working as a driver, which was a position that  
25 had a lot of independence and required a good deal of trust. T. Holiday did not consider

1 Spezialy's behavior bad enough to fire her, but he did not feel her performance was  
2 good enough to move her to the driver position. (Testimony of T. Holiday).

3 25) Spezialy was informed of T. Holiday's decision at some point after January  
4 15, 2018. (Testimony of Spezialy and T. Holiday)

5 26) T. Holiday observed Spezialy failed to clock out for a break on at least one  
6 other occasion but most likely did not confront Spezialy about her failure to do so given  
7 his admitted reticence about confronting employees. (Testimony of T. Holiday)

8 27) T. Holiday had also noticed that Spezialy spent time on her phone during  
9 her shift, which was not allowed. T. Holiday did not confront Spezialy about her phone  
10 usage, because he was unsure if her phone usage was for legitimate family reasons.  
11 Spezialy used her phone to change music and to keep in contact with drivers and with  
12 her manager, Perren, so she would be ready to load or unload vehicles. Spezialy rarely  
13 used her phone at work for non-work related reasons. (Testimony of T. Holiday and  
14 Spezialy)

15 28) On one occasion, H. Holiday found Spezialy seated at a table in a break  
16 area with her head on the table. H. Holiday asked Spezialy if she was okay, before  
17 asking if she had clocked out. Spezialy admitted she had not clocked out and indicated  
18 she would do so. H. Holiday never confirmed if she clocked out or not. (Testimony of  
19 H. Holiday)

20 29) On another occasion, H. Holiday came upon Spezialy and her co-worker,  
21 Andrews, eating a meal together in the breakroom. H. Holiday checked their timecards  
22 and discovered that neither had clocked out for their break. H. Holiday asked them if  
23 they had clocked out, and they both indicated they had not. H. Holiday reported the  
24 situation to T. Holiday and Perren. (Testimony of H. Holiday)



1           30) H. Holiday's observations of Spezialy and her failure to clock out for  
2 breaks "bothered [him] to no end." H. Holiday began reviewing Spezialy's timecards  
3 and observed that she regularly worked more than six hours and did not clock out for  
4 breaks. H. Holiday decided to discharge Spezialy, because his review of her timecards  
5 was consistent with information provided to him by Esparza, who had told him that  
6 Spezialy regularly bragged about not clocking out for breaks. (Testimony of H. Holiday)

7 **Holiday's Conduct Toward Spezialy**

8           31) Spezialy grew increasingly more anxious when H. Holiday questioned her  
9 about clocking out for breaks. Spezialy opted to not take a break some days so she  
10 could avoid having to engage with H. Holiday. (Testimony of Spezialy)

11           32) Spezialy's co-workers had reported to her that H. Holiday had made  
12 comments about her being transgender that suggested he did not agree with her  
13 transition. Spezialy overheard H. Holiday comment during a conversation with another  
14 employee in the workplace that he did not care how she identified because he still  
15 considered her to be a man. Spezialy also overheard H. Holiday comment that he did  
16 not agree with her being transgender or her coming out. Spezialy was aware H. Holiday  
17 had asked Perren what bathroom she would use after she "came out," and knew Perren  
18 had told him that it did not matter because the bathrooms were not gender specific.  
19 (Testimony of Spezialy)

20           33) H. Holiday frequently referred to Spezialy as "Robert" and not Raven, and  
21 he used incorrect pronouns when speaking to her or about her with her supervisor and  
22 co-workers throughout her employment. (Testimony of Spezialy, Andrews, and Erwin)

23           34) H. Holiday continued referring to Spezialy as "Robert" and using he/him  
24 pronouns during his interview with Senior Civil Rights Investigator Coury and during the  
25 hearing. (Testimony of Coury; Observation of ALJ)

1           35) On one occasion, H. Holiday "cherry-picked" Spezialy and Andrews, who  
2 was known to be friends and associated with Spezialy, to clean out his personal storage  
3 unit and transport his personal items to Sunstone. Spezialy heard H. Holiday comment  
4 that she and Andrews needed to "do real men's work" when he assigned them the task.  
5 (Testimony of Spezialy, Andrews)

6           36) In mid-June or early July 2018, H. Holiday yelled at Spezialy after a  
7 customer questioned why she was wearing a feminine work shirt. H. Holiday said  
8 Spezialy should be wearing more masculine clothes. (Testimony of Spezialy)

9           37) H. Holiday's comments regarding Spezialy being transgender hurt  
10 Spezialy and caused her to feel upset and anxious, particularly when H. Holiday was in  
11 the workplace. As a result, Spezialy had difficulty completing her shifts due to the  
12 anxiety she felt as a result of H. Holiday's behavior. (Testimony of Spezialy)

13           38) Crystal Doan is Spezialy's fiancée and has known Spezialy since 2014.  
14 Doan observed that Spezialy was increasingly more comfortable "passing" as female  
15 when Spezialy began working at Sunstone. Spezialy told Doan about how much she  
16 liked her job and her co-workers and how excited she was at the prospect of working as  
17 a driver for Sunstone. (Testimony of Doan)

18           39) Spezialy frequently complained to Doan about H. Holiday's treatment of  
19 her, including using the incorrect pronouns when referring to her and referring to her as  
20 "Robert." Spezialy was initially excited to go to work each day, but she began to "freak  
21 out" and express dread and anxiety about going to work toward the end of her  
22 employment due to the conduct of H. Holiday. Spezialy became more anxious and  
23 depressed as her employment progressed. Spezialy became more focused on her  
24 physical characteristics that she did not consider to be feminine, and her dress became  
25 more disheveled. Spezialy was "terrified" to present as female at the end of her

1 employment due to H. Holiday's conduct toward her and her transition "backtracked."  
2 Spezialy became less able to handle snide comments she overheard in public and  
3 frequently left stores and public areas. (Testimony of Spezialy, Doan)

4 40) Spezialy had completed the therapy program required as a part of her  
5 transition at or near the time of her employment with Sunstone. While Spezialy  
6 considered therapy to deal with her anxiety and depression that was worsened as a  
7 result of H. Holiday's conduct toward her, she was unable to return to her therapist due  
8 to the therapist already having a long waiting list. Spezialy was unable to locate a new  
9 therapist as she struggled to deal with the anxiety and depression caused by her  
10 working conditions at Sunstone. (Testimony of Spezialy)

11 **Spezialy's Timecards<sup>2</sup>**

12 41) At some point in 2017 or 2018, Sunstone management met with  
13 employees and implemented a break policy, which required employees to clock out for  
14 a 30-minute meal break if the employee was scheduled to work more than six hours.  
15 The "free reign" employees previously had with breaks "changed for everybody" after  
16 this meeting. (Testimony of Erwin)

17 42) It is unclear as to whether Spezialy attended this meeting. (Observation of  
18 ALJ)

19 43) Sunstone did not require employees to clock out for breaks shorter than  
20 30 minutes. Anyone working less than six hours was not required to clock out for a 30-  
21 minute break. (Testimony of T. Holiday, H. Holiday)

22  
23  
24  
25 <sup>2</sup> While some of Spezialy's timecard entries were illegible, the majority of the timecard entries were sufficiently legible to make out the approximate length of the shift, as well as if any breaks were taken.



