

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:

Case No. 05-21

**REYNOLDS CONSULTATION, INC,
dba SENIOR HELPERS OF SALEM,**

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

Respondent.

SYNOPSIS

The forum concluded that Respondent violated ORS 659A.030(1)(a), (b), (f); ORS 659A.199(1); OAR 839-005-0010; OAR 839-005-0030; OAR 839-010-0100; and OAR 839-005-0125 when it failed to take sufficient action to prevent unlawful harassment by Complainant's supervisor and terminated Complainant because of her sex and in retaliation for her complaints about unlawful harassment in the workplace. The forum concluded Complainant's supervisor took or caused tangible employment actions to be taken against Complainant, including her termination from employment, for which the Respondent was liable. OAR 839-005-0030(5). The forum awarded Complainant \$60,000 in damages for mental and emotional distress and \$204,575.11 for lost wages.

The above-entitled case came on regularly for hearing before Caroline A. Holien, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held May 24-25, 2022, via the Zoom video conference application.

1 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by
2 Administrative Prosecutor Anita Smith, an employee of the Agency. Complainant
3 Donna Bennett ("Bennett") was present throughout the hearing.

4 Respondent Reynolds Consultation, Inc., dba Senior Helpers of Salem ("Senior
5 Helpers") was represented by Lucas W. Reese, attorney at law. James Reynolds ("J.
6 Reynolds"), Senior Helpers Owner, was present throughout the hearing as
7 Respondent's authorized representative.

8 The Agency called Bennett; James Pappas ("Pappas"), Senior Investigator, Civil
9 Rights Division; Nichole Elliott ("Elliott") and J. Reynolds as witnesses. Respondent
10 called J. Reynolds as its only witness. The parties stipulated to the admission of
11 Agency Exhibits A1, A3, A5-A8, A10-A14, A16-A23, A26-A32, A34-A36, A39-45, A47-
12 A48, A52, A55, A62-A67¹ and Respondent Exhibits R1-R15. The Agency withdrew
13 Exhibits A2, A4, A9, A15, A24, A25, A33, A37, A38, A46, A49, A50, A51, A53, A56,
14 A57, and A58-A61. Exhibits A52, A63 and A64 are subject to the terms of the
15 Protective Order issued on January 21, 2022. Identifying information of non-parties was
16 redacted in Exhibit A55 to protect those individuals' privacy rights.

17 The parties submitted post-hearing briefing on the issue of the amount and
18 nature of damages, if awarded in this matter, which were timely filed on June 3, 2022.
19 Having fully considered the entire record in this matter, the Commissioner hereby
20 makes the following Findings of Fact (Procedural and on the Merits), Ultimate Findings
21 of Fact,² Conclusions of Law, Opinion, and Final Order.

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¹ Ex. A66A is a corrected copy of Ex. A66.

² The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact –
The Merits.

FINDINGS OF FACT – PROCEDURAL

1) On April 23, 2019, Bennett filed a verified complaint with the Agency's Civil Rights Division alleging Senior Helpers engaged in unlawful employment practices on the basis of her gender by subjecting her to severe and pervasive sexual harassment. Bennett further alleged she was discharged in retaliation for opposing an unlawful practice. (Ex. A1)

2) On April 22, 2020, after investigation, the Civil Rights Division issued a Notice of Substantial Evidence Determination in which it found "substantial evidence of an unlawful practice based on gender/sexual orientation, pursuant to ORS 659A.030(1)(a), (b), (f) in that Complainant was subjected to severe or pervasive sexual harassment and was terminated from employment for opposing an unlawful employment practice." (Ex. A14)

3) On July 20, 2021, the Forum issued a Notice of Hearing to Respondent, the Agency, and Complainant stating the time and place of the hearing as January 25, 2022, beginning at 9:30 a.m., at the Offices of the Bureau of Labor and Industries, 3865 Wolverine Street NE, Building E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's Formal Charges, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice explaining the significance of the Notice of Hearing, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

4) The Formal Charges included the following allegations:

a. "Respondent discriminated against Complainant in compensation or in terms, conditions or privileges of employment based on Complainant's sex in violation of ORS 659A.030(1)(b) and OAR 839-005-0030(1)(a), (A), (B), (b), (2), (3), (4)(a), (d), (5)(a), (b), (A), (B), (6), (7), (8) and/or (9)."

1 b. "Respondent discharged, expelled, subjected Complainant to adverse
2 treatment, discriminated against and/or retaliated against Complainant because
3 Complainant opposed an unlawful practice or what Complainant reasonable
4 believed to be an unlawful practice in violation of ORS 659A.030(1)(f); OAR 839-
005-0125(2)(a)(A), (b) and (c); OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I),
(II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (h)."³

5 c. "Respondent discharged Complainant from employment because of
6 Complainant's sex in violation of ORS 659A.030(1)(a); OAR 839-005-
0030(1)(a)(A), (B), (b), (2), (3), (4)(a), (d), (5)(a), (b), (A), (B), (6), (7), (8) and/or
7 (9)."

8 d. "Respondent discharged, demoted, suspended and/or in any manner
9 discriminated and/or retaliated against Complainant for the reasons that
10 Complainant had in good faith reported information that Complainant believed
11 was evidence of a violation of a state or federal law, rule or regulation in violation
of ORS 659A.199(1); OAR 839-010-0100(1); OAR 839-005-0010(1)(a), (b), (c),
(d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f)
and/or (h)."

12 (Ex. X2b)

13 5) On July 28, 2021, the forum issued an Interim Order Re Temporary
14 Procedures and Requiring Case Summaries, which included notice that the parties were
15 to file documents by email only, and set January 11, 2022, as the deadline for filing
16 Case Summaries. (Ex. X3)

17 6) On August 6, 2021, Senior Helpers filed Respondent's Answer to Formal
18 Charges in which it denied several of the allegations set forth in the Formal Charges
19 and admitted the following:
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23 ³ Based on the evidence presented at hearing, the forum understands this to be a scrivener's error and
24 understands the correct citation to be to OAR 839-005-0010(4)(g), which references harassment by non-
25 employees. ("An employer is liable for harassment by non-employees in the workplace when the
employer or the employer's agents knew or should have known of the conduct unless the employer took
immediate and appropriate corrective action. In reviewing such cases, the division will consider the extent
of the employer's control and any legal responsibility the employer may have with respect to the conduct
of such non-employees.

1 a. "[A]t sometime during her employment, Mr. Smith engaged in unwelcome
2 interactions towards complainant."

3 b. "[C]omplainant made a good faith complaint regarding Mr. Smith's conduct
4 towards her" and "opposed Mr. Smith's behavior by complaining about such
5 behavior on or about August 1, 2018."

6 c. "[I]t replaced Mr. Smith with Nichole Elliot for the day-to-day duties of the
7 operations director on or about August 3, 2018. Mr. Smith continued as a
8 consultant to assist in the transition to a new full-time operations director, though
9 respondent's owner took steps to ensure no interaction between Mr. Smith and
10 any of respondent's employees other than respondent's owner."

11 d. "It hired Samantha Torres as its new full-time operations director, and
12 Torres terminated Complainant's employment on January 3, 2019, after she had
13 taken vacation over the holidays in 2018."

14 e. "Respondent abandoned a plan to allow Mr. Smith to return with the home
15 staff after receiving staff complaints and cut all ties with him, including their
16 consulting relationship."

17 (Ex. X4, ¶¶ 5, 14-17, 20-22, 23)

18 7) On August 6, 2021, Senior Helpers filed a Motion to Postpone Contested
19 Case Hearing citing a scheduling conflict. The Agency did not object. (Ex. X5)

20 8) On August 19, 2021, the forum issued an Interim Order Re Respondent's
21 Motion to Postpone granting the motion to postpone. (Ex. X6)

22 9) On August 20, 2021, the forum issued an Interim Order Re New Hearing
23 Date and Case Deadlines setting February 15, 2022, as the deadline for filing Case
24 Summaries, and rescheduling the hearing to begin March 1, 2022. (Ex. X7)

25 10) On January 11, 2022, the Agency filed an Unopposed Agency Motion for
Protective Order seeking a protective order for certain documents produced during the
course of discovery. The Agency requested the Protective Order permit the parties to
designate those documents subject to the terms of the Protective Order as
"Confidential-Subject to Protective Order." (Ex. X8)

1 11) On January 21, 2022, the forum issued an Interim Protective Order
2 granting the Agency's unopposed motion for a protective order. (Ex. X9)

3 12) On February 10, 2022, the Agency filed its Agency Motion to Change
4 Place of Hearing requesting the hearing be held via video conference due to the health
5 risks associated with the ongoing COVID-19 pandemic. (Ex. X10)

6 13) On February 11, 2022, the Agency filed Amended Formal Charges, which
7 included additional information pertaining to efforts Complainant made to oppose and to
8 report sexual harassment by her supervisor in January 2018, March 2018, July 30,
9 2018, and August 2018, under the heading, "The Bases for Unlawful Discrimination are
10 That." (Ex. X11, pp. 3-7)

11 14) On February 15, 2022, the parties filed their Case Summaries. Included
12 with the Agency's Case Summary was a set of Stipulated Facts set forth below:
13

- 14 a) "Respondent employs one or more persons in the state of Oregon."
15 b) "Respondent is a "person" within the meaning of ORS 659A.001(9)(a),
16 OAR 839-003-0005(12), OAR 839-005-0125(3) and OAR 839-005-
17 0003(12)."
18 c) "Respondent is a "respondent" within the meaning of ORS 659A.001(12),
19 OAR 839-003-0005(13), and OAR 839-005-0003(14)."
20 d) "Respondent is an "employer" within the meaning of ORS 659A.001(4)
21 and OAR 839-005-0003(5)."
22 e) "Complainant, Donna Bennett, (hereinafter "Complainant") identifies as
23 female."
24 f) "On or about September 18, 2017, Respondent began employing
25 Complainant as a marketing / community relations director."
 g) "Between approximately September 18, 2017, and approximately early
August 2018, Richard Lynn Smith (hereinafter "Smith"), was
Complainant's supervisor and Respondent's Operations Director."

