



## 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 Nos. **61-18**

**STEFANI DOSS dba KNOCKERS  
STRIP CLUB; MGC HOLDINGS LLC  
dba KNOCKERS STRIP CLUB; KIRK  
M. OSTERMILLER, Individually and  
LAZARUS WILLIAMS, Individually,**

FINDINGS OF FACT  
CONCLUSIONS OF LAW  
OPINION  
ORDER

Respondents.

#### SYNOPSIS

The Amended Formal Charges alleged that Respondents violated ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I) and OAR 839-005-0010(4)(a)(A)(B)(C) (b) by subjecting Complainant to different terms and conditions of employment, and harassed her because of her race. The Agency also alleged that Respondents Ostermiller and Williams aided or abetted the unlawful actions under ORS 659A.030(1)(g). After a hearing on the merits, the forum concluded that the Agency failed to prove the alleged violations by a preponderance of the evidence and dismissed all charges against Respondents.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by the Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 9 and September 25-26, 2019, at the Eugene office of the Worker's Compensation Board, located at 1140 Willagillespie Road, Suite 38, in Eugene, Oregon.



1 The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by  
2 Administrative Prosecutor Adriana Ortega (“Ortega”), an employee of the Agency.  
3 Complainant, Marisella Contreras (“Contreras”) was present throughout the hearing.  
4 Respondents Stefani Doss (“S. Doss”) and MGC Holdings, LLC (“MGC”) were  
5 represented throughout the proceeding by Attorney Michael Schocket (“Schocket”).  
6 Attorney John Woodworth (“Woodworth”) represented Respondent Kirk M. Ostermiller  
7 (“Ostermiller”). Respondent Lazarus Williams (“Williams”) was also present.

8 The Agency called Contreras and Civil Rights Division Operations Manager Chris  
9 Lynch (“Lynch”)<sup>1</sup> as its witnesses.

10 Ostermiller, Williams, S. Doss and Matthew Doss (“M. Doss”) testified for  
11 Respondents.

12 The forum received into evidence: (a) Administrative exhibits X1 through X39; (b)  
13 Agency’s exhibits A1-A9, A12, A14-A15, and A17;<sup>2</sup> and (c) ALJ exhibit ALJ1 (7/10/2019  
14 Email). Respondents did not offer any exhibits into evidence.

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

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18  
19 <sup>1</sup> Respondents objected to the testimony of Chris Lynch. See Finding of Fact – Procedural # 23.

20 <sup>2</sup> Respondents objected to Exhibits A4-A7, A9, A12, A14-A15 and A17 due to lack of foundation because  
21 the Investigator who created the documents did not testify and Respondents did not have the opportunity  
22 to cross examine her. The objection was sustained, in part, and the exhibits were received solely for the  
23 purpose of showing that they were documents in the Civil Rights Division’s investigation file, but not for the  
24 statements made in the documents. With respect to Ex. A9 (Investigator’s Notes from Witness Interview of  
Summer Iverson), Respondents further objected because Iverson did not testify, and they did not have the  
opportunity to cross examine her. Ex. A9 was admitted solely for the purpose of showing that Iverson was  
interviewed, and was not admitted to prove the truth of Iverson’s statements in the document.

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

1 **FINDINGS OF FACT – PROCEDURAL**

2 1) Contreras filed a complaint with the Agency's Civil Rights Division on March  
3 24, 2017, citing ORS 659A.030(1)(b), and alleging that MGC engaged in unlawful  
4 employment practices and discriminated against her based on her race and national  
5 origin in that MGC subjected her to a hostile work environment and different terms and  
6 conditions of employment. (Ex. A1)

7 2) Contreras later filed an amended complaint adding "Stefani Doss dba  
8 Knockers Strip Club" as an additional Respondent. (Ex. A2)

9 3) On March 24, 2017, Contreras amended the complaint again to identify  
10 Ostermiller and Williams as aiders and abettors. The amended complaint added a  
11 citation to 659A.030(1)(g). (Exs. A3, A4)

12 4) On March 16, 2018, the Agency's Civil Rights Division issued a Notice of  
13 Substantial Evidence Determination ("SED") for Case No. STEMRC170324-50367 in  
14 which it found substantial evidence of an unlawful employment practice (terms and  
15 conditions) in violation of ORS 659A.030. (Ex. A17)

16 5) On July 30, 2018, the forum issued Notices of Hearing to Respondents,<sup>4</sup>  
17 the Agency, and Contreras, stating the time and place of the hearing as November 6,  
18 2018, beginning at 9:30 a.m., at BOLI's Eugene office, located at 1400 Executive Pkwy,  
19 Suite 200, Eugene, Oregon. Together with the Notice of Hearing, the forum sent a copy  
20 of the Agency's Formal Charges, a document entitled "Summary of Contested Case  
21 Rights and Procedures" containing the information required by ORS 183.413, a document  
22

23 \_\_\_\_\_  
24 <sup>4</sup> As explained below in Finding of Fact – Procedural, # 20, not all of Respondents received the initial Notice of Hearing issued on July 30, 2018.

1 entitled "Servicemembers Civil Relief Act (SCRA) Notification," a multi-language notice  
2 explaining the significance of the Notice of Hearing, and a copy of the forum's contested  
3 case hearings rules, OAR 839-050-0000 to 839-050-0445. (Exs. X2, X5, X12)

4 6) The Formal Charges alleged that (1) Respondents subjected Contreras "to  
5 different terms and conditions" because of her race in violation of ORS 659A.030(1)(b)  
6 and OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B(i)(I)); (2) Respondents subjected Contreras  
7 to harassment because of her race in violation of ORS 659A.030(1)(b) and OAR 839-  
8 005-0010(4)(a)(A)(B)(C), (b); and (3) that Ostermiller and Williams aided and abetted the  
9 unlawful actions in violation of ORS 659A.030(1)(g). (Exs. X2b, X5b)

10 7) On August 20, 2018, Ostermiller timely filed an answer to the Formal  
11 Charges in which he denied the allegations asserted against him. (Ex. X3)

12 8) On September 5, 2018, the ALJ issued an interim order requiring case  
13 summaries to be filed no later than October 23, 2018, and set out the requirements for  
14 what each participant must include in their case summary. The interim order also set a  
15 date for a prehearing telephone conference. (Ex. X4)

16 9) On September 18, 2018, the ALJ issued an interim order rescheduling the  
17 prehearing conference for Thursday, September 20, 2018, at 10:00 a.m. A telephonic  
18 prehearing conference was held on September 21, 2018. Ortega appeared on behalf of  
19 the Agency; Woodworth appeared on behalf of Ostermiller; Schocket appeared on behalf  
20 of S. Doss and MGC. Williams did not telephonically appear for the prehearing  
21 conference.