1           44)   Spezialy worked a total of 18 shifts in November 2017. Of those 18 shifts,  
2 Spezialy clocked out for a 30-minute meal break during only her first two shifts. (Exs.  
3 X3, B1)

4           45)   Spezialy worked a total of 19 shifts in December 2017. Spezialy clocked  
5 out for a 30-minute meal break for one shift and did not clock out for a break during the  
6 other 18 shifts, all of which were longer than six hours. (Exs. X3, B1)

7           46)   Spezialy worked a total of nine shifts in January 2018. Spezialy clocked in  
8 and out for a 30-minute meal break for four shifts and made handwritten entries for a  
9 30-minute meal break for four shifts. The remaining shift was less than six hours long.  
10 (Exs. X3, B1)

11          47)   Spezialy worked a total of 20 shifts in February 2018. There is one  
12 handwritten entry for the start of a 30-minute meal break. Three shifts were less than  
13 six hours long. Spezialy clocked out for a 30-minute break for the remaining shifts.  
14 (Exs. X3, B1)

15          48)   Spezialy worked a total of 20 shifts in March 2018. Spezialy clocked out  
16 for 30-minute meal breaks for each shift except for those that were less than six hours.  
17 There is only one handwritten entry regarding the start time of a shift. (Exs. X3, B1)

18          49)   Spezialy worked a total of 19 shifts in April 2018. Spezialy clocked out for  
19 a 30-minute break during nine shifts. There are handwritten entries for the beginning of  
20 a 30-minute meal break for three shifts. The remaining shifts were less than six hours  
21 long. (Exs. X3, B1)

22          50)   Spezialy worked a total of 21 shifts in May 2018. Spezialy clocked in and  
23 out for a meal break during four shifts. Ten shifts were less than six hours long.  
24 Spezialy worked seven shifts that were longer than six hours in which no break is noted  
25 as having been taken. (Exs. X3, B1)

1           51) In June 2018, Spezialy worked a total of 20 shifts. Eight of those shifts  
2 were less than six hours. Spezialy clocked out for a 30-minute break for one shift and  
3 did not do the same for the remaining shifts. (Exs. X3, B1)

4           52) In July 2018, Spezialy worked a total of 13 shifts. Five of those shifts were  
5 longer than six hours and no breaks were noted as having been taken. The remaining  
6 shifts were less than six hours in length. There were four handwritten entries regarding  
7 the start and end time of a shift. (Exs. X3, B1)

8 **Sunstone Employees at the time of Spezialy's Employment**

9 *Robert Andrews*

10           53) Andrews began working as a production associate for Sunstone on April  
11 10, 2018. (Testimony of Andrews)

12           54) Andrews previously worked with Spezialy at another job where he knew  
13 her as Raven. (Testimony of Andrews)

14           55) On approximately the third day of Andrews' employment at Sunstone, he  
15 was working with Spezialy when H. Holiday threatened to fire both of them for talking  
16 too much. Spezialy was in the middle of training Andrews at the time. (Testimony of  
17 Andrews)

18           56) Andrews observed H. Holiday refer to Spezialy as "Robert" and use  
19 he/him pronouns when referring to Spezialy. (Testimony of Andrews)

20           57) H. Holiday fired Andrews for "talking too much" on the same day he fired  
21 Spezialy. (Testimony of Andrews)

22 *Rikki Erwin*

23           58) Erwin was hired to work as a production associate at or near the time  
24 Spezialy began in her employment at Sunstone. Erwin worked at Sunstone for  
25 approximately three years before leaving the employment in September of 2019. Erwin

1 worked as a production associate before ultimately working as a Shift Lead. (Testimony  
2 of Erwin)

3 59) Erwin found H. Holiday was "not the easiest person to get along with."  
4 Erwin observed H. Holiday frequently interfered with production when he was in the  
5 facility. Erwin understood that both Perren and T. Holiday told H. Holiday to stop  
6 interfering with production. (Testimony of Erwin)

7 60) H. Holiday "cornered" Erwin on one occasion in the sticker room and  
8 demanded to know why she was given a key to the room. Erwin received the key as  
9 the night shift lead. Erwin noticed H. Holiday was "not nice" and things were "tense"  
10 when H. Holiday was in the facility. Erwin noticed this was most pronounced with  
11 female employees. (Testimony of Erwin)

12 61) Erwin never personally observed H. Holiday have a negative interaction  
13 with Spezialy but heard from other employees that H. Holiday had questioned what  
14 bathroom Spezialy would use after she came out as a transgender. (Testimony of  
15 Erwin)

16 *Zyanna Esparza*

17 62) Esparza worked for Sunstone for approximately three years beginning in  
18 2017. Esparza began working for Sunstone as a production associate and  
19 subsequently worked as a shift lead and trainer. Esparza most recently worked as  
20 Sunstone's retail store manager. Esparza no longer works for Sunstone. (Testimony of  
21 Esparza)

22 63) Esparza became friends with T. Holiday and H. Holiday through her  
23 employment at Sunstone. Esparza considered H. Holiday a father figure and was  
24 impressed with his entrepreneurial skills. H. Holiday considered Esparza to be a  
25 daughter due to the closeness of their relationship. (Testimony of Esparza, H. Holiday)



1           64)   Esparza observed H. Holiday had an “old school mentality,” and he was  
2 stern when correcting employees’ behavior. Esparza never observed H. Holiday act in  
3 a transphobic manner toward Spezialy or other Sunstone employees. However,  
4 Esparza did observe H. Holiday yell at Spezialy, but believed it was due to her  
5 performance and not Spezialy’s gender identity. (Testimony of Esparza)

6           65)   In mid-January 2018, Esparza reported concerns she had with T. Holiday  
7 regarding the performance of Spezialy and other employees. Esparza told T. Holiday  
8 that she thought Spezialy was taking advantage of his relaxed management approach,  
9 and she was not adequately performing her job duties. Esparza also reported concerns  
10 with the quality of Spezialy’s work. Esparza also reported Spezialy took excessive  
11 breaks, frequently failed to clock out for breaks, and bragged to her and to others that  
12 she was not clocking out for breaks. (Testimony of Esparza)

13           *Joshua Roach*

14           66)   Joshua Roach has worked for Sunstone for approximately three years.  
15 Roach began working in production and became a driver within a few weeks of his hire  
16 date. Roach observed Spezialy “brag” about picking up Andrews while still on the clock.  
17 (Testimony of Roach)

18           67)   Roach never observed H. Holiday treat Spezialy poorly due to her gender  
19 identity. (Testimony of Roach)

20           68)   Roach understood Spezialy was discharged due to timecard issues.  
21 (Testimony of Roach)

22           *Matthew Verdugo*

23           69)   Verdugo is currently Sunstone’s Division Manager for the Portland region.  
24 Verdugo has worked for Sunstone for approximately four years and has worked in  
25 production, deliveries, and logistics management. (Testimony of Verdugo)

1        70) Verdugo became familiar with Spezialy when he did deliveries, and  
2        Spezialy was responsible for cleaning and loading delivery vehicles. Verdugo never  
3        worked directly with Spezialy and was an infrequent presence at Sunstone's production  
4        facility. (Testimony of Verdugo)

5        71) Verdugo noticed that Spezialy usually wanted to chat when he arrived at  
6        the facility between 10:00 p.m. and 11:00 p.m. These conversations typically lasted an  
7        hour or more. Spezialy did not seem to care that she was on the clock when Verdugo  
8        questioned her about whether she was "on the clock." (Testimony of Verdugo)

9        72) Verdugo did not report his observations to either T. Holiday or H. Holiday,  
10       because he assumed the appropriate person would review the surveillance video at the  
11       facility and discover what he considered to be timecard fraud by Spezialy. (Testimony  
12       of Verdugo)