- 1 h) "On or about August 1, 2018, Complainant submitted a written complaint
2 to Respondent's human resources specialist, Dara Queen ("Queen"),
3 regarding unwelcome interactions Complainant alleges she suffered from
4 Smith during her employment with Respondent."
5
6 i) "Respondent commenced an investigation into Complainant's written
7 complaint and found Smith had engaged in unwelcome behavior towards
8 Complainant and others."
9
10 j) "In approximately August 2018, Respondent replaced Smith with Nichole
11 Elliott ("Elliott") as Complainant's supervisor and as Interim Operations
12 Director."
13
14 k) "On or about December 17, 2018, Respondent replaced Nichole Elliott
15 with Samantha Torres ("Torres") as Complainant's supervisor and as
16 Interim Operations Director."
17
18 l) "On or about January 3, 2019, Respondent terminated Complainant's
19 employment."
20
21 m) "Complainant was unemployed from on or about January 3, 2019, until
22 approximately August 2019."
23
24 n) "Complainant worked part-time at Oregon Rental Property Management
25 as an Office Manager from approximately August 2019 until approximately
March 2020. Complainant earned approximately \$17 per hour and worked
approximately 20 hours per week in 2019 for Oregon Rental Property
Management. Complainant earned approximately \$13,178.50 during her
employment with Oregon Rental Property Management."
o) "Complainant worked at Pacifica Calaroga Terrace LLC aka Trion
Solutions II aka Cobon as a Sales Marketing Director from approximately
November 2019 until approximately January 2020. Complainant earned
approximately \$11,998.17 during her employment with Pacifica Calaroga
Terrace LLC aka Trion Solutions II aka Cobon."
p) "Complainant worked at RSL Salem LLC aka Farmington Square as a
Sales Marketing Director from approximately January 2020 until
approximately March 2020. Complainant earned approximately \$8,844.23
during her employment with RSL Salem LLC aka Farmington Square."
q) "Complainant worked at MSNW Group LLC as a Regional Sales and
Marketing Manager from approximately September 2020 until
approximately late April 2021. Complainant earned approximately
\$45,108.57 during her employment with MSNW Group LLC."

1 r) "Complainant was unemployed from approximately late April 2021 until
2 approximately September 2021."

3 s) "Complainant worked for Pacific Row Senior Living aka Pacific Grove
4 Senior Living aka Forest Grove Senior Living LLC as the Sales Marketing
5 Director from approximately September 2021 until approximately late
6 October 2021. Complainant earned approximately \$12,820.03 during her
7 employment with Pacific Row Senior Living aka Pacific Grove Senior
8 Living aka Forest Grove Senior Living LLC."

9 t) "Complainant worked at HOLI Senior Living and Senior Services of
10 America as the Marketing Director from approximately November 2021
11 until approximately December 2021. Complainant earned approximately
12 \$6,250 during her employment with HOLI Senior Living and Senior
13 Services of America."

14 u) "Since approximately December 2021, Complainant has worked at Sinceri
15 Senior Living aka Senior Living EE Group, LLC as Community Relations
16 Director."

17 (Exs. X12-X13)

18 15) On February 16, 2022, the forum issued an Interim Order Re ALJ Change
19 assigning the matter to ALJ Caroline Holien. (Ex. X14)

20 16) On February 17, 2022, Senior Helpers filed Respondent's Answer to
21 Amended Formal Charges. (Ex. X15)

22 17) On February 28, 2022, Senior Helpers notified the forum that its counsel
23 would not be available for hearing due to a personal matter and requested the matter be
24 rescheduled. The Agency did not object to the request. (Forum File)

25 18) On March 3, 2022, the forum issued an Interim Order Rescheduling
Hearing setting the hearing to begin on May 24, 2022, the date the parties agreed upon.
(Forum File)

1 19) On May 19, 2022, the Agency filed its Third Addendum to Agency Case
2 Summary. (Ex. X21) (see Exs. X16-X20 for the First and Second Addendums to
3 Agency Case Summary)

4 20) On December 1, 2022, the ALJ issued a Proposed Order that notified the
5 participants they were entitled to file exceptions to the Proposed Order within ten days
6 of its issuance. On December 8, 2022, the Agency and the Respondent timely filed
7 exceptions to the proposed order.
8

9 **FINDINGS OF FACT – THE MERITS**

10 1) Senior Helpers is a local franchise that provides in-home care to
11 individuals requiring day to day assistance. Senior Helpers is owned by James and
12 Melanie Reynolds. (Testimony of J. Reynolds; Ex. A6)

13 2) Senior Helpers did not have an employee handbook at the time of
14 Bennett's hire. (Testimony of Bennett and J. Reynolds)

15 3) Bennett received a copy of Senior Helpers' Harassment Policy at the time
16 of hire that she signed on September 17, 2018. The Harassment Policy outlined what
17 conduct Senior Helpers considered to be sexual harassment and provided the following
18 reporting procedure:

19 "Any employee who believes that he/she has been the victim of
20 harassment should report the alleged conduct immediately to his/her
21 supervisor or to the Company's employee counselor. An investigation of
22 the complaint will be conducted in accordance with Reynolds
23 Consultation, Inc., procedures. Sanctions against employees for sexual
24 harassment may range from reprimand to termination depending on the
severity of the conduct and the circumstances of the particular case. Any
questions should be directed to your immediate supervisor or senior
management."

25 (Testimony of Bennett; Exs. A27, R4)

1 4) Bennett received a copy of Senior Helpers' Employee Equal Opportunity
2 Policy, which provided that Senior Helpers "fully complies with applicable federal, state,
3 and local laws concerning equal employment opportunity" and set forth its policy
4 prohibiting discrimination in the workplace. Bennett also received a copy of Senior
5 Helpers' Employee Work & Ethics Agreement. Bennett signed both policies on
6 September 18, 2017. (Testimony of Bennett; Exs. A27, R5, R6)

7 **Bennett's Role as Marketing/Community Relations Director**

8
9 5) As Operations Director, Smith was Bennett's direct supervisor and was
10 responsible for managing the daily operations of the business as the Reynolds
11 transitioned to retirement. Neither of the Reynolds were in the office on a regular basis
12 and relied upon information provided by Smith to make business decisions. (Testimony
13 of Bennett, J. Reynolds)

14 6) Bennett applied for the Marketing/Community Relations Director position
15 after being asked to do so by Smith. At the time Bennett was working as an
16 administrator at a local assisted living facility that had the same referral sources as
17 Senior Helpers. Bennett interviewed with the "whole team," including Smith and J.
18 Reynolds. Bennett presented as a superior candidate and was hired for the position.
19 (Testimony of Bennett, J. Reynolds)

20
21 7) Bennett's duties included marketing, advertising, networking, sales and
22 social media. There were no other employees in the marketing department at the time
23 of Bennett's employment. (Testimony of Bennett)

24 8) Bennett was required to enter her contacts with referral sources and
25 potential leads in ClearCare, which, in turn, formed the basis for weekly Community

1 Relations Contact reports ("CRC reports"). CRC reports tracked new prospect
2 appointments, meetings with referral sources, "closed deals," presentations made, and
3 networking events attended. Smith used the CRC reports to track Bennett's marketing
4 efforts and form projections based upon that information. (Testimony of Bennett, J.
5 Reynolds; Ex. A55)

6 9) Bennett's job duties also included listening to phone calls received by
7 Pronexis, which is a platform used by assisted living facilities to handle inquiries from
8 prospective clients. Bennett was required to determine if the calls were handled
9 appropriately and to follow up on any potential leads. Bennett spent several hours each
10 week reviewing calls and following up with potential leads. (Testimony of Bennett)

11 10) Senior Helpers provided Bennett with a vehicle that she was to use only
12 for business related travel during the workday. There was a GPS tracker on the vehicle
13 that had been used to track the vehicle prior to Bennett's hire and remained on the
14 vehicle during her employment with Senior Helpers. (Testimony of Bennett; Exs. A21,
15 R7)

16 11) Bennett's annual salary was \$50,000. Bennett was eligible to receive a
17 4% bonus based upon profits in excess of \$93,000, which was calculated and paid on a
18 bi-weekly basis. From January 2018 through June 2018, Bennett received bonus
19 payments totaling \$19,234.74. Bennett also received a \$500 monthly stipend to be
20 applied to her COBRA health insurance benefits. Bennett was not eligible for overtime
21 pay for hours worked in excess of 40 hours per week. (Testimony of Bennett; Exs. A45,
22 R2, A44, p. 4)

1 **Smith's Conduct Toward Bennett**

2 12) Bennett's relationship with Smith became "weird" shortly after she began
3 working for Senior Helpers. Smith regularly commented on Bennett's attire and
4 appearance, as well as her body and her attractiveness. Smith's comments were
5 unwanted by Bennett and made her feel uncomfortable. (Testimony of Bennett)

6 13) Smith informed Bennett shortly after she was hired that he had found her
7 on the social media dating platform PlentyofFish.com and that "they had matched
8 100%." Smith told Bennett that he had "really enjoyed" looking at all of her pictures,
9 which made Bennett feel uncomfortable. Bennett blocked Smith so he could not access
10 her profile on that and or any other social media website. (Testimony of Bennett)

11 14) Bennett first learned that Smith could monitor her use of the employer-
12 owned vehicle when Smith confronted her and demanded to know why she had stopped
13 at a certain address. Bennett explained to Smith that she had stopped at her son's
14 house, which was between two work-related stops she had scheduled that day, so she
15 could use the restroom. (Testimony of Bennett)