22 During the prehearing conference, Woodworth stated he had a conflict with the  
23 contested case hearing date that was set for November 6, 2018. The parties were asked  
24

1 to find a mutually agreeable date and directed to provide it to the forum, via email, no later  
2 than 5:00 p.m. on September 28, 2018. The issue of proper service was also briefly  
3 discussed. Schocket stated he had not received the documents in this matter. Based on  
4 his statements, the forum requested that Schocket provide an accurate address on the  
5 record. Schocket stated that the words "upper unit" needed to be added to his address.  
6 (Exs. X7, X11)

7 10) On September 11, 2018, the Agency filed a Motion for Default against MGC.  
8 Pursuant to OAR 839-050-0150(9), MGC's response was then due September 18, 2018.  
9 On September 17, 2018, MGC filed a motion for extension of time to answer the Agency's  
10 Formal Charges. The Agency filed a timely response to the extension motion on  
11 September 24, 2018. Since both motions involved arguments regarding the Agency's  
12 service of Formal Charges on MGC, the forum addressed both motions in one interim  
13 order, issued on September 27, 2018, ruling as follows:

14 **"AGENCY'S MOTION FOR DEFAULT"**

15 "Pursuant to OAR 839-050-0030(1), \* \* \* the charging document will be  
16 served on the party or the party's representative by personal service or by  
17 registered or certified mail. Service of a charging document is complete upon the  
18 earlier of:

- 19 (a) Receipt by the party or the party's representative; or  
20 (b) Mailing when sent by registered or certified mail *to the correct  
21 address of the party or the party's representative.*'

22 (emphasis added) In its motion, the Agency argued that service was complete  
23 upon the mailing of a copy of the Agency's Formal Charges to Respondent MGC's  
24 registered agent, \* \* \* Schocket. The Agency further provided proof of service to  
'an individual' located at '2118 SE 11<sup>th</sup> Ave., Portland, OR 97214.' (Agency's  
Motion, Ex. A, p. 4, Ex. F, p. 1) The Agency argued in error that the Secretary of  
State's record lists the address as '2118 SE 11<sup>th</sup> Ave., Portland, OR 97214.' The  
record, which was attached to the Agency's motion, lists the address as:

1                   'MICHAEL SCHOCKET  
2                   2118 SE 11<sup>TH</sup> AVE UPPER  
3                   PORTLAND, OR 97214'

4 (emphasis added) (Agency's Motion, Ex. B, p. 1).<sup>5</sup> Based on the evidence offered  
5 by the Agency, Respondent MGC was not properly served with the Formal  
6 Charges in this matter. The Agency's Motion for Default is **DENIED**.

7                   **"RESPONDENT'S MOTION FOR EXTENSION OF TIME TO ANSWER**

8                   "When a participant requires additional time to submit any document, a  
9 written request for such extension must be filed with *and received by* the Forum  
10 no later than the date set for filing of the document in question \* \* \*.' (emphasis  
11 added) OAR 839-050-0050(2). Respondent MGC's Answer to the Agency's  
12 Formal Charges was due on August 6, 2018. Respondent MGC's Motion for  
13 Extension was not filed until September 17, 2018. When a nonmoving party  
14 objects to a request for extension, the moving party must show good cause as to  
15 why the extension should be granted. OAR 839-050-0050(3). The Agency  
16 objected to Respondent's motion in its Answer to Respondent's Motion for  
17 Extension of Time to File Answer to Formal Charges, filed on September 24, 2018.

18                   "'Good cause" means, unless otherwise specifically stated, that a  
19 participant failed to perform a required act due to an excusable mistake or a  
20 circumstance over which the participant had no control. "Good cause" does not  
21 include a lack of knowledge of the law, including these rules.' OAR 839-050-  
22 0020(16). Respondent MGC argued that it had not received a copy of the Agency's  
23 Formal Charges. In its motion, Respondent MGC explained that the registered  
24 agent's address is a duplex, consisting of two separate residences. The registered  
agent is located in the upper unit of the address. Respondent MGC stated that it  
first received notice of the Formal Charges and the Agency's Motion for Default  
when \* \* \* Schocket spoke with co-Respondent Ostermiller's attorney, \* \* \*  
Woodworth.

"In its response, the Agency countered that Respondent MGC was properly  
served and that Respondent MGC failed to establish good cause in its motion.<sup>6</sup>  
However, based on the Agency's Motion for Default, the charges were not sent to

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<sup>5</sup> The Agency also noted that \* \* \* Schocket's address on the Oregon State Bar website does not include the word "upper." (Agency's motion, Ex. E, p. 1) Although this seems potentially problematic for \* \* \* Schocket, given his representation that it causes service issues for important documents, the address listed on the Secretary of State's Office is the relevant address for purposes of the Agency's Motion for Default, based on service to Respondent MGC's registered agent.

<sup>6</sup> The Agency argued that Respondent failed to show good cause for relief from default; however Respondent MGC has not been found in default. The same good cause standard is used, however, to determine if an extension should be granted when a nonmoving party objects. See OAR 839-050-0050(3) and OAR 839-050-0340(2).

1 the correct address. It is correct that Respondent MGC failed to offer any  
2 supporting evidence regarding its argument of improper service. However,  
3 Respondent MGC's argument is corroborated by the Secretary of State's Office  
4 record, offered by the Agency, which includes the word 'upper' in \* \* \* Schocket's  
5 address. The Agency's error in the address of Respondent MGC's registered  
6 agent is a circumstance beyond Respondent MGC's control and establishes good  
7 cause for Respondent MGC's delay in filing its motion and for its requested  
8 extension. Respondent MGC's Motion for Extension for Time to File an Answer is  
9 **GRANTED.**

6 "The Agency is directed to serve Respondent MGC with its current charging  
7 document at the address on file with the Secretary of State, and confirmed on the  
8 record by \* \* \* Schocket during the September 21, 2018, prehearing conference:

8 MICHAEL SCHOCKET  
9 2118 SE 11<sup>TH</sup> AVE UPPER  
10 PORTLAND, OR 97214

10 **Respondent MGC must file its Answer within 20 days after service of the**  
11 **charging document.** OAR 839-050-0130(4)."

11 (Exs. X6, X13, X14)(emphasis in original)

12 11) The Agency filed Amended Formal Charges on September 27, 2018, which  
13 removed the requests for lost wages and out-of-pocket damages. (Ex. X14)

14 12) On September 28, 2018, the Agency filed a Notice to Forum regarding the  
15 participants' availability for hearing. The Agency stated that the case participants had  
16 mutually agreed upon a suggested date for the contested case hearing. Based on  
17 Woodworth's unavailability for the November 6, 2018, hearing date, the ALJ issued an  
18 interim order on October 1, 2018, resetting the contested case hearing to begin on  
19 Tuesday, February 26, 2019. The interim order also rescheduled the case deadlines as  
20 follows:

21 "Formal Discovery Motions: Must be filed no later than January 15, 2019.  
22 Dispositive Motions: Must be filed no later than February 5, 2019.  
23 Case Summaries: Must be filed no later than February 12, 2019.

1 If you do not file a case summary, you may not  
2 be able to call witnesses or present evidence at  
3 the contested case hearing."

4 (Exs. X16, X17)

5 13) S. Doss and MGC filed an Answer to the Formal Charges on October 15,  
6 2018. (Ex. X18)

7 14) The Agency timely filed its case summary on February 12, 2019. (Ex. X19)

8 15) Following an unopposed email request from the administrative prosecutor,  
9 on February 14, 2019, the forum issued an interim order moving the location of the  
10 hearing to Oregon Worker's Compensation Offices, 1140 Willagillespie Road, Suite 38  
11 Eugene, Oregon. The interim order also changed the start time of the hearing to 1:00  
12 p.m. on Tuesday, February 26, 2019. (Exs. X20-X21)

13 16) On February 25, 2019, the Willamette Valley experienced inclement  
14 weather. As temperatures were not expected to sufficiently rise and icy conditions were  
15 likely to remain Tuesday afternoon, making travel conditions hazardous, the ALJ  
16 postponed the hearing by one day until Wednesday, February 27, 2019, at 9:30 a.m. The  
17 location of the hearing remained unchanged.