13       73) Verdugo never witnessed any discriminatory conduct by H. Holiday.  
14       (Testimony of Verdugo)

15       74) Verdugo understood Spezialy was discharged due to timecard issues.  
16       (Testimony of Verdugo)

17       **Spezialy's Complaint to T. Holiday**

18       75) On July 9, 2018, Spezialy sent an email to T. Holiday and Perren entitled,  
19       "Complaint." In the letter attached to the email, Spezialy complained about H. Holiday's  
20       behavior, which she described as including "screaming at employees, aggressively  
21       questioning about breaks and weather [sic] or not they are on the clock, harassing  
22       people before they have clocked in, making threats to employment, and even remarks  
23       on employees [sic] personal matters. For example, gender and pronoun preferences."  
24       (Exs. A14, A15)

1           76)   Spezialy noted in her letter that she believed H. Holiday had created a  
2 hostile work environment for her due to his behavior. Spezialy signed her letter, "Robert  
3 (Raven) Spezialy." (Exs. A14, A15)

4           77)   T. Holiday was not in the office when he received Spezialy's email. T.  
5 Holiday did not address the email with Spezialy or discuss it with either Perren or H.  
6 Holiday. T. Holiday assumed Perren had received a copy of Spezialy's email and letter.  
7 (Testimony of T. Holiday)

8           78)   Spezialy observed H. Holiday became "more aggressive" with her after  
9 she reported her concerns to T. Holiday. (Testimony of Spezialy)

10          79)   On July 24, 2018, Perren approached Spezialy in the parking lot prior to  
11 her clocking in for her shift. Perren informed her that she had been fired by H. Holiday  
12 overnight. (Testimony of Spezialy)

13          80)   H. Holiday was not aware of Spezialy's complaint to H. Holiday and  
14 Perren when he made the decision to terminate her employment on July 24, 2018.  
15 (Testimony of H. Holiday)

16 **Credibility of the Witnesses**

17          81)   Spezialy's testimony was fairly detailed regarding events in which H.  
18 Holiday subjected her to different treatment than her co-workers due to her gender  
19 identity. Spezialy's testimony was direct and responsive to the questions asked by both  
20 Agency counsel and Respondents' counsel. (Testimony of Spezialy)

21          82)   Respondents attempted to impeach Spezialy by introducing evidence  
22 showing she had been charged with several counts of contributing to the delinquency of  
23 a minor when she was 18 years old. Respondents also attempted to use issues  
24 Spezialy had regarding child custody and child support issues to impeach Spezialy's  
25 credibility. Spezialy's actions as an 18-year-old involving her younger brother and his



1 friends does not tend to discredit her testimony regarding her experiences working for  
2 Sunstone.

3 Similarly, the forum was not persuaded to find Spezialy's testimony less credible  
4 based upon Respondents' attempt to impeach Spezialy with evidence pertaining to  
5 information she provided in her name change application pertaining to past child  
6 support issues and criminal history. It is unclear whether Spezialy deliberately provided  
7 false information to the court or if she was genuinely confused as to the legal status of  
8 the issues raised by Respondents at hearing. Spezialy's testimony was not impeached  
9 by any substantial and credible evidence. Further, concerns Spezialy had regarding the  
10 treatment she received from Washington state authorities does not necessarily mean  
11 that her concerns were based upon issues she has with authority figures or taking  
12 criticism from her supervisors, as suggested by Respondents. (Testimony of Spezialy)

13 83) Doan has an obvious interest in the outcome of this case. Doan's  
14 testimony regarding the events that occurred in the workplace was not given great  
15 evidentiary weight, given that it was entirely based on information provided to her by  
16 Spezialy. However, Doan's testimony regarding her observations of Spezialy's  
17 emotional state during her employment at Sunstone and thereafter was considered to  
18 the extent it was consistent with other credible evidence. (Testimony of Doan)

19 84) H. Holiday discharged Andrews at the same time he discharged Spezialy.  
20 Andrews had a personal interest in the outcome of this case as he is a close friend of  
21 Spezialy's, and he believes he was discharged by H. Holiday as a result of his  
22 association with Spezialy. Andrews' testimony is deemed credible to the extent it is  
23 consistent with other credible evidence of record. (Testimony of Andrews)

24 85) Esparza's testimony was clear and direct and is deemed generally  
25 credible. Esparza's testimony as to her regard for T. Holiday and that she considered

1 H. Holiday a "father figure" shows an interest in the outcome of the proceeding. Further,  
2 H. Holiday's testimony that he was "closest" to Esparza and considered Esparza  
3 daughter makes her testimony less credible. Esparza's testimony is deemed credible to  
4 the extent it is consistent with other credible evidence of record. (Testimony of  
5 Esparza)

6 86) Verdugo and Roach testified that they understood that Spezialy was  
7 discharged due to timecard issues. The Agency did not elicit testimony as to how they  
8 came to gain that knowledge given that he was working at a different location and rarely  
9 interacted with Spezialy. The similarity of their testimony as to their understanding of  
10 the reasons for Spezialy's discharge, as well as the fact they continue to work for  
11 Sunstone, calls into question the credibility of their testimony as to the reasons for  
12 Spezialy's discharge. (Testimony of Verdugo, Roach)

13 87) The testimony of T. Holiday was generally credible as he demonstrated no  
14 significant animus toward Spezialy or her gender identity. T. Holiday is no longer  
15 involved with Sunstone. However, he clearly has an interest in the outcome of the  
16 proceeding. Therefore, T. Holiday's testimony was considered to the extent it did not  
17 conflict with other credible evidence of record. (Testimony of T. Holiday)

18 88) The testimony of H. Holiday was generally credible as to what he  
19 observed in the production area regarding Spezialy's failure to clock out for breaks as it  
20 was consistent with the timecards and the testimony of several witnesses. However, H.  
21 Holiday's testimony was frequently self-serving and focused more on promoting  
22 Sunstone and his efforts in developing the business rather than providing a direct  
23 answer to the question asked. The forum has credited H. Holiday's testimony to the  
24 extent it was corroborated by other credible evidence. (Testimony of H. Holiday)

1 89) The forum credited Spezialy's testimony when it conflicted with H.  
2 Holiday's testimony.

### 3 CONCLUSIONS OF LAW

4 1) Respondents did not terminate Spezialy's employment because of her  
5 sexual orientation (gender identity). ORS 659A.030(1)(a).

6 2) Respondents did not discharge, expel, or otherwise discriminate against  
7 Spezialy because she opposed Respondents' unlawful harassment as there is no  
8 evidence showing either T. Holiday or Perren communicated Spezialy's complaint to H.  
9 Holiday prior to his making the decision to terminate her employment. ORS  
10 659A.030(1)(f); OAR 839-005-0125(1)-(3) and OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A)

11 3) Respondents Sunstone Organics, LLC and H. Holiday subjected Spezialy  
12 to harassment because of her sexual orientation (gender identity) that was sufficiently  
13 severe or pervasive, such that it unreasonably interfered with her work performance and  
14 created an intimidating, hostile and offensive working environment in a hostile work  
15 environment because in violation of ORS 659A.030(1)(b), OAR 839-005-  
16 0010(4)(a)(A)(B)(C),(b).

17 4) Respondent Sunstone Organics, LLC is liable for the unlawful harassment  
18 because the harasser was H. Holiday, whose rank was such that he served as the  
19 employer's proxy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c).