16 15) A few months after she had started working for Senior Helpers, Smith
17 invited Bennett to join him on a ski trip to his cabin in Bend, Oregon. Smith suggested
18 he could get free lift tickets for Bennett's four children. Bennett responded by telling
19 Smith that it "was never going to happen" and that she "would not have sex with him."
20 Smith later became angry with Bennett when he learned that she had told the front desk
21 receptionist about his invitation and suggested he could get lift tickets for the
22 receptionist's children as well. Smith called Bennett a "loudmouth troublemaker" and
23 accused her of spreading rumors. (Testimony of Bennett)

1 16) Bennett's working relationship with Smith became strained after she
2 declined his invitation to accompany him to his Bend cabin. Smith began telling Bennett
3 frequently that she "was not worth anything" and criticized her attire as being too tight or
4 too short even though her wardrobe had not changed. Smith became highly critical of
5 Bennett's performance and began "micromanaging" her work. (Testimony of Bennett)

6 17) Bennett wanted to file a complaint regarding Smith's behavior but was
7 reticent to do so because she was fearful that she and her son, who also worked for
8 Senior Helpers at the time, would be fired due to the friendship between Smith and J.
9 Reynolds. Bennett understood Smith and J. Reynolds to be close, personal friends who
10 frequently socialized together outside of work. (Testimony of Bennett)

11 18) In January 2018, Bennett approached J. Reynolds and asked who she
12 should talk to about her workplace concerns, including Smith's frequent criticism and
13 micromanagement of her daily work. J. Reynolds directed Bennett to speak to Smith.
14 (Testimony of Bennett, J. Reynolds; Exs. A6, p. 2, A10)

15 19) In approximately March 2018, Bennett left a voice mail message for J.
16 Reynolds that she termed a "confidential voice mail" requesting a "confidential" meeting.
17 Bennett did not give a reason for her meeting request but asked for another woman to
18 be present for the meeting. Bennett felt compelled to request the meeting, because she
19 sensed that Smith was "going after" another female employee and she wanted to
20 protect that employee. (Testimony of Bennett)

21 20) J. Reynolds sent Smith to meet with Bennett. Smith was accompanied by
22 Respondent's human resources specialist, Dara Queen, when he met with Bennett.
23 Smith asked Bennett why she wanted to meet and told her that only he was allowed to
24
25

1 communicate directly with the Reynolds. Bennett did not make a formal complaint at
2 that time, because she believed it would have been futile. (Testimony of Bennett)

3 **Bennett's Calendar Entries**

4 21) In February 2018, Bennett began noting events on her calendar in which
5 she felt Smith was micromanaging her or was unfairly critical of her performance.
6 Bennett entered her calendar notes at or near the time of the event. (Testimony of
7 Bennett; Exs. A22, R10⁴)

8 22) On February 5, 2018, Bennett noted that Smith criticized her marketing
9 approach, which included visiting various facilities in the area and leaving treats or other
10 gifts for the staff. Bennett believed this approach led to increased referrals from that
11 facility. Bennett's February 5, 2018, calendar entry included:

13 "Reiterated: for the 3rd time wants me visiting Dr.'s offices and hospitals.
14 Told me no networking meetings doesn't see any sense in it – told him we
15 have had 3 referrals from it. He said that wasn't enough for 7 months. He
16 said he wants me to network on my own time. He told me that I can go to
the Retirement Connections Networking but only wants me to go to the
first 15 minutes and leave. I told him I wasn't going to do that (I will not
jeopardize my reputation)."

17 (Ex. A22, p. 1)

18 23) Bennett made similar notations in her calendar on February 9, February
19 13, and June 11, 2018. (Ex. A22, pp. 1,7)

20 24) Bennett's February 9, 2018, calendar entry notes Bennett's concern that
21 Smith was using the tracker on her employer provided vehicle to track her movements
22 during the day. (Ex. A22, pp. 1,7)

24
25 _____
⁴ References to specific pages of Bennett's calendar will be made using Ex. A22 for the sake of clarity.

1 25) Bennett's February 13, 2018, calendar entry notes Smith told Bennett that
2 Melanie Reynolds did not believe Bennett's job was necessary but Smith and J.
3 Reynolds "would have her back." Bennett's note included:

4 "He needs to be able to prove that I'm worth the money they pay [me]."
5 Bennett's March 5, 2018, note includes mention that Smith told her that he
6 did not see how she had contributed to the growth of the company.

7 (Ex. A22, pp. 2-3, 7)

8 26) Bennett's March 12, 2018, calendar entry notes that Smith told her that he
9 needed her to be in the field 80% of the time and that she needed to dress more
10 appropriately "(no mini-skirts or low cut shirts)." Bennett also noted that Smith told her
11 that he was tired of her "sitting back and raking in all the money from the sweat of [the]
12 team." (Ex. A22, pp. 4, 7)

13 27) Bennett's May 16, 2018, calendar entry includes:

14 "Lynn called me at work on his day off [and] asked me why I was
15 spreading rumors and when I said I wasn't, he said that from previous
16 experience he knows that's a lie. He then said a multitude of people say
17 that I was dressed inappropriately and continued to yell at me. Not doing
18 my job, not getting in front of people. He needs me in the field and all I do
19 is go around office to office and not work. He's talked to me about...my
20 clothes. He pays me a lot of money to do a job and he's not seeing any
21 results that he can account to me. He was not letting me explain that I
22 was. He would just say nothing that is happening he can contribute to me
23 and that he is going to change my bonus structure. I ended up crying and
24 couldn't stop."

25 (Ex. A22, pp. 5, 7)

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27 ///

1 28) Bennett's June 11, 2018, calendar entry includes:

2 "Meeting – Lynn has indicated that he now wants me to visit dependent
3 and assisted and why haven't I been (previously he said why was I visiting
4 those when they have their own caregivers). He also said that he wants
me to focus on all places in one area when before he has told me I have
to visit all hospitals [twice] weekly – three times for Salem."

5 (Ex. A22, p. 6)

6 29) Bennett's June 25, 2018, calendar entry includes:

7 "CRC Meeting (weekly)

8
9 Lynn talked to me about my weekly report and all the places I visited. He
asked if all data was put into ClearCare. I told him all but one or two and I
would finish those before I left. He asked about hiring another CRC to
10 help me. I said it could be a good idea [because] the large area to cover
and that we would need someone down south. I said I'd like to keep
11 Salem, Dalles, Mammoth, Independence, Slayton, and Silverton he said
that he would probably have me take ... Albany and Corvallis because of
12 BNI and all the work I was doing there. I told him that wouldn't be my
13 preference. He said he gets to make that choice and he'll do what he
thinks is right for the company. Went over weekly schedule – talked to
14 him about presentation at Center 50+ and that Dara was coming with me."

15 (Ex. A22, pp. 8-9)

16 30) Bennett's June 26, 2018, calendar entry includes:

17 "Lynn called while I was driving. I pulled off the freeway to talk to him. He
18 asked what happened yesterday. I went over my day activities. He asked
what happened at Center 50+. I told him I didn't have the correct
19 presentation but that we used the A+D presentation and talked more
about ... and that Kay and the reviews said it went pretty well. He said
20 why did Kay call looking for me. I said we were set up by 1:45. He asked
when we were asked to be there? I said 30 to 46 minutes before. He said
21 he had talked to Kay and she's going to say it went okay to my face. I
asked what did she say. He asked why he did he have to hear about all
22 this from Jim. I told him I thought he already knew because of the email
he sent me at 4:06 yesterday. He said how was he to know I talked to Jim
23 earlier in the day. I told him that I figured he was busy and didn't send it
24 out till later. He said I didn't understand how bad this was. I assured him I
25 did.

1 "He said we get referrals from Center 50+ and that how we looked liked
2 we were unprofessional. I said we got pretty good reviews. He asked
3 where were they and I told him on my desk. He said that numbers are
4 down and why aren't I getting any more referrals. I said the two we [got]
5 last week were pretty big (24 hours) and now we're getting little ones. It
6 takes time. He asked why I took Dara with me. I said because he wanted
7 her and Nichole to take over. He said only the Gems. I told him that I
8 didn't understand that. He asked why I wasn't prepared. I said I had
9 looked for the presentation and couldn't find it. I told him that I don't get
10 enough office time and I forgot about it until it hit my calendar week of. He
11 asked why I hadn't asked him. I said because previously he had me
12 talking to Jim about all presentations. He said not that Jim showed him
13 where everything was. I said okay I'll ask him. He said he was going to
14 have a meeting with Jim to see about who's going to do presentations."

15 (Ex. A22, pp. 8,10)

16 31) Bennett's June 27, 2018, calendar entry includes:

17 "9:30 meeting with Lynn. I went out and apologized to him for not being
18 prepared for the presentation. He asked what about it. I said not having
19 the correct slides. He said when was this scheduled. It said about four
20 months ago and I had originally looked on the M: drive but couldn't locate
21 it. Since I'm not in the office a lot, I completely forgot till it was on my
22 calendar for the week. He said what really made him mad is that it was
23 the first he heard of it.

24 "He said that he didn't want to be checking up on me...telling me how to
25 do my job that they pay for a professional and I'm not giving them and as
much as I'm paid he shouldn't have to tell me how to do my job or to
check up on me that he doesn't have time. He said that he has to tell me
where to go...He said the reports are supposed to be in on time. I said
that to confirm the CRC Report is due by 10 and that ClearCare is due by
noon on Monday. He said that was correct. It said that I did have them in
on time this week. He said he was generalizing for the last few weeks.
He said this was a formal reprimand. I said I was wrong for not being
prepared for the presentation on Monday and I'm sorry for that."