18 On February 26, 2019, the Agency filed a motion for postponement due to the  
19 continued inclement weather affecting the Willamette Valley. Respondents did not object  
20 to the postponement. Based on the dates provided by those who responded to the ALJ's  
21 emails, the ALJ issued an interim order postponing the hearing until Tuesday, June 18,  
22 2019, at 9:30 a.m. (Exs. X25-X28)

23 17) On February 25, 2019, the ALJ issued an interim order regarding  
24 Respondents' Motion For Remote Testimony of Stefani Doss. Given that the motion was  
filed the day before the contested case hearing was expected to begin, the forum sent an



1 email to all case participants requiring emailed responses by 9:30 a.m. on February 26,  
2 2019. The forum informed the Agency and Woodworth that it would accept their emailed  
3 responses as permissibly filed with the forum, pursuant to OAR 839-050-0040(1).  
4 Woodworth timely responded that he objected. The Agency did not respond. Attached  
5 to Respondents' motion was an affidavit, signed under penalty of perjury by S. Doss. In  
6 the affidavit, S. Doss stated that she was the primary caretaker for a family member and  
7 could not leave the family member alone for the length of time necessary to testify in  
8 person at the hearing. The ALJ's interim order stated, in part:

9 "Pursuant to OAR 839-050-0250(11), '[w]hen the testimony of a witness not  
10 present at the hearing is necessary to the complete and fair adjudication of the  
11 case, the administrative law judge may admit testimony of the witness by  
12 telephone or other two-way communication device. In such cases:

- 13 (a) The testimony of the witness will be broadcast simultaneously to all  
14 participants and to the administrative law judge;  
15 (b) All rules governing the questioning of witnesses present at the  
16 hearing apply to witnesses whose testimony is taken by telephone; and  
17 (c) The participant presenting the witness by telephone will provide the  
18 witness's telephone number and the approximate time that the witness will  
19 be available.'

20 "Based on the postponement of the contested case hearing, it is unclear if  
21 Respondent Doss will still need to testify by phone for the June 18, 2019, hearing.  
22 If her circumstances remain the same, however, her request to testify remotely is  
23 **GRANTED** assuming her testimony complies with the following conditions:

- 24 1. \* \* \* Schocket must file a Notice of Telephonic Testimony  
Information, listing any anticipated time restraints on Respondent Doss's  
testimony, with the Contested Case Coordinator, no later than June 4,  
2019.  
2. If there are restraints on Respondent Doss's time to testify, direct  
examination will be limited to the degree necessary, at the discretion of the  
forum, to allow for adequate cross-examination by \* \* \* Ostrander and the  
Agency. OAR 839-050-0240(1)(d) and (g).  
3. Respondent Doss must have real-time access to an operable email  
account that is capable of receiving attachments during her testimony.  
4. Respondent Doss must include an operable telephone number at  
which she can be reached and the address of the operable email account

1 within her Notice of Telephonic Testimony Information, filed no later than  
2 June 4, 2019.

3 5. \*\*\* Schocket is directed to provide Respondent Doss with a copy of  
4 the Agency's Case Summary and any Addendums thereto, assuming the  
5 Agency files such Addendums in a timely fashion, no later than June 4,  
6 2019.

7 **"If the aforementioned conditions cannot be met, Respondent Doss may not**  
8 **testify telephonically."**

9 (Exs. X22-X24, X29) (Emphasis in original)

10 18) On May 15, 2019, the ALJ contacted the case participants to inform them  
11 that the contested case in this matter would need to be postponed. The forum requested  
12 that the participants provide their availability for hearing, in the months of June and July,  
13 by no later than May 22, 2019. Based on those who responded to the ALJ's request, the  
14 forum issued an interim order on May 23, 2019, resetting the contested case hearing to  
15 begin on Tuesday, July 9, 2019, at 10:00 a.m. (Ex. X30)

16 19) On May 20, 2019, ALJ Gaddis issued an interim order transferring the case  
17 to ALJ Kari Furnanz. (Ex. X31)

18 20) At the time set for hearing on July 9, 2019, Williams appeared and indicated  
19 that he had only recently become aware of this matter and received a copy of the  
20 Amended Formal Charges from the Agency that morning. The Agency and other  
21 Respondents had made several previous attempts to locate him, but were unsuccessful  
22 until S. Doss was able to reach him shortly before the hearing.

23 S. Doss, MGC and Ostermiller made oral motions to postpone the hearing, stating  
24 that they needed additional time to talk with Williams and to prepare to defend the case  
with Williams involved. After a lengthy discussion on the record, the forum ruled that the  
matter would be postponed to provide for proper service of the Amended Formal Charges

1 on Williams, and to give him an opportunity to file a written response to the Amended  
2 Formal Charges and a case summary, and to coordinate with counsel for the other  
3 Respondents. The parties were given the opportunity to provide their availability for  
4 hearing within the upcoming months. Based on the availability of the Agency and  
5 Respondents, the ALJ issued an interim order on July 11, 2019, rescheduling the hearing  
6 to begin on Wednesday, September 25, 2019, at 10:00 a.m., and reiterated the  
7 requirements for filing documents and what each participant must include in their case  
8 summary.

9 The interim order of July 11, 2019, also stated, in part:

10 "Williams must file a case summary on or before Wednesday, September  
11 11, 2019. With the exception of Williams, the case summary deadline for the other  
12 parties has passed. Since the Agency timely filed a case summary, it may file an  
13 addendum to its case summary, if necessary. Respondents Doss, MGC and  
14 Ostermiller may file case summaries if there is newly discovered evidence received  
15 from Williams. With respect to any other evidence, [their] case will be limited to (1)  
16 presenting the testimony of the party and (2) offering testimony or evidence solely  
17 for the purpose of impeachment. See *Bravo Event Service, Inc., & Dan Kor*, 36  
18 BOLI 250, 257-58 (2018).

15 \*\* \* \*

16 " \* \* \* At the hearing, the Agency was instructed to serve Williams with the Amended  
17 Formal Charges by both regular service and email. Williams must file a response  
18 20 days after the Agency completes service by both methods.

18 " \* \* \* \* "

19 (Ex. X33) (Emphasis in original)

20 21) On September 23, 2019, the forum issued an interim order ruling on the  
21 Agency's motion for default against Williams. The interim order stated:

22 **"PROCEDURAL BACKGROUND**

23 "At the time set for hearing on July 9, 2019, [Williams] appeared and  
24 indicated that he had only recently become aware of this matter and received a

1 copy of the Amended Formal Charges from the Agency that morning. After a  
2 lengthy discussion on the record, the forum ruled that the matter would be  
3 postponed to provide for proper service of the Amended Formal Charges on  
4 Respondent Williams, and to give him an opportunity to file a written response to  
5 the Amended Formal Charges and a case summary, and to coordinate with  
6 counsel for the other Respondents.<sup>7</sup> On July 11, 2019, the forum issued an interim  
7 order postponing the hearing until September 25, 2019. The Interim Order of July  
8 11, 2019, also contained the following instructions:

9 'During the hearing, Respondent Williams confirmed that his correct  
10 mailing address is "2921 Autumn Haze Ln., Las Vegas, NV, 89117."  
11 Respondent Williams indicated that he would like a courtesy copy of filings  
12 and orders sent to him at [lasvegaslazarus@gmail.com](mailto:lasvegaslazarus@gmail.com). The case  
13 participants are directed to provide emailed copies of all filed documents to  
14 all case participants and the forum, no later than 5pm on the date of filing.  
15 **Emailed copies of documents are merely courtesy copies and do not  
16 replace required methods of filing documents, pursuant to the  
17 Division 50 Contested Case Hearing Rules.**

18 (Emphasis in original.)