20 5) Respondent Sunstone Organics, LLC is liable for the harassment by H.  
21 Holiday, who was a supervisor with immediately or successively higher authority over  
22 Spezialy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A), (C), (D).

23 6) H. Holiday aided or abetted Respondent Sunset Organics, LLC's unlawful  
24 practice described above in violation of ORS 659A.030(1)(g).  
25



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

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

## OPINION

The Agency alleges that Respondents engaged in discrimination on the basis of sexual orientation (gender identity) in violation of ORS 659A.030(1)(a),(b) and discrimination for opposing an unlawful practice in violation of ORS 659A.030(1)(f). The allegations set forth in the Formal Charges include the following:

- Respondent terminated Spezialy because of her sexual orientation (gender identity) in violation of ORS 659A.030(1)(a).
- Respondent subjected Spezialy to harassment based on her sexual orientation (gender identity) that was sufficiently severe or pervasive, such that it unreasonably interfered with her work performance and created an intimidating, hostile and offensive working environment. ORS 659A.030(1)(b), OAR 839-005-0010(4)(a)(A)(B)(C),(b)
- Respondent is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy. As one of two members of Respondent Sunstone Organics, LLC, H. Holiday's rank is sufficiently high so that he serves as the employers' proxy. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c)
- Respondent Sunstone Organics LLC is liable for harassment by a supervisor with immediate or successively higher authority over Spezialy because she was removed from training to be a driver, not promoted to a driver position and terminated. ORS 659A.030(1)(b), OAR 839-005-

010(4)(a)(A)(B)(C),(d)(A),(C),(D).

- Respondents subjected Spezialy to different terms and conditions because she opposed Respondents' unlawful harassment pursuant to ORS 659A.030(1)(f). OAR 839-005-0125(1)-(3) and OAR 839-005-0010(4)(a)(A)(B)(C),(d)(A).
- Respondent Hugh Holiday was an aider and abettor pursuant to ORS 659A.030(1)(g).

The Agency seeks lost wages and out of pocket expenses in amounts to be determined at hearing and damages for emotional, mental, and physical suffering in the amount of at least \$250,000.

#### **LIABILITY FOR DISCHARGE BECAUSE OF SEXUAL ORIENTATION (GENDER IDENTITY)**

It is an unlawful employment practice for "[a]n employer, because of an individual's \* \* \* sexual orientation \* \* \* to discharge the individual from employment." ORS 659A.030(1)(a), amended by Or Laws 2021, ch. 585, § 10.

To establish that Sunstone violated ORS 659A.030(1)(a) by terminating Spezialy's employment, the Agency must establish a prima facie case consisting of the following five elements: (1) Sunstone was an employer pursuant to ORS 659A.001(4)(a); (2) Sunstone employed Spezialy; (3) Spezialy was in a protected class; (4) Sunstone discharged Spezialy; and (5) Sunstone discharged Spezialy because of her sexual orientation (gender identity). *In the Matter of Vision International Petroleum, LLC*, 37 BOLI 187, 196 (2019).

While there is no dispute as to Elements One, Two and Four, Elements Three and Five remain in dispute.

#### ***Element Three – Membership in a Protected Class***

Prior to 2021, "gender identity" was not set forth individually as a defined protected class under ORS 659A.030(1)(a), amended by Or Laws 2021, c. 367, § 35,

1 eff. June 23, 2021. Spezialy's employment with Sunstone was in 2018. At the time  
2 relevant to this matter, the Agency by OAR 839-005-0003(16) defined "sexual  
3 orientation" as:

4 "an individual's actual or perceived heterosexuality, homosexuality,  
5 bisexuality, or gender identity, regardless of whether the individual's  
6 gender identity, appearance, expression or behavior differs from that  
traditionally associated with the individual's assigned sex at birth."

7 OAR 839-005-0003(8) defined "gender identity" as:

8 "an individual's gender-related identity, whether or not that identity is  
9 different from that traditionally associated with the individual's assigned  
sex at birth, including, but not limited to, a gender identity that is  
transgender or androgynous."

10 OAR 839-005-0003(7) defined "gender expression" to mean:

11 "the manner in which an individual's gender identity is expressed,  
12 including, but not limited to, through dress, appearance, manner, or  
13 speech, whether or not that expression is different from that traditionally  
associated with the individual's assigned sex at birth."

14 Spezialy presented as male at the time of her hire and was known as "Robert."

15 Spezialy had started her gender transition near the time she began working at  
16 Sunstone. Spezialy informed her supervisor and her co-workers shortly after she began  
17 in her employment with Sunstone that she wished to be referred to as Raven and began  
18 wearing feminine style clothing to work. Spezialy expressed her gender identity through  
19 her dress, appearance, and manner. Spezialy was a member of a protected class  
20 based upon sexual orientation (gender identity) pursuant to ORS 659A.030(1)(a). OAR  
21 839-005-0003(7),(8),(16). Therefore, the Agency has established Element Three of the  
22 prima facie case.  
23  
24  
25



1           ***Element Five – Discharge Because of Sexual Orientation (Gender Identity)***

2           The fifth element -- causal connection -- is disputed, with the Agency asserting  
3           Spezialy was discharged because of her gender identity and Respondents asserting  
4           Spezialy was discharged due to her lackluster job performance and repeated failure to  
5           clock out for 30-minutes breaks.

6           Under the “specific intent” theory of discrimination, proof of a causal connection  
7           may be established through evidence that shows a respondent knowingly and  
8           purposefully discriminated against a complainant because of the complainant’s  
9           membership in a protected class. OAR 839-005-0010(1)(a)(A). *See, e.g., In the Matter*  
10          *of Cyber Center, Inc., dba Cybercenter Sports Grill and Gary Speaks as Aider/Abettor,*  
11          32 BOLI 11, 32 (2012) citing *In the Matter of WINCO Foods, Inc.*, 28 BOLI 259, 300  
12          (2007); *In the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 61 (2002). While specific  
13          intent may be established by direct evidence of a respondent’s discriminatory motive, it  
14          may also be shown through circumstantial evidence. *Id.*

15          There is no direct evidence that Spezialy was discharged due to her sexual  
16          orientation (gender identity). Respondents’ witnesses testified that the decision to  
17          discharge Spezialy was based on her performance issues and timecard issues.  
18          Spezialy conceded she had received a “handful” of warnings throughout her  
19          employment. Spezialy testified she took the warnings seriously and attempted to  
20          correct the issues as they were brought to her attention. Respondents offered no  
21          documentation as to the alleged performance concerns.  
22

23          The Agency alleged in the Formal Charges that H. Holiday made the decision to  
24          remove Spezialy from driver training and to not promote her to a driver position. The  
25          preponderance of the evidence shows T. Holiday made that determination at or near the

1 time he met with Esparza in January 2018 when he determined Spezialy's performance  
2 did not make her a good candidate for the driver position, which required a good deal of  
3 independence. There was no evidence offered showing H. Holiday influenced that  
4 decision or had any role in removing Spezialy from driver training or denying Spezialy a  
5 driver position.

6 Respondents' witnesses indicated in their testimony that Spezialy was  
7 discharged due to "timecard issues" or failure to clock out for breaks. Spezialy admitted  
8 she occasionally failed to clock out for breaks at the beginning of her employment.  
9 Spezialy testified she was not required to clock out for breaks at her last job, so she was  
10 not aware she was required to do so at Sunstone. Spezialy testified she stopped taking  
11 breaks toward the end of her employment because of the "constant" harassment by H.  
12 Holiday about not clocking out. Spezialy's timecards reflect that she did not clock out  
13 for a 30-minute break during several shifts in which she worked more than six hours.