26 (Ex. A22, p. 8, 10 – portion of second paragraph is illegible)

27 **Bennett's Issues in the Workplace**

28 32) On February 22, 2018, Smith sent an email to Queen noting that he had a
29 situation involving Bennett in which she failed to follow up with a new lead,

1 approximately three days after the individual requested information. Smith noted a
2 verbal coaching was issued and asked that the information be added "to the ongoing
3 documentation file of Donna Bennett." (Ex. A28)

4 33) On or about March 16, 2018, Smith yelled at Bennett for being in the office
5 rather than in the field. Bennett had received information related to the scheduling of a
6 client who received 24-hour services, which she left for another employee to follow up
7 on after being ordered out of the office by Smith. Bennett sent an email to the
8 employee explaining the situation and left documents related to the client in a basket on
9 the employee's desk. The employee never acted on the information and, as a result,
10 Senior Helpers lost the client. Bennett later learned that the employee was engaged in
11 a sexual relationship with Smith. (Testimony of Bennett)

13 34) On May 7, 2018, Elliott addressed issues she observed in care plans
14 completed by Bennett. Care plans are used by Senior Helpers staff to identify a client's
15 specific needs and outline the services required. Bennett told Elliott that she did not
16 prepare care plans that frequently and often forgot what was needed in each section.
17 Bennett told Elliott it took her several hours to complete care plans, which were low on
18 her list of priorities given her other assigned duties. Ultimately, care plan preparation
19 was assigned to the Client Services Manager due to the time constraints Bennett had
20 as a result of her other duties. (Testimony of Elliott; Ex. A44, pp. 32-33)

22 35) On June 25, 2018, Smith sent Bennett an email outlining issues he had
23 addressed with her during the previous weeks, including her attire and appearance;
24 timely completion of CRC reports; amount of time spent in the field; and Bennett's
25

1 marketing efforts. Smith sent the email to Queen to be included in Bennett's personnel
2 file. (Ex. A44, pp. 31-33)

3 36) On July 20, 2018, Bennett and Smith attended an event at the 50+ Center
4 when Bennett sent Smith a picture of a sign at a vendor's stand via text messaging
5 questioning the dimensions of the sign. Bennett later met Smith outside the restroom.
6 Smith excused himself to go to the restroom and returned to where Bennett was
7 standing. Smith pointed to his crotch and told Bennett that "it was large and very
8 visible." Smith then said he had not been that embarrassed since seeing a picture of a
9 catheter at a nurse's desk at the office. (Testimony of Bennett; Ex. A6)

10 37) In September 2018, Senior Helpers stopped paying Bennett's monthly
11 stipend of \$500 for health insurance with little explanation. (Testimony of Bennett)

12 **Bennett's Complaint Regarding Smith**

13 38) On or about July 31, 2018, Bennett sent a text message to Smith
14 informing him of a family emergency that required her to attend to her brother's children.
15 Smith told Bennett that if she did not report for work that she would be fired. Bennett
16 reported to the office as Smith ordered. (Testimony of Bennett)

17 39) Bennett felt Smith was unreasonable in ordering her to report to the office
18 when she needed to care for her brother's minor children. Bennett felt Smith's order
19 was merely a continuation of his harassment. (Testimony of Bennett)

20 40) On August 1, 2018, Bennett filed a written complaint alleging Smith had
21 sexually harassed her in the workplace. Bennett's complaint was addressed, "To the
22 Department of Human Resources," and included copies of her notes and text messages
23 between her and Smith. (Testimony of Bennett; Exs. A17, R7)

1 41) Queen and Respondent's co-owner Melanie Reynolds interviewed every
2 individual mentioned in Bennett's complaint, including Smith and Bennett. The notes
3 taken from each interview are signed by Melanie Reynolds, Queen, and the individual
4 interviewed. Those employees interviewed generally described Smith as treating
5 employees harshly and responsible for creating a tense and stressful work environment.
6 (Exs. A19, R9, R12⁵)

7 42) One individual reported that Smith treated Bennett "differently" and
8 frequently questioned her attire and talked about her clothing with other employees.
9 The individual noted that Smith treated Bennett "like she's a target." (Ex. A19, pp. 1-2)

10 43) One individual reported overhearing Bennett's side of a telephone
11 conversation with Smith in which it sounded like Bennett was "under attack." The
12 individual reported hearing Bennett say, "but the skirt I was wearing was only two inches
13 above my knees." The individual described having to console Bennett because she
14 was so upset after the telephone call had ended. (Exs. A19, pp. 7-8, A23)

15 44) Another individual confirmed that Smith was "too harsh a lot with Donna"
16 and he often commented on Bennett's whereabouts. Another individual confirmed that
17 Smith "berated" Bennett. It was noted by one individual that the female employee with
18 whom Smith was having a sexual relationship dressed "way worse" than Bennett, who
19 was described as looking "work appropriate." (Ex. A19, p. 7-8)

20 45) One individual described Smith as treating the female employee with
21 whom he was having a sexual relationship preferentially as compared to his treatment
22 of other employees. The individual described Bennett as being "berated" by Smith and
23
24
25

⁵ References to specific notes will be made using Ex. A19 for the sake of clarity.

1 that Smith had once commented that Bennett's skirt was "so short [he] could see
2 everything." (Ex. A19, p. 9-14)

3 46) J. Reynolds ultimately decided to transfer supervision of Bennett to Elliott.
4 On August 3, 2018, Bennett was informed that Elliott was her new supervisor.
5 (Testimony of Bennett, Elliott; Exs. A6, p. 9, A34)

6 47) On August 7, 2018, when Queen advised Smith that he would be
7 interviewed, Smith began "yelling and screaming" and demanded to know information
8 regarding Bennett's situation. Elliott secured the security video after Queen reported it
9 to her. Elliott immediately reported the incident to J. Reynolds. (Testimony of Elliott)

10 48) J. Reynolds called a staff meeting later that day in which J. Reynolds
11 announced that Smith would be staying on as Operations Director, but he would be
12 apologizing for his behavior. After Smith spoke, several employees walked out of the
13 meeting and left the office. J. Reynolds called Queen, who had gathered with the
14 employees at a nearby coffee shop, and told her that it was his fault and asked Queen
15 and the other employees to return to the office. Smith offered a half-hearted apology for
16 his behavior after the employees returned to the office. (Testimony of Bennett, Elliott)

17 49) J. Reynolds ultimately decided that Smith could no longer work as the
18 Operations Director due to the apparent dissatisfaction of the staff with Smith.
19 (Testimony of J. Reynolds)

20 50) On or about August 7, 2018, Senior Helpers "terminated" Smith's
21 employment as Operations Director. On August 16, 2018, Senior Helpers and Smith
22 entered into a separation agreement. (Testimony of J. Reynolds; Exs. A44, pp. 12-19,
23 R47-51)

1 **Elliott Named Interim Director of Operations**

2 51) Elliott became the interim Operations Director, an appointment that was to
3 be "reconsidered" after six months, after Smith's "termination." Elliott's role as interim
4 Operations Director was limited, and she was required to communicate with Smith
5 about all management issues. (Testimony of Elliott; Exs. A44, p. 39, A45)

6 52) J. Reynolds contracted with Smith as a consultant because he considered
7 Smith to be a "great data analyst." Despite the change in his employment status, Smith
8 continued performing the duties of the Operations Director but without the staff being
9 apprised of that fact. Reynolds directed Elliott to not tell the staff of his decision to retain
10 Smith as a consultant. (Testimony of J. Reynolds, Elliott; Exs. A10, A44, p. 12)

11 53) Bennett quickly figured out Smith was still involved in management after
12 noticing that Smith was included on several emails. (Testimony of Bennett; Ex. A11)

13 54) During her time as interim Operations Director, Elliott observed Bennett
14 regularly met sales goals and the office was generally on an "upswing." Smith and J.
15 Reynolds repeatedly expressed concerns about Bennett's performance. Elliott believed
16 that Smith and J. Reynolds focused more on projected sales rather than present
17 performance. Elliott tried explaining to both Smith and J. Reynolds that Bennett's job
18 was to obtain the referrals and potential leads, and she had no control if the client
19 ultimately cancelled the contract. Overall, Elliott considered Bennett's performance and
20 attendance acceptable. (Testimony of Elliott; Ex. A55)

21 55) In July 2018, Senior Helpers' total client hours, which is the measure by
22 which Smith determined the "health" of the business, was at a record high in July 2018
23 and continued being high over the next several months. (Ex. A44, pp. 41-43)

1 56) An opportunity to attend training on dementia arose while Elliott was
2 interim Operations Director. Bennett had previously expressed an interest in attending
3 the training. However, Smith and J. Reynolds decided not to send Bennett to the
4 training and, instead, sent Elliott and Queen. (Testimony of Elliott)

5 57) Smith and J. Reynolds often complained about Bennett to Elliott. J.
6 Reynolds told Elliott that he had received complaints from community members
7 regarding Bennett's conduct at an event in which she allegedly spoke about Smith's
8 harassment. Elliott tried to contact the individuals named by J. Reynolds, but both
9 individuals declined to make any comment. (Testimony of Elliott)

10 58) J. Reynolds asked Elliott twice to terminate Bennett. Elliott refused,
11 because there was only one warning in Bennett's human resources file. Elliott had not
12 observed any issues with Bennett's performance that she felt warranted termination.
13 (Ex. A11)

14 59) Elliott had personally only addressed one issue with Bennett. Elliott
15 approached Bennett with concerns about how she completed assessment forms. It
16 quickly became clear to Elliott that Bennett had not received the proper training on how
17 to complete the form. Elliott did not consider this issue to be reflective of Bennett's job
18 performance. (Testimony of Elliott)

19 60) J. Smith told Elliott several times while she was interim Operations
20 Director that she should discharge Bennett for performance issues. Elliott refused due
21 to concerns she had regarding the potential legal liability for discharging Bennett without
22 a sufficient basis for doing so. Smith repeatedly told Elliott to "watch" Bennett and
23 alluded to Bennett as being untrustworthy. (Testimony of Elliott)

1 61) J. Reynolds also directed Elliott to track Bennett "closely," which she
2 believed came from Smith. (Testimony of Elliott)

3 62) Elliott noticed that there was a difference in the information Smith used to
4 prepare his reports and the reports he actually generated. Smith's reports suggested
5 Bennett's performance was lacking. Smith's assessment appeared inconsistent to
6 Elliott given the successful performance of the business, which she believed was tied
7 directly to Bennett's performance. (Testimony of Elliott)

8 63) On October 24, 2018, J. Reynolds notified staff via email that the national
9 Franchise Operations Director would be in the office. The email included an agenda
10 that listed Smith as a presenter at the meeting. Several employees, including Bennett,
11 questioned Smith's role at the meeting, which resulted in J. Reynolds notifying staff that
12 Smith would not be attending the meeting. (Ex. A44, pp.109-120)

13 64) J. Reynolds sent the following email to staff:

14 "After careful consideration and listening to our valued team members,
15 Melanie and I agreed to terminate [Smith's] employment as an employee
16 of Reynolds Consultation, Inc. He remains terminated and will not be
17 rehired.