19 "On September 6, 2019, the Agency moved for an Order of Default against  
20 Williams, asserting that Williams 'was properly served and has not filed a timely  
21 answer to the Formal Charges in this matter.'<sup>8</sup> The Agency represented that it  
22 served a copy of the "Notice of Hearing and Formal Charge"" on Williams on July  
23 10, 2019, but he had not filed an answer.

24 "On September 10, 2019, the ALJ sent an email to the parties which stated:

**'Request to the Agency to Supplement the Record in Support of  
Motion for Default as to Lazarus Williams:**

'The Agency is directed to supplement the record in support of the Motion  
for Default as to Lazarus Williams with the following information:

- A copy of the email the Agency sent to \* \* \* Williams on July 10,  
2019, (including all attachments) that is referenced in Section I.f. on  
page 2 of the Agency's motion.

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<sup>7</sup> Although the other Respondents had moved for a postponement, their motion was not granted. The matter was postponed for the benefit of Williams who had just received a copy of the Amended Formal Charges that day.

<sup>8</sup> Throughout its motion, the Agency refers repeatedly to the "Formal Charges" instead of the "Amended Formal Charges" which are currently at issue. The forum assumes that the references to the "Formal Charges" are typographical errors and that the Agency intended to argue that Williams failed to file an answer to the *Amended* Formal Charges.

- 1
- A copy of the email from \* \* \* Williams in which he confirmed that he received the documents the Agency emailed on July 10, 2019, and that he would “review and reply accordingly” as indicated in Section I.f. on page 2 of the Agency’s motion.
  - Documentation showing that the Agency emailed a courtesy copy of the motion for default “to all case participants and the forum, no later than 5pm on the date of filing” as required by the forum’s interim order of July 11, 2019.
- 2  
3  
4  
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6 ‘Please file the requested supplemental information as soon as possible, but no later than noon on Wednesday, September 11, 2019. As a reminder, courtesy copies of the filings must be emailed to all participants and myself.’

7

8 (Emphasis in original.)

9 “Later that day, Administrative Prosecutor Adriana Ortega sent an email to the ALJ and the parties which stated that the documents the ALJ requested were attached as Exhibit A. However, the Agency did not ‘file’ the supplemental information contained in Exhibit A by September 11, 2019, with the forum as requested in the ALJ’s email.<sup>9</sup>

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12 “On September 11, 2019, the ALJ emailed the parties and stated, among other things, that the deadline for filing Williams’s response to the motion for default was extended to September 17, 2019, and that his response ‘must be filed with BOLI’s Contested Case Coordinator *and emailed* to the parties by 5:00 p.m. that day.’ (Emphasis added.)

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15 “On September 19, 2019, BOLI’s Contested Case Coordinator received two documents from Williams that were titled ‘Response to Motion for Default as to Lazarus Williams’ and ‘Case Summary.’ The documents were enclosed in an envelope that was stamped with postage but not postmarked by the United States Postal Service. Accordingly, pursuant to OAR 839-050-0040(2), the documents were filed two days later on September 19, 2019, the date they were received by the forum.

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## 19 **“RULING ON THE AGENCY’S MOTION**

### 20 *“Standard for Default*

21 “OAR 839-050-0330(1)(a) provides that default may occur when ‘[a] party fails to file a required response, including \* \* \* an answer, within the time specified

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23 <sup>9</sup> Since the documents in Exhibit A were requested by the ALJ using the authority in OAR 839-050-0250(9),  
24 the ALJ printed the documents, marked them as Exhibit ALJ 1 and place them in the forum file.

1 in the charging document.’ OAR 839-050-0130(4) requires that ‘a party must file  
2 an answer within 20 days after service of the charging document.’ OAR 839-050-  
0030(1), describes the methods of serving the charging document and states, in  
3 pertinent part:

4 \* \* \* [T]he charging document [in a BOLI contested case] will be served on  
5 the party or the party's representative by personal service or by registered  
or certified mail. Service of a charging document is complete upon the  
earlier of:

6 “(a) Receipt by the party or the party’s representative; or

7 “(b) Mailing when sent by registered or certified mail to the correct  
8 address of the party or the party's representative.’

9 *“Notice of Hearing Requirement*

10 “Additionally, OAR 839-050-0080(2) states that when Formal Charges are  
11 issued, ‘the notice of hearing will accompany the Formal Charges.’ In its motion,  
12 the Agency represented to the forum that ‘the Notice of Hearing and Formal  
13 Charges’ were provided to Williams on July 9, 2019, when the parties initially  
14 convened for hearing. However, on the record at the hearing, Administrative  
Prosecutor acknowledged that she had only provided Williams with the Amended  
Formal Charges and that she ‘did not provide’ documents to Williams that typically  
accompany charging documents and explain his rights. Accordingly, the forum  
concludes that the Agency did not prove that Williams received the Notice of  
Hearing on July 9, 2019.

15 “The Agency’s motion for default also states that it ‘served a Notice of  
16 Hearing and Formal Charges upon’ Williams on July 10, 2019. The motion was  
17 accompanied by the Declaration of Diane Anicker, which stated that on July 10,  
2019, Anicker ‘issued Formal Charges and a Notice of Hearing’ to Williams and  
18 cites to ‘Attachment 1.’ Attachment 1 to Anicker’s declaration did not include a  
copy of the Notice of Hearing in this case. Attachment 1 also did not include a  
copy the ‘Formal Charges,’ but did include the *Amended* Formal Charges, along  
with copies of the following:

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- 20 • Certificate of Service signed by Anicker stating that she served a copy  
of the Amended Formal Charges on Williams by certified mail on July  
10, 2019.
  - 21 • A ‘Warning’ statement written in multiple languages indicating that  
important documents are enclosed.
  - 22 • A document titled ‘Summary of Contested Case Rights and Procedures  
(Civil Rights Division).’
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- A document titled 'Responsive Pleadings Rule 839-050-0130,' which states, 'An Answer must be filed within Twenty (20) days after service of the Formal Charges,' and contains the text of OAR 839-050-0130.
  - A document entitled 'Servicemembers Civil Relief Act (SCRA) Notification.'
  - A copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445, effective July 1, 2019.

5 "Because Attachment 1 did not include the Notice of Hearing, the forum concludes that the Agency did not serve a copy of the actual Notice of Hearing on Williams. Accordingly, the forum must examine whether the other documents served on Williams (the documents in Exhibit A and the forum's interim order of July 10, 2019) satisfy the notice requirements of ORS 183.413, ORS 183.415 and OAR 839-050-0080(4).

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9 "ORS 183.413(2) specifies that a notice of a contested case hearing that contains the following information should be served on each party, personally or by mail:

10 '(a) The time and place of the hearing.

11

12 '(b) A statement of the authority and jurisdiction under which the hearing is to be held.

13 '(c) A statement that generally identifies the issues to be considered at the hearing.

14

15 '(d) A statement indicating that the party may be represented by counsel and that legal aid organizations may be able to assist a party with limited financial resources.

16

17 '(e) A statement that the party has the right to respond to all issues properly before the presiding officer and present evidence and witnesses on those issues.

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19 '(f) A statement indicating whether discovery is permitted and, if so, how discovery may be requested.

20 '(g) A general description of the hearing procedure including the order of presentation of evidence, what kinds of evidence are admissible, whether objections may be made to the introduction of evidence and what kind of objections may be made and an explanation of the burdens of proof or burdens of going forward with the evidence.

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23 '(h) Whether a record will be made of the proceedings and the manner of making the record and its availability to the parties.