15 Respondents have produced sufficient evidence by way of the timecards, as well  
16 as the testimony of its witnesses, to support its contention that Spezialy regularly failed  
17 to clock out for breaks. The forum is not convinced that Spezialy did not understand  
18 this requirement, given she clocked out for breaks for the majority of her shifts  
19 beginning in January 2018. However, consistent with Spezialy's testimony, she  
20 stopped clocking out for break in May 2018 and continuing through the rest of her  
21 employment at Sunstone. The forum is somewhat perplexed as to why Spezialy made  
22 the decision to stop taking breaks when, by all accounts, H. Holiday's issue was not with  
23 her taking breaks but, rather, her not clocking out for a 30-minute break.  
24  
25

1        Additionally, the evidence does not support a finding that H. Holiday made the  
2 decision to terminate Spezialy's employment when he discovered Spezialy was  
3 transitioning from male to female. Spezialy "came out" as transgender within a month of  
4 starting her employment. Spezialy testified she asked her co-workers and supervisor to  
5 refer to her as Raven and to use she/her pronouns. Spezialy testified everyone  
6 respected her wishes except H. Holiday, who referred to her as "Robert" and he/him  
7 pronouns, which suggests he had some knowledge of her gender identity well before he  
8 made the decision to terminate her employment. Further, Spezialy testified she  
9 suspected H. Holiday was treating her aggressively due to her gender identity  
10 throughout her employment, which does not suggest a discovery of that information by  
11 H. Holiday at or near the time he made the decision to discharge Spezialy.  
12

13        As noted above, the evidence clearly shows that Spezialy was not clocking out  
14 for breaks. H. Holiday testified he reviewed Spezialy's timecards when he observed her  
15 having a meal with Andrews and they both confirmed they had not clocked out for  
16 break, which "bothered him to no end." (Finding of Fact # 29) H. Holiday testified he  
17 discharged Spezialy after reviewing her timecards and discovering she had not clocked  
18 out for several breaks despite being told she was required to do so. (Testimony of H.  
19 Holiday)  
20

21        The forum finds credible H. Holiday's testimony that he decided to terminate  
22 Spezialy's employment after a review of her timecards confirmed for him that she was  
23 regularly not clocking out for breaks. Therefore, the Agency has failed to show a causal  
24 connection between Spezialy's membership in a protected class and the adverse  
25 employment action. For these reasons, the forum concludes that Respondents did not



1 discharge Spezialy because of her sexual orientation (gender identity). ORS  
2 659A.030(1)(a).

3 **LIABILITY FOR DISCHARGE BECAUSE OF OPPOSITION TO UNLAWFUL HARASSMENT**

4 ORS 659A.030(1)(f) provides:

5 “It is an unlawful employment practice [f]or any person to discharge, expel  
6 or otherwise discriminate against any other person because that other  
7 person has opposed any unlawful practice, or because that other person  
8 has filed a complaint, testified or assisted in any proceeding under this  
chapter or has attempted to do so.”

9 The Agency's prima facie case in an ORS 659A.030(1)(f) retaliatory discharge  
10 case consists of the following elements: (1) Spezialy opposed an unlawful employment  
11 practice; (2) Sunstone subjected Spezialy to an adverse action; and (3) there is a causal  
12 connection between Spezialy's opposition and the adverse action. *In the Matter of*  
13 *From the Wilderness, Inc.*, 30 BOLI 227, 288 (2009)

14 The evidence shows Spezialy sent an email to T. Holiday and Perren on July 9,  
15 2018, and was terminated by H. Holiday on July 24, 2018. T. Holiday testified he was  
16 out of the office at the time he received Spezialy's email and denied discussing the  
17 contents of the email with either H. Holiday or Perren. See Finding of Fact – the Merits  
18 #77. H. Holiday denied being aware of Spezialy's email at the time he made the  
19 decision to terminate her employment. See Finding of Fact – the Merits #80.

20 The Agency has shown that Spezialy opposed an unlawful employment practice  
21 by sending the email to T. Holiday and Perren outlining her concerns regarding H.  
22 Holiday's conduct toward her in the workplace. Therefore, the Agency has satisfied the  
23 first element of its prima facie case. Similarly, the Agency has shown that Spezialy  
24 suffered an adverse action when H. Holiday terminated her employment on July 24,  
25

1 2018, thereby satisfying the second element of its prima facie case. However, the  
2 Agency has not shown a causal connection between the protected activity and the  
3 adverse action.

4 Proof of a causal connection between protected conduct and a materially  
5 adverse action can be established (1) "indirectly, by showing that the protected activity  
6 was followed closely by discriminatory treatment or through other evidence such as  
7 disparate treatment of fellow employees who engaged in similar conduct" or (2) "directly,  
8 through evidence of retaliatory animus directed against a plaintiff by the defendant."  
9 *Boynton-Burns v. University of Oregon*, 197 Or. App. 373, 380, 105 P.3d 893 (2005)  
10 (emphases in original; internal quotation marks omitted). "If the plaintiff attempts to  
11 establish the causal connection indirectly, relying on mere temporal proximity between  
12 the events, the events must be 'very close' in time." 197 Or. App. at 381, 105 P.3d 893  
13 (citing *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273, 121 S.Ct. 1508, 149  
14 L.Ed. 2d 509 (2001)).

16 Respondents argue that Spezialy was terminated due to her continuing timecard  
17 issues and not due to her complaint to T. Holiday and Perren. The fact that only 15  
18 days passed between Spezialy's July 9, 2018, email to T. Holiday and Perren and the  
19 termination of her employment on July 24, 2018, gives rise to an inference of a causal  
20 connection between the two events. However, the evidence does not show that the  
21 adverse action was taken because of Spezialy's complaint. See *Medina v. State of*  
22 *Oregon*, 278 Or. App. 579, 588, 377 P.3d 626 (2016). There is no evidence showing  
23 that H. Holiday was aware of Spezialy's complaint at the time he made the decision to  
24 terminate her employment. Even if it was found that temporal proximity alone was  
25

1 established the requisite causal connection, there is no evidence showing that the  
2 reasons proffered by Respondents for Spezialy's termination was a pretext for  
3 retaliation. *LaCasse v. Owen*, 278 Or. App. 24, 35-36, 373 P.3d 1178 (2016).  
4 Therefore, the Agency has failed to establish the final element of its prima facie case.  
5 As such, the Agency has failed to show that Respondents retaliated against Spezialy  
6 because of her opposition to an unlawful employment practice in violation of  
7 659A.030(1)(f).  
8

#### 9 **LIABILITY FOR DISCRIMINATION BASED ON SEXUAL ORIENTATION (GENDER IDENTITY)**

10 The Agency alleges that Respondents subjected Spezialy to discriminatory terms  
11 and conditions of employment based on her sexual orientation (gender identity) through  
12 the ongoing behavior of Respondent H. Holiday that was sufficiently severe or pervasive  
13 to have the effect of unreasonably interfering with their work performance or creating a  
14 hostile, intimidating or offensive working environment in violation of ORS 659A.030(1)(b)  
15 and OAR 839-005-0010(4)(a)(A)(B)(C),(b).