18 "Upon recommendation of the franchise and Melanie's and my decision,
19 we chose to use [Smith] for a period of time in a consulting role. Although
20 he has certain tasks to perform on behalf of the owners, [Smith] has not
21 and will not have any interface with any staff, other than Nichole [Elliott]."

22 (Ex. A44, pp. 121-123)

23 65) Elliott was involved in a car accident and was out of the office for one
24 week beginning December 17, 2018. When she returned to the office, she learned she
25 had been demoted and was given no reason for the demotion. (Testimony of Elliott)

1 66) Torres, who was the Office Manager at the time, took over as Operations
2 Director. Torres was also the employee with greatest seniority at the time. J. Reynolds
3 did not feel Elliott “was up to the challenges” facing the business based upon Smith’s
4 projections. (Testimony of J. Reynolds)

5 **Senior Helpers’ Employee Surveys and Team Member Handbook**

6 67) Senior Helpers sent out surveys to all employees about workplace issues
7 following the August 7, 2018, meeting. Each employee was required to complete the
8 survey. Several of the surveys returned referred to workplace issues with references to
9 “he” and “him,” which Elliott understood to be in reference to Smith. (Testimony of
10 Elliott; Ex. A44, pp. 28, 49-66)

11 68) In August 2018, Senior Helpers implemented a Team Member Handbook,
12 which was later reissued in December 2018. The most recent version of the handbook
13 includes Senior Helpers’ open door policy, as well as its policy prohibiting retaliation and
14 the EEO Statement and Nonharassment Policy. (Ex. A30, pp. 12, 14, 20-21)

15 **Bennett’s Termination**

16 69) From December 9, 2018, through January 2, 2019, Bennett was out of the
17 office for approved leave. (Testimony of Bennett)

18 70) J. Reynolds recommended Torres discharge Bennett based upon a
19 projected downward trend identified by Torres. J. Reynolds felt a different marketing
20 approach was needed. (Testimony of J. Reynolds)

21 71) On January 3, 2019, Torres and Queen discharged Bennett without
22 explanation. Torres’ purported reasons for discharging Bennett were due to poor
23 tracking of sales leads and a downturn in sales. (Testimony of J. Reynolds; Ex. A13)

1 72) Bennett and Torres previously had a dispute over how much money
2 Bennett was spending on “swag” that Bennett left as gifts and treats for local facilities
3 that were considered valued referral sources. Torres ultimately took over purchasing
4 and chose to purchase what Bennett believed to be inferior products. Bennett felt the
5 change in “swag” adversely affected her ability to obtain referrals from the various
6 nursing facilities. (Testimony of Bennett)

7 73) Bennett later learned that Torres, who she thought reported directly to J.
8 Reynolds, was actually reporting to Smith after his “termination.” (Testimony of Bennett)

9
10 **Senior Helpers’ Continuing Relationship with Smith**

11 74) On February 13, 2019, J. Reynolds announced at a staff meeting that
12 Smith would be returning as the Operations Director. A majority of staff left the meeting
13 in protest. J. Reynolds ultimately decided against bringing Smith back based upon the
14 staff’s demonstrated displeasure. (Testimony of Elliott, J. Reynolds)

15 **Credibility of the Witnesses**

16 75) The forum found all three witnesses who testified to be credible. To the
17 extent that the testimony of Bennett and Elliott described Smith’s conduct toward
18 Bennett and other employees, their testimony is considered more credible than the
19 testimony of J. Reynolds, who was in the office infrequently and not in a position to
20 personally observe several of the incidents described by Bennett and Elliott.

21
22 76) The forum relied upon information provided by individuals interviewed by
23 Melanie Reynolds and Queen as part of their investigation of Bennett’s August 1, 2018,
24 complaint. See Findings of Fact – the Merits ## 44-47. The notes from each interview
25 are signed by Melanie Reynolds, Queen, and the person interviewed. The forum finds

1 the notes sufficiently reliable as to be credible evidence of Smith's conduct toward
2 Bennett. (Exs. A19, R9, R12)

3 **Bennett's Damages as a Result of Smith's Harassment and Termination**

4 77) Bennett felt anxiety throughout much of her employment due to Smith's
5 repeated threats about her job security. Bennett worried about her ability to provide for
6 her family if she were to lose her job. (Testimony of Bennett)

7 78) Bennett was upset at being discharged from a job she "put her heart and
8 soul into." Bennett felt it was unfair that Smith was free to make inappropriate
9 comments about her appearance and to make frequent comments that "she wasn't
10 worth the money" she was being paid. Bennett often felt "less than" and was often
11 reduced to tears by Smith's conduct. (Testimony of Bennett)

12 79) Bennett sought mental health counseling after her discharge but had
13 difficulty establishing a relationship with a counselor due to not having insurance.
14 Bennett ultimately saw a counselor for approximately three months to deal with her
15 anger and sadness at her experience working with Smith and being discharged by
16 Senior Helpers. Bennett had to discontinue counseling because she did not have
17 insurance and did not qualify for any health care assistance. Bennett lost 25 pounds
18 due to her distress. (Testimony of Bennett)

19 80) Bennett had trouble paying her bills and had to seek financial help from
20 her son to pay her rent. Bennett's credit rating was "in the toilet" after her termination
21 from Senior Helpers. Bennett defaulted on loans she took out for her son's college
22 education. (Testimony of Bennett)

1 81) Bennett made reasonably diligent efforts to obtain similar employment
2 following her discharge from Senior Helpers. (Testimony of Bennett; Ex. A65)

3 82) Bennett was unemployed from January 3, 2019, through approximately
4 August 2019. (Ex. X13)

5 83) Bennett's annual compensation from her employment with Senior Helpers
6 was \$102,686.17 in 2018, and included her salary, bonuses and monthly COBRA
7 stipend. Bennett's average monthly compensation was \$8,557.18. (Ex. A66)

8 84) Bennett did not obtain similar or comparable employment until she began
9 working for Senior Living in approximately December 2021. As of April 30, 2022,
10 Bennett's average monthly earnings from Senior Living were \$8,987.12 (\$35,948.46
11 YTD / 4 months). (Exs. A52, A64)

12 85) Bennett suffered approximately \$204,575.11 in wage losses as a result of
13 her termination from Senior Helpers. (Ex. A66)

14 **CONCLUSIONS OF LAW**

15
16 1) At all times material herein, Senior Helpers was an "employer" within the
17 meaning of ORS 659A.001(4) and OAR 839-005-0003(5). Respondent employs one or
18 more persons in the state of Oregon. Respondent employed Bennett.

19 2) Senior Helpers is a "person" within the meaning of ORS 659A.001(9)(a),
20 OAR 839-003-0005(12), OAR 839-005-0125(3) and OAR 839-005-0003(12). Senior
21 Helpers is a "respondent" within the meaning of ORS 659A.001(12), OAR 839-003-
22 0005(13), and OAR 839-005-0003(14).

23 3) Senior Helpers, through the actions of Smith (Bennett's supervisor),
24 discriminated against Bennett on the basis of sex in violation of ORS 659A.030(1)(b)
25

1 and OAR 839-005-0030(1)(a), (A), (B), (b), (2), (3), (4) (a), (d), (5)(a), (b), (A), (B), (6),
2 and (7)

3 4) Senior Helpers discriminated against Bennett because she opposed an
4 unlawful practice or what she reasonably believed was an unlawful practice in violation
5 of ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-005-
6 0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A),
7 (B)(i), (ii), (f) and (g).

8 5) Senior Helpers discharged Bennett in retaliation for her good faith report
9 of information that she believed was in violation of state or federal law, rule or regulation
10 in violation of ORS 659A.199(1); OAR 839-010-0100(1); and OAR 839-005-0010(1)(a),
11 (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f)
12 and (g).

13 6) The actions of Bennett's supervisor are properly imputed to Respondent.
14 OAR 839-005-0030(3) and (4).

15 7) The Commissioner of the Bureau of Labor and Industries has jurisdiction
16 of the persons and of the subject matter herein. ORS 659A.800-ORS 659A.865.

17 8) Pursuant to ORS 659A.850(4)(a)(B), the Commissioner of the Bureau of
18 Labor and Industries has the authority under the facts and circumstances of this case to
19 issue a cease and desist order, including an award of compensatory damages to
20 Complainant, based on Respondent's unlawful practices. The sum of money awarded
21 and the other actions required of Respondents in the Order below are an appropriate
22 exercise of that authority.
23
24
25

OPINION

The Agency alleges that Senior Helpers discriminated against and discharged Bennett on the basis of sex in violation of ORS 659A.030(1)(a), (b) and OAR 839-005-0030(1)(a)(A), (B), (b), (2), (3), (4)(a), (d), (5)(a), (b), (A), (B), (6), (7), (8), and (9). The Agency further alleges Senior Helpers retaliated against Bennett because she opposed an unlawful practice or what she reasonably believed to be an unlawful practice in violation of ORS 659A.030(1)(f); OAR 839-005-0125(2)(a)(A), (b) and (c); and OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I),(II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (g). The Agency further alleges Senior Helpers retaliated against Bennett because she had in good faith reported information that she believed was evidence of a violation of a state or federal law, rule or regulation in violation of ORS 659A.199(1); OAR 839-010-0100(1); OAR 839-005-0010(1)(a), (b), (c), (d)(A), (B)(i)(I), (II), (4)(a)(A), (B), (C), (b), (c), (d)(A), (D), (e)(A), (B)(i), (ii), (f) and/or (g).