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'(i) The function of the record-making with respect to the perpetuation of the testimony and evidence and with respect to any appeal from the determination or order of the agency.

'(j) Whether an attorney will represent the agency in the matters to be heard and whether the parties ordinarily and customarily are represented by an attorney.

'(k) The title and function of the person presiding at the hearing with respect to the decision process, including, but not limited to, the manner in which the testimony and evidence taken by the person presiding at the hearing are reviewed, the effect of that person's determination, who makes the final determination on behalf of the agency, whether the person presiding at the hearing is or is not an employee, officer or other representative of the agency and whether that person has the authority to make a final independent determination.

'(l) In the event a party is not represented by an attorney, whether the party may during the course of proceedings request a recess if at that point the party determines that representation by an attorney is necessary to the protection of the party's rights.

'(m) Whether there exists an opportunity for an adjournment at the end of the hearing if the party then determines that additional evidence should be brought to the attention of the agency and the hearing reopened.

'(n) Whether there exists an opportunity after the hearing and prior to the final determination or order of the agency to review and object to any proposed findings of fact, conclusions of law, summary of evidence or recommendations of the officer presiding at the hearing.

'(o) A description of the appeal process from the determination or order of the agency.

'(p) A statement that active duty servicemembers have a right to stay proceedings under the federal Servicemembers Civil Relief Act and may contact the Oregon State Bar or the Oregon Military Department for more information. The statement must include the toll-free telephone numbers for the Oregon State Bar and the Oregon Military Department and the Internet address for the United States Armed Forces Legal Assistance Legal Services Locator website.'

"ORS 183.415(3) further requires state agencies to give notice of the following:

'(a) A statement of the party's right to hearing, with a description of the



1 procedure and time to request a hearing, or a statement of the time and  
2 place of the hearing;

3 '(b) A statement of the authority and jurisdiction under which the hearing is  
4 to be held;

5 '(c) A reference to the particular sections of the statutes and rules involved;

6 '(d) A short and plain statement of the matters asserted or charged;

7 '(e) A statement indicating whether and under what circumstances an order  
8 by default may be entered; and

9 '(f) A statement that active duty servicemembers have a right to stay  
10 proceedings under the federal Servicemembers Civil Relief Act and may  
11 contact the Oregon State Bar or the Oregon Military Department for more  
12 information. The statement must include the toll-free telephone numbers for  
13 the Oregon State Bar and the Oregon Military Department and the Internet  
14 address for the United States Armed Forces Legal Assistance Legal  
15 Services Locator website.'

16 "Language in BOLI's contested case rule OAR 839-050-0080(4)  
17 substantially echoes the statutory notice of hearing requirements, stating that a  
18 notice of hearing 'will include' the following:

19 '(a) A statement of the time and place of the hearing, including the statement  
20 that the hearing will reconvene on successive business days thereafter until  
21 concluded;

22 '(b) A statement of the authority and jurisdiction under which the hearing is  
23 to be held;

24 '(c) A reference to the particular sections of the statutes and rules involved;

'(d) A short and plain statement of the matters asserted or charged;

'(e) The name of the Administrative Law Judge designated by the  
commissioner to preside over the contested case and whether the  
Administrative Law Judge is an employee of the Agency; and

'(f) A statement indicating whether the case for the Agency will be presented  
by the Oregon Department of Justice or by an Agency Administrative  
Prosecutor.'

"The forum finds that documents in Ex. ALJ1 and the forum's interim order  
of July 10, 2019, contained the information required by the authorities described

1 above. Therefore, the forum concludes that Williams was served with the  
2 Amended Formal Charges on July 10, 2019, by certified mail and by email, and  
3 that service was accompanied by the required notice. Williams responded to the  
4 email on July 10, 2019, stating 'received and I will review and reply accordingly.'  
5 More than 20 days have elapsed since July 10, 2019, and Williams has not yet  
6 filed an answer to the Amended Formal Charges.

7 "Based on Williams's failure to file an answer by July 30, 2019, the forum  
8 **GRANTS** the Agency's motion and finds Williams in default. If Williams is not  
9 granted relief from default, Williams will not be allowed to participate in any manner  
10 in the hearing, including, but not limited to, presentation of witnesses or evidence  
11 on his behalf, examination of Agency witnesses, objection to evidence presented  
12 by the Agency, making of motions or argument, and filing exceptions to the  
13 Proposed Order. OAR 839-050-0330(4).

#### 14 **"NOTICE OF DEFAULT**

15 "Relief from default may be granted if Williams shows good cause, within  
16 ten days after the date of this order, for failing to timely file an answer. The request  
17 for relief must be in writing and accompanied by a written statement, together with  
18 appropriate documentation, setting forth the facts supporting the claim of good  
19 cause. OAR 839-050-0340.

20 **"IT IS SO ORDERED."** (Exs. X34-X39)

21 22) At the start of hearing, the ALJ orally informed the participants of the issues  
22 to be addressed, the matters to be proved and the procedures governing the conduct of  
23 the hearing. Part of the instructions included informing the parties that witnesses would  
24 be questioned on direct, by cross-examination and by re-direct. When Ostermiller's  
counsel requested permission to ask M. Doss additional questions, the ALJ denied the  
request because counsel had already completed cross-examination of the witness.  
(Hearing Record)

25 23) The Agency called Lynch to testify as its first witness. Respondents  
26 Ostermiller and MGC objected because he was not listed on the Agency's case summary.  
27 The ALJ found there was a satisfactory reason for not listing Lynch as a witness because  
28 Investigator Radich was out on medical leave at the time of hearing.

1 Respondents Ostermiller and MGC also objected to Lynch testifying about the  
2 contents of the documents in the investigation file. They argued that it would be a violation  
3 of Respondents' due process rights because they would be unable to cross examine  
4 Investigator Radich, who authored most of the documents in the file. Respondents stated  
5 that the matter should be postponed until Radich was available to testify and could be  
6 cross examined. The ALJ found that Respondents had valid arguments as to the weight  
7 of Lynch's testimony and informed Respondents that they could object to any specific  
8 question they found objectionable for this reason. The ALJ also noted that Respondents'  
9 arguments would be considered further when the Proposed Order was issued.<sup>10</sup> (Hearing  
10 Record)

11 24) Williams testified that he never received a report or heard that Contreras  
12 believed she had been discriminated against or harassed. Ostermiller's counsel then  
13 asked Williams whether he was "in tune" to people saying things that were "off color" or  
14 "not quite appropriate" because he had Hispanic family members. The Agency objected  
15 to the "in tune" question on the grounds that the question was not impeachment  
16 evidence.<sup>11</sup> Ostermiller's counsel argued that Williams was testifying to rebut the  
17 testimony of Contreras when she stated that she reported to Williams that Ostermiller had  
18 discriminated against her. The ALJ allowed Williams to answer the question and said  
19 that a ruling on the objection would be made in the proposed order.

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22 <sup>10</sup> As stated above in footnote 2, the statements of Radich in the documents she authored are not  
23 considered as substantive evidence in the record because she was not available for cross examination and  
the Agency did not notify Respondents prior to the hearing that Lynch would be testifying in place of Radich.

24 <sup>11</sup> Respondents were only permitted to offer impeachment evidence or rebuttal witnesses because they did  
not file case summaries. See OAR 839-050-0210(1)(a).