16 OAR 839-005-0030(2) provides:

17 "The standard for determining whether harassment based on an  
18 individual's sex is sufficiently severe or pervasive to create a hostile,  
19 intimidating or offensive working environment is whether a reasonable  
20 person in the circumstances of the complaining individual would so  
21 perceive it."

22 In determining whether conduct is sufficiently severe or pervasive to have  
23 created a hostile, intimidating or offensive working environment, the forum looks at the  
24 totality of the circumstances, i.e., the nature of the conduct and its context, the  
25 frequency of the conduct, its severity or pervasiveness, whether it is physically  
threatening or humiliating, and whether it unreasonably interferes with an employee's  
work performance. *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 287



1 (2009). "The working environment must subjectively and objectively be perceived as  
2 abusive." *Freeho Inc., v. BOLI*, 319, Or App 548, 558, \_\_\_ P.3d \_\_\_ (2022), citing *Harris*  
3 *v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22, 114 S. Ct. 367, 126 L. Ed. 2d 295 (1993).  
4 "More specifically, whether the workplace is objectively hostile is determined "from the  
5 perspective of a reasonable person with the same fundamental characteristics" as the  
6 plaintiff." *Id.* at 549, citing *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995).  
7 The forum looks at the "totality of the circumstances" when making this determination.  
8 *In the Matter of Andrew W. Engel, DMD, PC*, 32 BOLI 94, 120 (2012), citing *In the*  
9 *Matter of Fred Meyer, Inc.*, 15 BOLI 77 (1996), affirmed, *Fred Meyer v. Bureau of Labor*  
10 *and Industries*, 152 Or App 302, 309, 954 P2d 804 (1998).

12 In this case, the conduct consisted of (1) H. Holiday questioning what bathroom  
13 Spezialy would use in a facility without gender specific bathrooms; (2) H. Holiday using  
14 incorrect pronouns and referring to her as "Robert" despite being told of Spezialy's  
15 wishes and being corrected by employees such as Erwin and Perren; (3) H. Holiday  
16 yelling at Spezialy after a customer questioned why she was wearing a feminine style  
17 work shirt; and (4) H. Holiday assigning Spezialy to clean out his personal storage  
18 space and declaring it to be "men's work." The forum is not persuaded that H. Holiday's  
19 questioning of Spezialy regarding her failing to clock out for breaks was based on her  
20 sex (gender identity). As an employer, he had the right and the duty to question  
21 whether an employee had properly clocked out for a break. Further, Spezialy conceded  
22 she did not clock out for breaks at times during her employment, despite demonstrating  
23 an ability to do so.  
24  
25

1 The conduct complained of all occurred at Spezialy's workplace and in the  
2 presence of her co-workers and friends. The conduct was all attributable to H. Holiday,  
3 an owner of Sunstone and the father of the second owner. As to the frequency, severity,  
4 and pervasiveness, the conduct occurred regularly, albeit not "constantly" as alleged by  
5 Spezialy, throughout her employment and frequently interfered with her ability to work  
6 her entire scheduled shift. Spezialy testified she often left work before the end of her  
7 shift due to her anxiety being exacerbated by H. Holiday's presence in the facility and  
8 his past conduct toward her. Spezialy testified these feelings of anxiety, anger, sadness  
9 and hurt continued outside of work and, at times, affected her home life.  
10

11 Considering all of the above, the forum must ultimately determine whether a  
12 reasonable person in the circumstances of the complaining individual would have  
13 perceived the conduct to be sufficiently severe or pervasive to create a hostile,  
14 intimidating, or offensive working environment. OAR 839-005-0010(4)(b). A reasonable  
15 person in Complainant's circumstances would be an individual who is transgender and  
16 who had come out to her employer, co-workers, and friends. Under those  
17 circumstances, a reasonable individual facing similar circumstances would perceive H.  
18 Holiday's conduct to be sufficiently severe or pervasive to create a hostile, intimidating,  
19 or offensive working environment. The Agency has shown that H. Holiday's conduct  
20 toward Spezialy was sufficiently severe or pervasive to have the effect of creating a  
21 hostile, intimidating or offensive working environment for Spezialy's in violation of ORS  
22 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A).  
23  
24  
25

1           ***Sunstone is Liable for H. Holiday's Discriminatory Conduct***

2           To determine whether Sunstone is liable for H. Holiday's discriminatory conduct  
3 toward Spezialy, the forum must first determine whether H. Holiday's rank was at a level  
4 to warrant imposition of liability against Sunstone. The forum considered a similar issue  
5 in *Vision International*, 37 BOLI at 197, and noted:

6           "Supervisors with 'immediate (or successively higher) authority over the  
7 employee' are considered agents of an employer for purposes of an  
8 employer's Title VII liability. *Faragher v. City of Boca Raton*, 524 US 775,  
9 807 (1998).<sup>3</sup> Determining whether a particular individual is a supervisor 'is  
10 not dependent upon job titles or formal structures within the workplace.'  
11 *Dawson v. Entek Int'l.*, 630 F3d 928, 940 (9th Cir 2011), *citing McGinest v.*  
12 *GTE Service Corp.*, 360 F3d 1103, 1119 n.13 (9th Cir 2004). Rather, for  
13 purposes of vicarious liability under Title VII a person is a supervisor 'if he  
14 or she is empowered by the employer to take tangible employment actions  
against the victim.' *Vance v. Ball State University*, 570 US 421, 424  
(2013). A tangible employment action is 'a significant change in  
employment status, such as hiring, firing, failing to promote, reassignment  
with significantly different responsibilities, or a decision causing a  
significant change in benefits'." *Burlington Industries, Inc. v. Ellerth*, 524  
U.S. 742, 761 (1998)."

15           H. Holiday was one of two members of Sunstone Organics, LLC. H. Holiday had  
16 the apparent and actual authority to control and to direct the work performance of  
17 Sunstone's employees and the authority to take tangible employment action against  
18 Spezialy. As such, the forum determines that H. Holiday had "immediate (or  
19 successively higher)" authority over Spezialy, and is, therefore, considered an agent of  
20 Sunstone for purposes of any employer's liability. ORS 659A.030(1)(b), OAR 839-005-  
21 0010(4)(a)(A)(B)(C),(d)(A), (C), (D). See *Vision International*, 37 BOLI at 197.  
22 Similarly, H. Holiday's rank as a part-owner of Sunstone was sufficiently high that he  
23  
24  
25



1 served as a proxy for the employer. ORS 659A.030(1)(b), OAR 839-005-0010(4)(c).

2 Therefore, Sunstone is liable for H. Holiday's discriminatory conduct.

3 **LIABILITY OF H. HOLIDAY FOR AIDING OR ABETTING AN UNLAWFUL PRACTICE**

4       ORS 659A.030(1)(g) provides that it is an unlawful employment practice "[f]or  
5 any person, whether an employer or employee, to aid, abet, incite, compel or coerce the  
6 doing of any of the acts of this chapter or to attempt to do so." The forum has found that  
7 a corporate officer and owner who commits acts rendering the corporation liable for an  
8 unlawful employment practice may be found to have aided or abetted the corporation's  
9 unlawful employment practice. *In the Matter of Vision International*, 37 BOLI at 218.  
10 *See also In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 166-67  
11 (2012); *In the Matter of Andrew Engel, DMD, PC*, 32 BOLI 94, 137 (2012); *In the Matter*  
12 *of Cyber Center, Inc.*, 32 BOLI 11, 35 (2012).