SEXUAL HARASSMENT

It is an unlawful employment practice for "[a]n employer, because of an individual's *** sex *** to *** discriminate against the individual in compensation or in terms, conditions or privileges of employment." ORS 659A.030(1)(b). Unlawful sexual harassment may take the form of *quid pro quo* harassment or hostile work environment harassment. *In the Matter of Bravo Event Service, Inc.*, 36 BOLI 250, 264 (2018).

A. SEXUAL HARASSMENT – QUID PRO QUO

OAR 839-005-0030(1)(a) defines *quid pro quo* sexual harassment as:

"(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:

1 (A) Submission to such conduct is made either explicitly or implicitly a term or
2 condition of employment; or

3 (B) Submission to or rejection of such conduct is used as the basis for
4 employment decisions affecting that individual.”

5 The Agency’s prima face case in a matter involving OAR 839-005-0030(1)(a)(A)
6 is as follows: (1) Senior Helpers was an employer subject to ORS 659A.001 to
7 659A.030; (2) Senior Helpers employed Bennett; (3) Bennett is a member of a protected
8 class (sex); (4) Smith engaged in unwelcome conduct (verbal or physical) directed at
9 Bennett because of her sex; (5) Bennett’s submission to this conduct was made an
10 explicit or implicit term or condition of her employment, or as the basis of employment
11 decisions affecting her. *See In the Matter of Bravo Event Service, Inc.*, 36 BOLI at 264-
12 265. The first three elements are established in that it is undisputed that Senior
13 Helpers is an Oregon employer that employed Bennett, a member of a protected class
14 (sex). The final two elements of the prima facie case remain in dispute.

15 1. Smith engaged in unwelcome verbal conduct directed at Bennett because of
16 her sex.

17 Bennett credibly testified that Smith initially approached her shortly after she was
18 hired and informed her that he had found her on a social media dating website and told
19 her that they “matched 100%.” Bennett testified that Smith made several comments
20 about her physical appearance and attire throughout her employment. Those
21 comments became increasingly more critical after her rejection of his invitation to Bend
22 and her pronouncement that she was never going to have sex with him.

23 The forum concludes that the conduct was unwelcome to Bennett based on her
24 testimony that it made her feel uncomfortable and evidence of record showing that other
25 employees observed Bennett’s emotional reaction to Smith’s comments. The forum

1 further concludes that Smith's conduct was because of Bennett's sex based on the fact
2 that Smith's initial overture to Bennett about matching on a social media dating website
3 and his frequent comments on her appearance and attire.

4 2. Bennett's submission to Smith's conduct was an implicit term of her
5 employment and ultimately formed the basis for employment decisions
6 affecting her.

7 The final element is whether Bennett's submission to Smith's conduct was made
8 an explicit or implicit term of her employment. Bennett credibly testified that Smith's
9 behavior markedly changed after she rejected his invitation and told him that "It was
10 never going to happen." Bennett testified that Smith became highly critical of her work
11 and suggested repeatedly that her employment was in jeopardy. Both Bennett and
12 Elliott testified that Smith frequently criticized Bennett's attire and appearance although
13 Bennett's choice of attire did not change while she worked for Senior Helpers.

14 The forum finds that Bennett's submission to Smith's conduct was an implicit
15 term of her employment. Bennett's testimony establishes that her employment was
16 secure until she refused Smith's invitation. At that point, it became increasingly
17 precarious as evidenced by Smith's frequent comments regarding Bennett's
18 performance and job security.

19 Further, Bennett's refusal to submit to Smith's advances ultimately formed the
20 basis of decisions affecting her employment. OAR 839-005-0030(1)(a)(B). The
21 evidence shows Smith became increasingly critical of Bennett's performance after she
22 rejected his Bend invitation. Smith's attacks on Bennett's performance, her attire and
23 appearance, and personal conduct became heightened and more regular. As a result,
24 Smith's frequent attacks on Bennett led to her discharge as discussed more fully below.
25

1 The Agency has established the final element of its prima face case of *quid pro*
2 *quo* harassment. The forum concludes that Senior Helpers violated ORS
3 659A.030(1)(b) and OAR 839-005-0030(1)(a)(A)(B). Senior Helpers is liable for this
4 harassment under OAR 839-005-0030(3) and (4) as discussed in more detail later in
5 this Opinion in the section titled "Liability."

6 **B. SEXUAL HARASSMENT – HOSTILE WORK ENVIRONMENT**

7 OAR 839-005-0030(1)(b) defines this form of sexual harassment as:

8 "Any unwelcome verbal or physical conduct that is sufficiently severe or
9 pervasive to have the purpose or effect of unreasonably interfering with
10 work performance or creating a hostile, intimidating or offensive working
environment."

11 The conduct must be sex-based. OAR 839-005-0030(1).

12 The standard for determining whether harassment based on an individual's sex is
13 sufficiently severe or pervasive to create a hostile, intimidating or offensive working
14 environment is "whether a reasonable person in the circumstances of the complaining
15 individual would so perceive it." OAR 839-005-0030(2).

16 The elements of a prima facie case in a hostile work environment case include:
17 (1) Senior Helpers was an employer subject to ORS 659A.001 to 659A.030; (2) Senior
18 Helpers employed Bennett; (3) Bennett is a member of a protected class (sex); (4)
19 Bennett was subjected to unwanted conduct because of her sex; (5) the unwelcome
20 conduct was sufficiently severe or pervasive to have the purpose or effect of
21 unreasonably interfering with Bennett's work performance or creating a hostile,
22 intimidating or offensive work environment for Bennett; and (6) Bennett was harmed by
23 the unwelcome conduct. *In the Matter of Vision International Petroleum, LLC*, 37 BOLI
24 187, 197-198 (2019).
25

1 As discussed above, the first four elements of the Agency's prima facie case
2 have been satisfied in that Senior Helpers is an Oregon employer that employed
3 Bennett, a member of a protected class (sex), who was subjected to unwelcome
4 conduct directed at her by Smith because of her sex.

- 5 1. Smith's unwelcome conduct was sufficiently severe or pervasive to have the
6 purpose or effect of unreasonably interfering with Bennett's work performance
7 or creating a hostile, intimidating or offensive working environment.

8 The standard for determining whether harassment based on an individual's sex is
9 sufficiently severe or pervasive to create a hostile, intimidating or offensive working
10 environment is "whether a reasonable person in the circumstances of the complaining
11 individual would so perceive it." OAR 839-005-0030(2); *Vision International*, at 198. In
12 making that determination, the forum looks at the totality of the circumstances, *i.e.*, the
13 nature of the conduct and its context, the frequency of the conduct, its severity or
14 pervasiveness, whether it is physically threatening or humiliating, and whether it
15 unreasonably interferes with an employee's work performance. *In the Matter of Andrew*
16 *W. Engel, DMD, PC*, 32 BOLI 94, 120 (2012).

17 ***Nature of the conduct and its context*** – The unwelcome conduct involved
18 Smith making or directing verbal comments of a sexual nature at Bennett in her work
19 environment.

20 ***Frequency*** – All of the unwelcome conduct occurred within the first few months
21 of Bennett's hire in September 2017 and continued through July 2018. After Bennett
22 rejected Smith's invitation to accompany him to Bend, Smith's comments about
23 Bennett's appearance and attire, while previously complimentary, turned highly critical.
24
25

1 Smith continued to comment on Bennett's appearance and attire to her supervisor and
2 to the owners even after his "termination" in August 2018.

3 ***Severity or Pervasiveness*** – The severity and pervasiveness of Smith's
4 conduct was intensified because it began during the first few weeks of Bennett's
5 employment. Smith stopped trying to date Bennett after his Bend invitation was
6 rejected but continued commenting on Bennett's appearance and attire, at times
7 causing Bennett to break down and cry at work. Other employees observed Smith
8 treated Bennett differently than other employees and often berated her in the workplace.
9

10 Bennett's calendar notes show Smith's hostility toward Bennett was sustained for
11 several weeks and months following her rejection of the Bend invitation. Smith's
12 harassing conduct toward Bennett did not end with his "termination" but, rather,
13 continued while he served in a "consultant" role where he continued criticizing Bennett's
14 performance to her supervisor and to the owners of the business.

15 ***Physically threatening or humiliating*** – Bennett credibly testified that Smith's
16 conduct made her feel "less than" and scared her as a woman in her 50's who could ill
17 afford to lose her job. Bennett testified she was eager to work for Senior Helpers due to
18 their reputation in the community and what they appeared to stand for as a company.
19 Bennett testified that Smith quickly poisoned her work environment and made it more
20 difficult for her to do her job. Smith's conduct made Bennett feel upset, awkward,
21 uncomfortable, and embarrassed.
22

23 Most persuasive on this point are the notes taken during the interviews
24 conducted as part of Senior Helpers' investigation of Bennett's complaint. Many of the
25 comments show that Smith's conduct was sufficiently severe so as to have been

1 noticed by other employees. These employees described Smith as berating Bennett
2 and treating her differently than he did other employees. One employee described
3 Smith talking to Bennett in such a manner that Bennett was left in tears and the
4 employee felt she needed to console Bennett.

5 ***Unreasonable interference with Complainant's work performance*** – Bennett
6 credibly testified that Smith's conduct made it difficult for her to do her work on a daily
7 basis, which she had not previously experienced in another job. Bennett's testimony
8 establishes that Smith's conduct toward her unreasonably interfered with her work
9 performance.
10

11 Based on the above, the forum concludes that Smith's unwelcome conduct was
12 sufficiently severe or pervasive to have unreasonably interfered with Bennett's work
13 performance and that it created a hostile, intimidating or offensive work environment for
14 her from the objective standpoint of a reasonable person in Bennett's particular
15 circumstances.