1           Upon further review, the forum notes that Respondents were attempting to  
2 impeach the portion of Contreras’s testimony in which she stated that 1) an employee  
3 named Summer Iverson (“Iverson”) made a report to Williams that Ostermiller was  
4 engaging in discriminatory conduct against Contreras and 2) nothing was done in  
5 response to the report. The ALJ provided Ostermiller’s counsel with the opportunity to  
6 cite an evidentiary rule to support the position that the ethnicity of Williams’s family  
7 constituted impeachment evidence, but counsel did not do so. Accordingly, it is not clear  
8 how the question about Williams being “in tune” with issues due to the ethnicity of family  
9 members impeaches Contreras’s testimony. Nevertheless, the testimony will be  
10 considered as rebuttal evidence. The forum considered the Agency’s objection when  
11 evaluating the weight of the evidence.

12           25) On April 27, 2022, the Agency filed a Notice of Change of Administrative  
13 Prosecutor, indicating that the case had transferred to Chief Prosecutor Adam Jeffries.

14           26) On April 12, 2023, the ALJ issued a proposed order that notified the  
15 participants they were entitled to file exceptions to the proposed order within ten days of  
16 its issuance. The Agency filed exceptions on April 27, 2023. No Respondents filed  
17 exceptions.

18   **FINDINGS OF FACT – THE MERITS**

19           1) At all times material herein, MGC was an active limited liability company  
20 doing business in Oregon. MGC and S. Doss operated a business under the assumed  
21 business name of Knockers Strip Club (“Knockers”) in Springfield, Oregon. Knockers  
22 featured entertainment from female exotic dancers, and also served food and alcoholic  
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1 drinks.<sup>12</sup> (Exs. X18, A8; Testimony of Contreras)

2       2) M. Doss is the husband of S. Doss and assisted her in operating the  
3 Knockers business. He came to the bar almost every Thursday to discuss the operations  
4 of the bar with Williams. (Testimony of M. Doss, Ostermiller, Williams)

5       3) Contreras was employed by Knockers as a cook from approximately  
6 October 13, 2016, until the bar closed in March or April of 2017.<sup>13</sup> (Ex. A1; Testimony of  
7 Contreras, Ostermiller)

8       4) Contreras was hired by Travis Powell, the former kitchen manager. Powell  
9 stopped working at Knockers shortly after Contreras was hired when the kitchen manager  
10 position was eliminated. After Powell left, Williams became her direct supervisor.  
11 (Testimony of Williams)

12       5) Williams was the Executive Manager of Knockers when Contreras was  
13 employed there. He worked at Knockers from 2016 until it closed in 2017. Williams hired  
14 and fired employees. Employees could write down suggestions to Williams about when  
15 they wanted to work, but Williams made the final schedules. Employees could suggest  
16 food or drink menu items to Williams, but he decided what the bar would serve. Williams  
17 worked primarily in the evenings and was physically present in the bar three to four nights  
18 of the week. Although Contreras worked during the day, Williams's shifts frequently  
19 overlapped with hers and he saw her approximately 2-3 times per week. (Testimony of  
20 Williams, Ostermiller)

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22 <sup>12</sup> Since many of the witnesses referred to Knockers as "the bar" in their testimony, that term will be used  
23 interchangeably with "Knockers."

24 <sup>13</sup> There was conflicting testimony as to whether Knockers closed on March 24 or April 24, 2017.  
(Testimony of Contreras, Ostermiller)

1           6)     Ostermiller worked at Knockers primarily performing bartender duties. His  
2 job title was "Shift Manager." Williams hired him in September of 2016. Ostermiller did  
3 not have the power to hire or fire employees, and he did not make work schedules.  
4 However, Ostermiller sometimes interviewed prospective employees and made  
5 recommendations to Williams. Ostermiller could prepare checks, but he did not have the  
6 authority to sign them. Ostermiller understood that if there were any disputes between  
7 employees, it should be reported to Williams. (Testimony of Ostermiller, Williams, S.  
8 Doss, M. Doss)

9           7)     On occasion, Williams and Ostermiller either covered or assisted Contreras  
10 with her duties. For example, on one occasion, Ostermiller asked Contreras to bring cash  
11 deposits to the bank and he covered her kitchen responsibilities in her absence.  
12 (Testimony of Contreras, Ostermiller)

13           8)     The Oregon Liquor and Cannabis Commission ("OLCC") requires businesses  
14 that serve alcohol to keep a log of incidents that occur on the premises. (Testimony of  
15 Ostermiller, Williams)

16           9)     Ostermiller has licenses from the OLCC and the Oregon Department of  
17 Public Safety Standards and Training ("DPSST"). At the time Ostermiller was hired, the  
18 bar was subject to additional oversight from the state because a former employee had  
19 worked with an expired license. Knockers had a policy requiring customers to present  
20 two forms of identification before entering the bar. Ostermiller understood that this  
21 requirement was imposed by the OLCC and there was a sign on the wall stating that two  
22 forms of identification were required. Ostermiller refused entry to Knockers to individuals  
23 without proper identification on many occasions, including a white male, a Hispanic  
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1 female and an African American male. (Testimony of Ostermiller)

2 10) Contreras also had an OLCC alcohol server license. She understands that  
3 licensed alcohol servers are required to verify identification. There are only certain forms  
4 of identification that Oregon law allows a server to rely upon. If an OLCC licensed server  
5 provides alcohol to someone who does not present proper identification, the server can  
6 receive a \$1,500 fine and a bar can be fined \$5,000. A server can also have their license  
7 revoked. Contreras agrees that reviewing proper identification is important under Oregon  
8 law. She is aware that doormen who check identification at bars must have DPSST  
9 licensing and she does not have that training. (Testimony of Contreras)

10 11) Contreras saw Ostermiller refuse to let two of her Hispanic friends into the  
11 bar, and she noticed that on another occasion two doormen let those same friends enter.  
12 She did not inspect the identification of her friends on either occasion to see if it met  
13 OLCC identification requirements. (Testimony of Contreras)

14 12) Ostermiller recalled an occasion when three Hispanic males came to  
15 Knockers. One of the men had a green permanent resident card and the other two men  
16 had identification from another country. Ostermiller turned the men away because those  
17 forms of identification are not acceptable to the OLCC. It was his understanding that if  
18 the OLCC came to inspect, both he and Knockers could be fined, and he could lose his  
19 license to work as a bartender. (Testimony of Ostermiller)

20 13) Contreras sometimes stayed at Knockers after her shift ended and drank  
21 alcohol. On more than one occasion, Ostermiller "cut off" Contreras and stopped serving  
22 her alcohol when he observed her displaying visible signs of intoxication, including  
23 vomiting. After Ostermiller stopped serving alcohol to Contreras, she became angry at  
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1 him and told him it was not fair. Ostermiller called Williams to report this information to  
2 him. He told Williams that he was not comfortable serving alcohol to Contreras.