14       The forum's approach is consistent with the approach outlined by the Oregon  
15 Court of Appeals in *Allison v. Dolich*, 321 Or App 721, 726, 518 P.3d 591, 595 (2022).  
16 The court reasoned that the plain text of ORS 659A.030(1)(g) makes clear that it applies  
17 to any person, which "includes a business-entity employer's principal decision-maker  
18 directing the entity." *Id.* at 725. The court reasoned that the term "any person," as used  
19 in ORS 659A.030(1)(g) is "broad enough to cover those persons who act on behalf of  
20 the employer – indeed, the statute expressly references 'an employer or employee'." *Id.*  
21 at 726. The court concluded that it was the legislature's intention to hold "persons  
22 directing the business-entity employer's unlawful conduct" individually liable under ORS  
23

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25 <sup>3</sup> Federal law similar to Oregon's civil rights laws is not binding on the forum, but federal decisions can be instructive in construing and applying similar state law. *Bravo Event Services, Inc. and Dan Kor*, 36 BOLI

1 659A.030(1)(g). *Id.* Ultimately, the court ultimately concluded, “whether the individual  
2 defendants were acting in their personal capacities or on behalf of the LLCs, they were  
3 ‘persons’ who assisted the LLCs by making decisions that enabled the violations.” *Id.*

4 H. Holiday was one of two members of the limited liability corporation the other  
5 being his son, T. Holiday. H. Holiday had the ability to “aid, abet, incite, compel or  
6 coerce” the hostile work environment, ” given his status within the limited liability  
7 corporation and the role he held in the daily operations of the business. ORS  
8 659A.030(1)(g). H. Holiday aided or abetted the unlawful harassment of Complainant  
9 by failing to take corrective action to ensure Spezialy could work in an environment free  
10 of discrimination and actively participating in the discriminatory actions. Therefore, H.  
11 Holiday is in violation of ORS 659A.030(1)(g). As an aider or abettor, H. Holiday is  
12 jointly and severally liable with Sunstone for Sunstone’s unlawful employment practices.

#### 14 **DAMAGES**

##### 15 ***Back Pay and Out of Pocket Expenses***

16 The purpose of a back pay award in employment discrimination cases is to  
17 compensate a complainant for the loss of wages and benefits the complainant would  
18 have received but for the respondents’ unlawful employment practices. *In the Matter of*  
19 *Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). Back pay awards are  
20 calculated to make a complainant whole for injuries suffered as a result of the  
21 discrimination. *Id.* A complainant who seeks back pay is required to mitigate damages  
22 by using reasonable diligence to find other suitable employment. *Id.* As set forth  
23 above, the forum did not find Sunstone’s discharge of Spezialy was an unlawful  
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250, 265 (2018). See also *In the Matter of Murrayhill Thriftway, Inc.*, 20 BOLI 130, 149 (2000) (stating

1 employment practice. As such, Spezialy is not entitled to a back pay award.

2 Out-of-pocket expenses that are directly attributable to unlawful employment  
3 practice are recoverable from a respondent as a means to eliminate the effects of any  
4 unlawful practice found, including actual expenses. *In the Matter of Maltby Biocontrol,*  
5 *Inc.*, 33 BOLI 121, 158 (2014). Here, the forum awards no damages for out-of-pocket  
6 expenses because no evidence was presented at hearing that would give the forum a  
7 basis for calculating such an award. *Id.*

8  
9 ***Damages for Emotional and Physical Suffering***

10 In its Formal Charges, the Agency seeks "at least \$250,000.00" in damages for  
11 Complainant's "emotional, mental, and physical suffering" resulting from Respondents'  
12 unlawful employment practices. Pursuant to ORS 659A.850, the Commissioner of the  
13 Bureau of Labor and Industries has the authority to award money damages for  
14 emotional, mental, and physical suffering sustained. *In the Matter of Frehoo Inc.*, 36  
15 BOLI 42, 71 (2015), *rev'd and rem'd on other grounds*, 319 Or App 548, \_\_\_ P.3d \_\_\_  
16 (2022).

17 Emotional distress damages are recoverable if they result from the harm caused  
18 by the unlawful conduct. *See, e.g., In the Matter of Andrew Engel, DMD, PC*, 32 BOLI  
19 at 123 (in a religious harassment case, the complainant's anxiety and stress were  
20 suffered as a result of the employer's unlawful conduct). As the forum has previously  
21 noted:  
22

23 "In determining an award for emotional and mental suffering, the forum considers  
24 the type of discriminatory conduct, and the duration, frequency, and severity of  
25 the conduct. It also considers the type and duration of the mental distress and  
the vulnerability of the aggrieved persons. The actual amount depends on the

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that "decisions interpreting Title VII are instructive in construing and applying the similar state law").



1 facts presented by each aggrieved person. An aggrieved person's testimony, if  
2 believed, is sufficient to support a claim for mental suffering damages."

3 *In the Matter of Edgewood Construction LLC*, 37 BOLI 2, 15 (2018)(internal citation  
4 omitted). Further, "[t]his forum has long held that respondents must take complainants  
5 'as they find them,'" meaning a respondents' unlawful conduct may cause more harm to  
6 a particular complainant than to others. *In the Matter of Kara Johnson dba Duck Stop*  
7 *Market*, 34 BOLI 2, 37 (2014), *aff'd sub nom Johnson v. Or. Bureau of Labor & Indus.*,  
8 290 Or App 335, 415 P3d 1071 (2018).

9 Spezialy enjoyed her job and liked her co-workers but her attitude toward her job  
10 changed as a result of H. Holiday's conduct. *Id.* Doan testified that Spezialy frequently  
11 "freaked out" about having to go to work out of fear of dealing with H. Holiday and was  
12 visibly distressed when preparing to go to work at the end of her employment. *Id.* Doan  
13 described Spezialy's transition as being "backtracked" as a result of H. Holiday's  
14 conduct. *Id.* Spezialy became more dysphoric regarding her physical characteristics  
15 and began dressing in baggy jeans and "hole-y" t-shirts. *Id.* Spezialy became more  
16 anxious about leaving the house out of fear of people questioning her gender like H.  
17 Holiday had done. *Id.*

18  
19 The forum finds that an award of \$125,000 is appropriate in this case due to the  
20 effect H. Holiday's conduct had on Spezialy, who at the time of her employment was in  
21 the process of transitioning. Spezialy credibly testified that H. Holiday's conduct toward  
22 her caused her to become more anxious and depressed. Both Spezialy and Doan  
23 testified that Spezialy became terrified to present as female due to H. Holiday's  
24 conduct, which led to Spezialy avoiding public areas out of fear that that people would  
25 make comments about her similar to those made by H. Holiday. See Finding of Fact –

1 the Merits #39. The record shows H. Holiday's conduct affected Spezialy not only at  
2 work but in her personal life outside of work.

3 The award of \$125,000 in emotional distress damages is consistent with the  
4 forum's award in *In the Matter of Navex Global, Inc.*, 36 BOLI 202 (2018), in which the  
5 forum awarded Complainant \$120,000 in emotional distress whose preexisting anxiety  
6 condition was worsened as a result of the discriminatory conduct of the Respondent in  
7 discharging Complainant because of their jury service. Unlike the Complainant in *Vision*  
8 *International*, who was awarded \$60,000 in damages for emotional, mental, and  
9 suffering, the record shows that H. Holiday's discriminatory conduct had a lasting impact  
10 on Spezialy up to the date of hearing. *Vision International*, 37 BOLI at 201.