16 2. Bennett was harmed by the unwelcome conduct.

17 Smith's conduct toward Bennett effectively poisoned her work environment
18 causing her substantial and emotional distress as detailed above. The Agency has
19 satisfied each of the required elements of its prima facie case.
20

21 Senior Helpers, acting through Smith, committed an unlawful employment
22 practice by subjecting Complainant to sexual harassment in violation of ORS
23 659A.030(1)(b) and OAR 839-005-0030(1)(b). Senior Helpers is liable for this
24 harassment under OAR 839-005-0030(3) and (4) as discussed in more detail later in
25 this Opinion in the section titled "Liability."

1 **DISCHARGE BECAUSE OF SEX**

2 The Agency's prima facie case in an OAR 839-005-0030(4)(a) case consists of
3 the following elements: (1) Senior Helpers was an employer subject to ORS 659A.001
4 to 659A.030; (2) Senior Helpers employed Bennett; (3) Bennett is a member of a
5 protected class (sex); (4) Smith engaged in unwelcome conduct (verbal or physical)
6 directed at Bennett because of her sex; (5) Smith had immediate or successively higher
7 authority over Bennett; and (6) Smith took or caused Senior Helpers to take a tangible
8 employment action against Bennett. *In the Matter of Cyber Center, Inc.*, 32 BOLI 11, 31
9 (2012). A tangible employment action includes * * *terminating employment * * *." OAR
10 839-005-0030(4)(a).
11

12 As noted above, the Agency has satisfied the first four elements of the prima
13 facie case. The final two elements remain in dispute.

- 14 1. Smith had immediate or successively higher authority over Bennett even after
15 his "termination."

16 The forum addressed harassment by a supervisor *In the Matter of Vision*
17 *International Petroleum LLC & Hai Chheng Gov*, 37 BOLI 168, 197 (2019), citing
18 *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998).

19 "The forum first examines whether there is evidence of harassment by a
20 supervisor. Supervisors with "immediate (or successively higher) authority
21 over the employee" are considered agents of an employer for purposes of
22 an employer's Title VII liability. Determining whether a particular individual
23 is a supervisor "is not dependent upon job titles or formal structures within
24 the workplace." *Dawson v. Entek Int'l.*, 630 F3d 928, 940 (9th Cir 2011),
25 *citing McGinest v. GTE Service Corp.*, 360 F3d 1103, 1119 n.13 (9th Cir
2004). Rather, for purposes of vicarious liability under Title VII a person is
a supervisor "if he 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

1 causing a significant change in benefits." *Burlington Industries, Inc. v.*
2 *Ellerth*, 524 U.S. 742, 761 (1998)."

3 Smith was no longer Bennett's direct supervisor at the time she was terminated
4 from her employment. However, the evidence shows that Smith continued to control
5 the daily operations of the business after his "termination." The forum is not persuaded
6 that Smith's authority to take tangible employment actions against Bennett ended with
7 his "termination." Elliott's credible testimony establishes that "all decisions had to go
8 through" Smith. Elliott described her role as interim Operations Director as limited in
9 that she did not have access to the information that Smith had access to and, as a
10 result, Elliott effectively reported to Smith. As such, the forum is not persuaded that
11 Torres alone made the decision to terminate Bennett. It is more likely than not that
12 Torres acted at the behest of Smith or, at the very least, relied upon information
13 provided to her by Smith. The Agency has shown that Smith had immediate or
14 successively higher authority over Bennett while Operations Director and that continued
15 without any interruption while he worked as a consultant for the Respondent.
16

17 2. Bennett was not discharged because of her sex.

18 The preponderance of the evidence shows that Smith had direct involvement in
19 this decision to terminate Bennett's employment. However, the evidence does not show
20 that the termination was because of Bennett's sex. Rather, the evidence shows the
21 termination was in retaliation for Bennett's opposition to Smith's illegal conduct, as
22 discussed below. Therefore, the Agency has not sustained its burden of proof to
23 establish a violation of ORS 659A.030(1)(a) for the termination of Bennett. The Agency
24 has therefore not shown that Senior Helpers discharged Bennett because of her sex in
25 violation of ORS 659A.030(1)(a).

1 **RETALIATION - DISCHARGE**

2 ORS 659A.030(1)(f) makes it an unlawful employment practice for an employer
3 to "discharge * * * any person because that * * * person has opposed any unlawful
4 practice[.]" The Agency's prima facie case in an ORS 659A.030(1)(f) retaliatory
5 discharge case consists of the following elements: (1) Bennett opposed an unlawful
6 employment practice; (2) Senior Helpers subjected Bennett to an adverse action; and
7 (3) there is a causal connection between Bennett's opposition and the adverse action.
8 *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 288 (2009).
9

10 The same facts that prove Complainant was discharged because she rejected
11 Smith's unwelcome conduct directed at her also prove that she was discharged in
12 retaliation for opposing an unlawful employment practice by filing her complaint on
13 August 1, 2018. Within days of her complaint, Senior Helpers assigned her to a new
14 supervisor before "terminating" Smith's employment as Operations Director. Despite
15 this "termination," Smith continued to control the daily operations of the business. As
16 Elliott testified, all decisions went through Smith when she was interim Operations
17 Director. The forum has no doubt that Smith's control continued after Torres was made
18 Operations Director. Further, the forum has no doubt that Torres acted at the behest of
19 Smith when she discontinued the payment of Bennett's \$500 monthly insurance stipend
20 and discharged Bennett a few weeks later. The Agency has shown that Senior Helpers
21 violated ORS 659A.030(1)(f) when it discharged Bennett in retaliation for her reporting
22 Smith's behavior.
23
24
25

1 The Agency also alleges that Senior Helpers violated ORS 659A.199. The
2 analysis used in determining that Senior Helpers violated ORS 659A.030(1)(f) applies
3 equally to the Agency's ORS 659A.199 claim. Accordingly, the forum's conclusion that
4 Senior Helpers violated 659A.030(1)(f) necessarily leads to the conclusion that Senior
5 Helpers also violated ORS 659A.199(1) when it discontinued Bennett's monthly
6 insurance stipend and terminated her employment after her report of harassment. See
7 *Vision International*, 37 BOLI at 199.

8 **LIABILITY**

9
10 "An employer is liable for harassment when the harasser's rank is sufficiently
11 high that the harasser is the employer's proxy, for example, the respondent's president,
12 owner, partner or corporate officer." OAR 839-005-0030(3).

13 The preponderance of the evidence shows Smith served as the employer's proxy
14 in his role as Operations Director. Even after his "termination," all decisions related to
15 the daily operations of the business went through Smith. Further, J. Reynolds
16 admittedly relied upon Smith's advice and counsel in making decisions regarding the
17 business and continued to do so when Smith became a contracted consultant. It is
18 therefore determined that Smith served as the employer's proxy.

19
20 Respondent's liability for Smith's illegal conduct is also based on Smith's role as
21 Bennett's supervisor. OAR 839-005-0030(4) provides:

22 "Harassment by Supervisor plus Tangible Employment Action: An employer is
23 liable for sexual harassment by a supervisor with immediate or successively
24 higher authority over an individual when the harassment results in a tangible
25 employment action that the supervisor takes or causes to be taken against that
individual. A tangible employment action includes but is not limited to the
following:

- (a) Terminating employment, including constructive discharge;
- (b) Failing to hire;
- (c) Failing to promote; or
- (d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit."

As discussed above, Smith continued to exercise immediate or successively higher authority over Bennett even after he was "terminated" and began working for Respondent as a consultant. Tangible employment actions were taken against Bennett, which Smith either took directly or caused to be taken by others during his time as a consultant. For example, Bennett lost her health insurance stipend in September 2018; she suffered a reduction in her marketing budget that directly interfered with her ability to successfully perform her job duties; Smith denied Bennett's request for time off to tend to a family emergency; and Bennett was ultimately discharged because of the actions of Smith both in his role as Bennett's direct supervisor and in his role as a consultant. Senior Helpers is, therefore, liable for the tangible employment actions taken against Bennett either taken directly by Smith or indirectly by others as a result of Smith's continuing harassment and retaliatory conduct toward Bennett.

DAMAGES

Lost Wages

The purpose of a back pay award in an employment discrimination case is to compensate a complainant for the lost wages she would have received but for the unlawful employment practice. *Vision International*, 37 BOLI at 200. Back pay awards are calculated to make a complainant whole for injuries suffered as a result of the unlawful termination. *Id.*

1 An award for lost wages involves a three-step analysis. First, whether
2 Complainant exercised due diligence in seeking work to mitigate her wage loss. OAR
3 839-003-0090(3). Second, is to determine the amount of wages Complainant would
4 have earned, but for the unlawful termination, to be offset by her subsequent earned
5 income. OAR 839-003-0090(3)(a), and third, when the period for which lost wages are
6 sought should end. A complainant who is seeking damages for back pay is required to
7 mitigate damages by using reasonable diligence in finding other suitable employment.
8 *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). The
9 burden of proof for failure to mitigate damages lies with the Respondent. *In the Matter*
10 *of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

12 Bennett exercised reasonably diligent efforts to seek comparable work following
13 her termination from Senior Helpers. Bennett was unable to obtain employment in her
14 preferred field and ultimately found work for Oregon Rental Property Management in
15 August 2019, with average monthly earnings of \$1,647.31. Bennett found a second job
16 in November 2019 with Pacifica Calaroga Terrace LLC, with average monthly earnings
17 of \$3,999.39. While greater than her wages at ORPM, Bennett's wages at Pacifica
18 were not comparable to the wages she would have earned if she had not been
19 terminated by Senior Helpers. Bennett subsequently obtained other employment and
20 worked for four other employers where she earned substantially less than what she
21 would have earned if she had been allowed to continue working for Senior Helpers.
22 See Ex. A66. Bennett ultimately obtained employment that offered comparable
23 compensation in mid-November 2021, when she began working for Sinceri, which
24 offered a regular hourly wage of \$30.7692, and an overtime hourly wage of \$46.1538.
25

1 Bennett was also eligible for bonuses in her employment with Sinceri. See Ex. A52, p.
2 34. As of the pay period ending April 30, 2022, Bennett's average monthly earnings
3 were \$8,987.12. Therefore, an award for lost wages is properly ending after 36 months,
4 which would have been the first pay period in which Bennett received the same or
5 comparable pay following her termination from Senior Helpers.