3 (Testimony of Ostermiller, Williams)

4 14) Contreras admitted that she vomited on more than one occasion after  
5 drinking alcohol at Knockers, including one time in a restaurant booth and once in the  
6 restroom. (Testimony of Contreras)

7 15) Williams worked with the OLCC extensively regarding the bar's liquor  
8 service issues, and became concerned that Contreras's intoxication at the bar put the  
9 business at risk. (Testimony of Contreras, Williams)

10 16) Williams had a disciplinary conversation with Contreras to discuss concerns  
11 he had regarding her alcohol consumption at the bar. He told her that her behavior was  
12 not acceptable. Williams put her on probation from drinking at the bar, and told  
13 employees not to serve her alcohol. (Testimony of Contreras, Williams)

14 17) When Contreras arrived late to work one day, Ostermiller commented to her  
15 that she should have had enough time to call and let the staff know. (Testimony of  
16 Ostermiller)

17 18) On one occasion, Kitchen Manager Travis Powel suggested a "Taco  
18 Tuesday" special to increase sales. Ostermiller thought it was a good suggestion and  
19 suggested that Tecate beer would pair well with tacos. (Testimony of Ostermiller)

20 19) Ostermiller has two tattoos that represent his heritage. One tattoo  
21 represents his Native American ancestors from the Potawatomi tribe, and another  
22 signifies his German/Jewish heritage and is meant to honor the memory of his ancestors.  
23 Contreras once called him a "Nazi," and he assumed she misunderstood the meaning of  
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1 his tattoos. Because of his Jewish ancestry and family history, this upset Ostermiller and  
2 he attempted to explain the meaning of the tattoos to Contreras. (Testimony of  
3 Ostermiller)

4 20) Contreras did not pay attention to Ostermiller's tattoos when he showed  
5 them to her and does not recall him telling her what the tattoos symbolized. (Testimony  
6 of Contreras)

7 21) Ostermiller speaks a little Spanish. He once overheard Contreras talking to  
8 someone in Spanish on the telephone and thought he heard her call him a "God Damn  
9 White Man" in Spanish. He talked to Contreras about it, and she told him to stop listening  
10 to her telephone conversations. (Testimony of Ostermiller)

11 22) Knockers had "quite a bit of diversity" in its employees and patrons,  
12 including African Americans, Latinos and Native Americans. (Testimony of Contreras,  
13 Ostermiller, M. Doss)

14 23) There was a BOLI poster on the wall with information for employees about  
15 how to contact BOLI for assistance if someone is harassed or discriminated against.<sup>14</sup>  
16 (Testimony of Ostermiller)

17 24) No one reported to Williams, S. Doss or M. Doss that Contreras had any  
18 complaints of harassment or discrimination, or that she was not being treated  
19 appropriately at work. (Williams, S. Doss, M. Doss)

20 *Credibility Findings*

21 25) There were multiple inconsistencies in the testimony of Contreras that raise  
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23 <sup>14</sup> The poster was not submitted as an exhibit and there was no testimony with specifics as to what the  
24 poster said, except that it provided general information about discrimination and harassment, and included  
BOLI contact information.

1 questions about her credibility and reliability as a witness.

2 First, she testified confidently on direct examination that she only spoke to Williams  
3 on two occasions and that those conversations were limited to discussing her paycheck.  
4 She further stated that Williams was never around and was not available to talk to her.  
5 However, on cross-examination, she admitted that Williams spoke to her on at least one  
6 other occasion to discuss concerns he had about her drinking alcohol excessively and  
7 vomiting at the bar after her shift ended.

8 Second, in the original complaint that Contreras signed and submitted to BOLI's  
9 Civil Rights Division, Contreras stated that she believed that MGC discriminated against  
10 her based on her race and national origin by reducing her work hours. She testified that  
11 she reviewed the complaint to make sure that it was accurate before she signed it.  
12 However, on cross-examination, she contradicted the statements in the original complaint  
13 and admitted that her hours "were not cut for being Latina."

14 Third, Contreras testified about dates when alleged events may have occurred, but  
15 then later provided different dates when the same events occurred. For example,  
16 Contreras said that Ostermiller's alleged discriminatory conduct towards her began when  
17 President Trump was elected, but at one point said it started around February of 2017.  
18 Later, she testified that harassing comments were made in April and May of 2017, but  
19 also said that she stopped working at Knockers in March of 2017 when the business  
20 closed. She stated that everything was "fine" until after she worked there for a month,  
21 then the harassment started happening. She admitted that she was "confused" about the  
22 dates. Given this testimony, there is insufficient evidence in the record for the forum to  
23 reach a conclusion as to when or how often alleged events may have occurred.

1 Fourth, she testified about specific and discreet acts of alleged harassment by  
2 Ostermiller. She later made generalizations indicating that the harassment was ongoing  
3 and did not stop, but provided no further details of the alleged continuing behavior.

4 Given the multiple inconsistencies in Contreras's testimony, the forum is unable to  
5 accept her version of the events when there is conflicting testimony from other witnesses.

6 26) Lynch was a credible witness, but he lacked firsthand knowledge of the  
7 investigation conducted by Investigator Radich.

8 27) All of Respondents' witnesses (Ostermiller, S. Doss, M. Doss and Williams)  
9 had an inherent motive to protect their financial interests in that they were either named  
10 as parties in this matter or had a financial interest with a party. Although they generally  
11 testified consistently with one another, there was no evidence that they colluded with one  
12 another or had prepared remarks. With respect to Williams, there was evidence that he  
13 was out of touch with Respondents for quite some time and did not learn of this matter  
14 until shortly prior to the hearing. Although Williams lacked legal representation and did  
15 not appear to have prepared for his testimony, his testimony was nevertheless consistent  
16 with that of the other witnesses for Respondents. As well, Respondents' witnesses were  
17 not otherwise impeached by the Agency with credible evidence. In particular, the Agency  
18 did not call any witnesses to testify who could support Contreras's version of the alleged  
19 discriminatory events or her allegation that Iverson spoke to Williams about alleged  
20 harassment. Accordingly, the testimony of Respondents' witnesses was generally  
21 credited over the testimony of Contreras when there were conflicting versions of events.

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1 **CONCLUSIONS OF LAW**

2 1) At all times material herein, MGC and S. Doss were employers as defined  
3 in ORS 659A.001(4)(a) and employed Contreras.

4 2) At all times herein, Ostermiller and Williams were individuals and "person[s]"  
5 under ORS 659A.001(9)(a) and ORS 659A.030(1)(g).

6 3) Respondents did not subject Contreras to different terms and conditions of  
7 employment based on her race, and did not violate ORS 659A.030(1)(b) and OAR 839-  
8 005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I).

9 4) Respondents did not subject Contreras to harassment because of her race,  
10 and did not violate ORS 659A.030(1)(b) and OAR 839-005-0010(4)(a)(A)(B)(C) (b).

11 5) Ostermiller and Williams did not aid and abet unlawful employment  
12 practices, and did not violate ORS 659A.030(1)(g).

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

16 7) Under ORS 659A.850(3), the Commissioner of the Bureau of Labor and  
17 Industries shall issue an order dismissing the charges against any respondent not found  
18 to have engaged in any unlawful practice charged.

19 **OPINION**

20 The Amended Formal Charges allege that Respondents subjected Contreras to  
21 different terms and conditions of employment and harassed her on the basis of race in  
22 violation of ORS 659A.030(1)(b), OAR 839-005-0010(1)(a)(b)(c)(d)(A), (B)(i)(I) and OAR  
23 839-005-0010(4)(a)(A)(B)(C) (b). Additionally, the Agency asserts that Ostermiller and  
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1 Williams aided and abetted the unlawful employment actions in violation of ORS  
2 659A.030(1)(g). The Agency seeks emotional distress damages for Contreras.

3 Since Williams is in default, the Agency need only establish a prima facie case to  
4 support the allegations in order to prevail as to the charges against him. *In the Matter of*  
5 *Vision International Petroleum, LLC*, 37 BOLI 187, 196 (2019).