12 The forum concludes \$125,000 is an appropriate award of emotional distress  
13 damages as a result of H. Holiday's unlawful discrimination. See, e.g. *In the Matter of*  
14 *Blachana, LLC*, 32 BOLI 220, 249-253 (2013)(\$40,000 in emotional and mental  
15 suffering damages awarded to 11 complainants who were denied a public  
16 accommodation because of their sexual orientation); *In the Matter of Andrew W. Engel,*  
17 *DMD, PC*, 32 BOLI at 140-141 (\$325,000 awarded for emotional and mental suffering  
18 following discrimination and constructive discharge because of Complainant's religion);  
19 *In the Matter of Cyber Center, Inc.*, 32 BOLI at 39 (\$120,000 in emotional and mental  
20 suffering damages awarded after Complainant was demoted and discharged because  
21 of sex(pregnancy)); *In the Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 170  
22 (2012)(\$150,000 in emotional and mental suffering damages awarded for sexual  
23 harassment and discharge); *In the Matter of From the Wilderness, Inc.*, 30 BOLI at 291  
24  
25

1 (\$125,000 in emotional and mental suffering damages awarded for sexual harassment  
2 and hostile work environment).

3 ***Additional Relief Requested by the Agency***

4 In its Formal Charges, the Agency requested a Cease and Desist Order be  
5 entered against the Respondents that included "such other relief as is appropriate to  
6 eliminate the effects of the unlawful practices found both as to Complainant and as to  
7 others similarly situated." BOLI's Commissioner is authorized to issue an appropriate  
8 cease and desist order reasonably calculated to eliminate the effects of any unlawful  
9 practice found. ORS 659A.850(4). Among other things, that may include requiring a  
10 respondent to:

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

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

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

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

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

21 **EXCEPTIONS TO THE PROPOSED ORDER**

22 On February 24, 2022, the Agency and Sunstone timely filed exceptions to the  
23 Proposed Order. Most of the exceptions have been addressed in this Final Order  
24 above, except for four exceptions to procedural issues that are addressed below:

25 ***Exception 2***

Respondents argue that Spezialy did not sign the Amended Complaint (Ex. A2)  
and it is unclear whether Spezialy amended the Complaint. The Amended Complaint



1 sets forth the same allegations as are set forth in the original Complaint (Ex. A1). The  
2 only difference between the two Complaints is the Complainant's name, which was  
3 changed from "Robert M. Spezialy" to "Raven M. Spezialy."

4 OAR 839-03-0040 provides in pertinent part:

5 "(2) The division may amend a complaint to correct technical defects and to add  
6 additional persons as respondents. The division may amend a complaint on its  
7 own initiative or at the aggrieved person's request (with the division's agreement)  
8 at any time prior to the issuance of formal charges, except that respondents may  
9 only be added during the course of investigation. Examples of technical defects  
include: clerical errors, additions or deletions, name and address corrections, and  
statute or rule citation errors.

10 "(3) A complaint may be amended to add a protected class only if the addition is  
11 supported by facts already alleged. New facts may not be added. If new facts are  
12 alleged, the aggrieved person must file a new complaint meeting the standards  
provided in OAR 839-003-0005(5).

13 "(4) Amended complaints need not be verified or signed by the aggrieved  
person."

14 OAR 839-003-0040(2),(3),(4)

15 No new facts were added in the Amended Complaint. The only change made  
16 was to cure a technical defect, as defined in OAR 839-003-0040(2). Therefore, the  
17 signature of the Complainant is not required for an Amended Complaint. Respondents'  
18 exception to the Amended Complaint (Ex. A2) is OVERRULED.

19 ***Exception 22***

20 Respondents object to the forum's decision to conduct the hearing via video  
21 conference rather than an in-person hearing.

22 On November 17, 2021, the forum issued an Interim Order Ruling on  
23 Respondents' Formal Objections to Video Conference Hearing. The forum  
24 acknowledged that the parties preferred an in-person hearing. The forum noted the  
25

1 efforts made to find a physical location that would accommodate the safety precautions  
2 in place at that time due to the COVID-19 pandemic. The forum acted according to the  
3 responsibilities outlined for ALJ's under OAR 839-050-0240(1)(d) and well within the  
4 authority granted under OAR 839-050-0255. The ALJ acted in a manner that was  
5 respectful of the parties' preference for an in-person hearing, while being mindful of the  
6 safety precautions mandated by state and federal health authorities at that time.  
7 Respondents' Exception 22 is OVERRULED.

8  
9 ***Exceptions 23 and 24***

10 Respondents' Exceptions 23 and 24 object to a different ALJ preparing the  
11 proposed order than the ALJ who conducted the hearing in this matter and argue their  
12 due process rights have been affected.

13 OAR 839-050-0020(15) defines "forum" as meaning "the Administrative Law  
14 Judge assigned to preside over the contested case proceeding and the Commissioner  
15 or Deputy Commissioner who signs the final order." OAR 839-050-0020(1) provides:

16 "Administrative Law Judge' means the commissioner or an individual or a special  
17 tribunal designated by the commissioner to preside over any or all aspects of a  
18 contested case proceeding including motions, oral or written hearings,  
19 preparation of the Proposed Order and assistance in preparation of the Final  
20 Order. The Administrative Law Judge may or may not be an employee of the  
21 Agency, except that when a case involves a complaint alleging an unlawful  
22 practice under ORS 659A.145 or 659A.421 or discrimination under federal  
23 housing law, the Administrative Law Judge or anyone appointed as a hearings  
24 officer or member of a special tribunal to hear the matter must be an employee of  
25 the Agency."

22 There is no requirement that the assigned Administrative Law Judge who  
23 conducted the hearing be the same as the Administrative Law Judge who prepared the  
24 proposed order or assists in the preparation of the Final Order. Therefore,  
25 Respondents Exception 23 and 24 are OVERRULED.

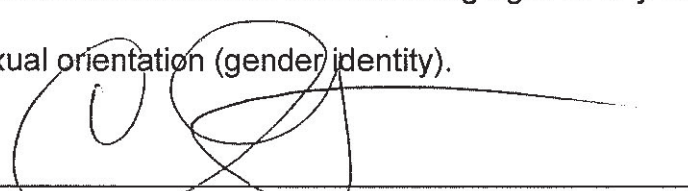
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**ORDER**

A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS 659A.850(4), and to eliminate the effects of Respondents' violations of ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C), (b) and as payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Sunstone Organics, LLC and Hugh Holiday aka Norman Luebbert** to deliver, within 60 days, to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for **Raven Spezialy** in the amount of:

- 1) ONE HUNDRED TWENTY-FIVE THOUSAND (\$125,000.00), representing compensatory damages for emotional and physical suffering experienced by Complainant as a result of Respondents' unlawful employment practices found herein; plus,
- 2) Interest at the legal rate on the sum of ONE HUNDRED TWENTY-FIVE THOUSAND (\$125,000.00), until paid.

B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and 659A.850(4), and to eliminate the effects of Respondents' unlawful employment practices found herein, the Commissioner of the Bureau of Labor and Industries hereby further orders **Respondents Sunstone Organics, LLC and Hugh Holiday aka Norman Luebbert** to cease and desist from discriminating against any employee based upon the employee's sexual orientation (gender identity).

  
\_\_\_\_\_  
Christina Stephenson, Commissioner  
Bureau of Labor and Industries

Issued On: \_\_\_\_\_

2/10/23