6 The forum adopts the calculations of the Agency in its lost wage assessment.
7 See *Agency Post-Hearing Brief: Damages*, p. 4 (filed 06/03/2021). Bennett's total
8 earnings from subsequent employment totaled \$104,173.49. But for her termination
9 from Senior Helpers, Bennett would have enjoyed earnings totaling approximately
10 \$308,748.60. Bennett is, therefore, entitled to a lost wage award of \$204,575.11.

11
12 *Emotional Distress Damages*

13 Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and
14 Industries has the authority to award money damages for emotional, mental, and
15 physical suffering sustained. *In the Matter of Oregon Truck Painting, LLC*, 37 BOLI 87,
16 114-15 (2018). The commissioner has the authority to fashion a remedy adequate to
17 eliminate the effects of unlawful practices. *Id.*

18 In determining the appropriate amount of mental and physical suffering damages,
19 "this forum has long held that Respondents must take Complainants 'as they find
20 them.'" *In the Matter of Oregon Truck Painting*, 37 BOLI at 115. A complainant's
21 testimony, if believed, is sufficient to support a claim for mental suffering damages. *In*
22 *the Matter of Dr. Andrew Engel, DMD, PC*, 32 BOLI at 141.

23
24 Bennett provided compelling testimony that she suffered emotional and mental
25 suffering as a result of the hostile work environment caused by Smith's sexual

1 harassment and behavior after she rejected his advances, as well as the emotional and
2 mental suffering she experienced following her termination from a job that she loved
3 and put her "heart and soul into." Bennett was visibly upset at hearing as she described
4 the financial issues she experienced, including having to ask her son for financial help
5 to pay her rent. Bennett felt hurt, embarrassed and distressed as she attempted to
6 handle Smith's behavior for several months and in the months following her termination.

7 The Agency seeks damages on behalf of Bennett in the amount of "at least"
8 \$200,000 for emotional, mental and physical suffering. A review of past emotional
9 distress damage awards is instructive when determining an appropriate emotional
10 distress damages award. The forum has made the following emotional distress
11 damages awards in past discrimination cases.
12

13 The forum awarded \$120,000 in emotional distress damages where Respondent
14 terminated Complainant within days of learning she was pregnant and Complainant
15 subsequently lost the child shortly after she lost her job. *In the Matter of Next Step*
16 *Carpet, LLC*, 38 BOLI ____ (2021). The forum awarded \$60,000 in emotional distress
17 damages to a Complainant who experienced harassment based on his race and was
18 discharged in retaliation about his complaints regarding unlawful harassment in the
19 workplace. *In the Matter of Vision International Petroleum LLC*, 37 BOLI 187, 200
20 (2019). The forum awarded Complainants \$50,000 and \$100,000 in emotional distress
21 damages where the Complainants were physically assaulted by their co-workers without
22 provocation and the hostile work environment they experienced during the remainder of
23 their employment. The forum's award was also based upon discrimination and
24 retaliation the Complainants experienced, as well as their ultimate discharge, due to
25

1 their participation in a criminal investigation of the assault. *In the Matter of Maltby*
2 *Biocontrol, Inc.*, 33 BOLI 121, 159 (2014)

3 The forum awarded \$150,000 in emotional distress damages where a
4 Complainant was sexually harassed by Respondent's president and general manager
5 and ultimately discharged in retaliation for her complaint about the unlawful harassment.
6 The forum found that there were at least 12 specific incidents that occurred during
7 Complainant's three-month period of employment. The forum noted the financial issues
8 Complainant experienced as a result of her termination, as well as other issues such as
9 experiencing panic attacks; difficulty sleeping, and self-imposed social isolation. *In the*
10 *Matter of Crystal Springs Landscapes, Inc.*, 32 BOLI 144, 170 (2012). The forum
11 awarded \$50,000 in emotional distress damages where a Complainant was subjected to
12 verbal and physical sexual harassment in two three-day periods, which culminated in
13 her discharge after Respondent hit her on the head with his fist. *In the Matter of*
14 *Charles Edward Minor*, 31 BOLI 88, 104 (2010).

15
16 The hostile work environment created by Smith's conduct toward Bennett and
17 her subsequent discharge in retaliation for her complaint regarding Smith's sexual
18 harassment caused Bennett distress and financial issues that continued until she was
19 able to secure comparable employment. The situation at Senior Helpers has had a
20 lasting impact on Bennett and has adversely affected her daily life. Based on the facts
21 of this case, the forum therefore concludes that an award of \$60,000 for emotional
22 distress damages is appropriate in this case.
23
24
25

1 **OTHER REQUESTED RELIEF**

2 In its Amended Formal Charges, the Agency requested that a cease and desist
3 order be issued against Respondents, requiring them to immediately stop all of the
4 unlawful employment practices alleged in the Amended Formal Charges. BOLI's
5 Commissioner is authorized to issue an appropriate cease and desist order reasonably
6 calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4).
7 Among other things, that may include requiring a respondent to:
8

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

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

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

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

17 The forum finds that the Agency's requested cease and desist order to be
18 appropriate relief in this case. The forum further finds that the Agency's request that
19 Senior Helpers' managers, supervisors, and human resources personnel complete
20 training, at the expense of Senior Helpers, on preventing discrimination based on sex in
21 the workplace appropriate relief. The training must be completed by the Bureau of
22 Labor and Industries' Employer Assistance Unit, or another trainer agreeable to and
23 approved by the Agency.

24 **EXCEPTIONS TO THE PROPOSED ORDER**

25 On December 8, 2022, the Agency filed exceptions to the Proposed Order,
seeking corrections to scrivener's errors. As the Agency's exceptions are well taken,
the Agency's exceptions are GRANTED as reflected above.

1 Respondent filed its exceptions to the Proposed Order on December 8, 2022,
2 seeking the removal of language requiring Respondent to undergo training pertaining to
3 sexual harassment in the workplace. Respondent argued that its current manager
4 participated in a webinar on workplace harassment and discrimination conducted by
5 BOLI on June 29, 2021, and that it was Respondent's intention to continue engaging in
6 similar trainings in the future.

7
8 In order to ensure that the effects of Respondent's unlawful employment
9 practices are eliminated, the Respondent's managers, supervisors and human
10 resources personnel shall be required to undergo annual training pertaining to sexual
11 harassment in the workplace. This training shall be completed no later than December
12 31, 2023, and each year thereafter for five years.

13 Respondent's Exception is therefore DENIED and the language set forth below is
14 modified to reflect that Respondent shall be required to participate in annual training
15 pertaining to sexual harassment in the workplace.

16 ORDER

17
18 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
19 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(a), (b),
20 (f); ORS 659A.199(1); OAR 839-005-0030(1)(a), (b), (4)(a), (b); OAR 839-005-
21 0125(2)(a)(A); OAR 839-010-0100(1) by Respondent **Reynolds Consultation, Inc.,**
22 **dba Senior Helpers of Salem**, and as payment of the damages awarded, the
23 Commissioner of the Bureau of Labor and Industries hereby orders Respondent
24 **Reynolds Consultation, Inc., dba Senior Helpers of Salem** to deliver to the
25 Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office

1 Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check
2 payable to the Bureau of Labor and Industries in trust for **Donna Bennett** in the amount
3 of:

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

7 2) TWO HUNDRED FOUR THOUSAND FIVE HUNDRED SEVENTY-
8 FIVE DOLLARS AND ELEVEN CENTS (\$204,575.11), representing wages lost
as a result of Respondents' unlawful employment practices; plus

9 3) Interest at the legal rate on the sum of TWO HUNDRED SIXTY
10 FOUR THOUSAND FIVE HUNDRED SEVENTY FIVE DOLLARS AND ELEVEN
CENTS (\$264,575.11), until paid.

11 B. NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate
12 the effects of violations of ORS 659A.030(1)(a), (b), (f) and ORS 659A.199(1) by
13 Respondent **Reynolds Consultation, Inc., dba Senior Helpers of Salem.**, the
14 Commissioner of the Bureau of Labor and Industries hereby orders Respondent
15 **Reynolds Consultation, Inc., dba Senior Helpers of Salem** to:

16 1) At Respondent's expense, undergo training, along with all
17 managers, supervisors, and human resources personnel, on the correct
18 interpretation and application of Oregon laws pertaining to sexual harassment in
19 the workplace, with the training to be conducted by the Bureau of Labor and
20 Industries Employer Assistance Unit or another trainer agreeable to the Agency,
with the training to be completed no later than December 31, 2023, and by
December 31, of each successive year for five years.

21 2) To create and implement a harassment policy that accurately
22 reflects Oregon law, to be approved by the Bureau of Labor and Industries, Civil
23 Rights Division. If such a policy is in place, Respondent shall provide a copy of
24 that policy to the Bureau of Labor and Industries, Civil Rights Division, to ensure
the policy conforms with Oregon law. Respondent shall provide a copy of any
25 policy currently in place to the Civil Rights Division of the Bureau of Labor and
Industries no later than sixty (60) days following the issuance of this Final Order.

1 3) Cease and desist from violating laws pertaining to unlawful
2 discrimination against persons with disabilities in the scope of the operation of
3 Senior Helpers of Salem.

4 DATED this 18th day of April, 2023.

5
6 

7 Christina Stephenson, Commissioner
8 Bureau of Labor and Industries
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