### 6 **RACE DISCRIMINATION - DIFFERENT TERMS AND CONDITIONS OF EMPLOYMENT**

7 In Paragraph 8 of the Amended Formal Charges, the Agency alleged that  
8 Respondents “subjected Complainant to different terms and conditions [of employment]  
9 because of her race” in violation of ORS 659A.030(1)(b), OAR 839-005-  
10 0010(1)(a)(b)(c)(d)(A), (B)(i)(I). It is an unlawful employment practice for “[a]n employer,  
11 because of an individual's \* \* \* race \* \* \* to discriminate against the individual in  
12 compensation or in terms, conditions or privileges of employment.” ORS 659A.030(1)(b).  
13 There was reference in the testimony to the fact that, at one point, Contreras made a  
14 complaint to BOLI about a reduction of her work hours due to her race. However,  
15 Contreras admitted that her hours were not reduced “for being Latina.” The remainder of  
16 the Agency’s case focused on alleged racial harassment, which will be discussed below.

### 17 **RACE DISCRIMINATION - HARASSMENT**

#### 18 *Harassment by a Supervisor*

19 The forum first examines whether there is evidence of harassment by a supervisor.  
20 Supervisors with “immediate (or successively higher) authority over the employee” are  
21 considered agents of an employer for purposes of an employer's Title VII liability.  
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1 *Faragher v. City of Boca Raton*, 524 US 775, 807 (1998).<sup>15</sup> Determining whether a  
2 particular individual is a supervisor “is not dependent upon job titles or formal structures  
3 within the workplace.” *Dawson v. Entek Int’l.*, 630 F3d 928, 940 (9th Cir 2011), *citing*  
4 *McGinest v. GTE Service Corp.*, 360 F3d 1103, 1119 n.13 (9th Cir 2004). Rather, for  
5 purposes of vicarious liability under Title VII a person is a supervisor “if he or she is  
6 empowered by the employer to take tangible employment actions against the victim.”  
7 *Vance v. Ball State University*, 570 US 421, 424 (2013). A tangible employment action is  
8 “a significant change in employment status, such as hiring, firing, failing to promote,  
9 reassignment with significantly different responsibilities, or a decision causing a  
10 significant change in benefits.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761  
11 (1998), OAR 839-005-0010(4)(d).

12 In this case, Contreras testified as to negative treatment she received from  
13 Ostermiller. However, there is insufficient evidence that Ostermiller had “immediate (or  
14 successively higher) authority over” her employment. Ostermiller could not hire or fire  
15 employees, and had to report any workplace issues to Williams to take action. Contreras  
16 claimed that Ostermiller set her schedule, but there was testimony from Ostermiller and  
17 Williams that, although Ostermiller could request to work certain hours, Williams set the  
18 work schedules. Accordingly, even if the forum had determined that Ostermiller harassed  
19 Contreras, there is insufficient evidence that he was her supervisor.

20 ///

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23 <sup>15</sup> Federal law similar to Oregon’s civil rights laws is not binding on the forum, but federal decisions can be  
24 instructive in construing and applying similar state law. *Bravo Event Services, Inc. and Dan Kor*, 36 BOLI  
250, 265 (2018). See also *In the Matter of Murrayhill Thriftway, Inc.*, 20 BOLI 130, 149 (2000) (stating that  
“decisions interpreting Title VII are instructive in construing and applying the similar state law”).

1 *Co-Worker Harassment*

2 A prima facie case of co-worker harassment based on race consists of the  
3 following elements: (1) respondent is a respondent as defined by statute; (2) complainant  
4 is a member of a protected class; (3) complainant was harmed by harassment directed  
5 at complainant by co-workers; (4) complainant's race was a reason for the co-worker  
6 harassment; and (5) the harassment was sufficiently severe or pervasive to have the  
7 purpose or effect of unreasonably interfering with the complainant's work performance or  
8 creating an intimidating, hostile or offensive working environment. OAR 839-005-  
9 0010(4)(f); *Vision*, 37 BOLI at 198. The standard for determining whether harassment is  
10 sufficiently severe or pervasive to create a hostile, intimidating or offensive working  
11 environment is whether a reasonable person in the circumstances of the complaining  
12 individual would so perceive it. OAR 839-005-0010(4)(b).

13 The first two elements are not in dispute. With respect to the remaining elements,  
14 the forum analyzes each of the instances in which Contreras claimed that Ostermiller  
15 harassed her.

16 Contreras first described an incident when she arrived at work and Ostermiller  
17 thought she was late. Contreras said that Ostermiller told her that because Trump "put  
18 up the wall," she could not "make it over." Ostermiller testified that he did not make this  
19 comment. He said that when Contreras arrived an hour late, he asked her why she did  
20 not call to let them know.

21 Contreras's second example of harassment involved a discussion with Ostermiller  
22 about serving Tecate beer and tacos for a "Taco Tuesday" special. She said that  
23 Ostermiller told her that she should bring "her people" in for the special and this offended  
24

1 her. Ostermiller remembered discussing "Taco Tuesday" specials, but denied making the  
2 comment about Contreras's "people."

3 Third, Contreras testified that Ostermiller would not let her Hispanic friends into the  
4 bar and told her that they had fake identification. Contreras also testified that Ostermiller  
5 said "you know how it is" and that people can get fake identification in Santa Ana. She  
6 then said that the night security guard at Knockers let these same friends enter. In  
7 response, Ostermiller testified that he had to deny entry to three Hispanic men once  
8 because they did not have the type of identification that is allowed by the OLCC.

9 Fourth, Contreras said that Ostermiller argued with her about not knowing how to  
10 do her job. Ostermiller denied saying this and testified that he thought Contreras did a  
11 good job.

12 Finally, Contreras said that at one point she told Ostermiller that he was a racist  
13 and, in response, he tried to show her his tattoos to demonstrate that he was not racist.  
14 In contrast, Ostermiller testified that Contreras saw his tattoos and called him a "Nazi."  
15 He was offended by her comment because he had Jewish ancestors who had been  
16 persecuted. He attempted to explain the meaning of his tattoos to Contreras, which he  
17 said represented his German Jewish and Native American heritage.

18 In a case such as this with conflicting evidence, the forum must determine whether  
19 there is sufficient credible evidence to support the Agency's case. As stated above in the  
20 Findings of Facts – Procedural ## 25 and 27 discussing credibility, there were too many  
21 inconsistencies in Contreras's testimony for the forum to conclude that her testimony was  
22 more credible and reliable than the contrasting testimony of Respondents' witnesses.  
23 There was also evidence that Contreras was angry at Ostermiller when he cut off alcohol  
24



1 service to her for drinking excessively and vomiting in the bar. Although Contreras  
2 claimed that some of the alleged harassment by Ostermiller was witnessed by others,  
3 such as Iverson, the Agency did not call Iverson or any other witness to confirm that the  
4 alleged conduct occurred. Therefore, the forum concludes that the Agency did not meet  
5 its burden of proof to establish that Ostermiller harassed Contreras because of her race.

6 Finally, if the forum were to conclude that Ostermiller harassed Contreras because  
7 of her race, Respondents MGC and S. Doss would be liable for harassment they "knew  
8 or should have known about," unless they "took immediate and appropriate corrective  
9 action." *Vision*, 37 BOLI at 198, *citing* OAR 839-005-0010(4)(f). Contreras's testimony  
10 demonstrated that she was aware that Williams was someone who should be notified of  
11 any alleged harassment<sup>16</sup> and that she tried to inform Williams about the alleged  
12 harassment. She first stated that she called Williams to report the alleged harassment,  
13 but did not leave a voicemail when he did not answer. She also testified that she could  
14 not talk to Williams in person because he was rarely present at Knockers and he only  
15 spoke to her twice to discuss her paycheck. On cross-examination she admitted she had  
16 actually spoken to him on other occasions, including the time he spoke to her with  
17 concerns about her alcohol consumption after work at Knockers. There was also  
18 testimony from multiple witnesses that Williams was at Knockers at least two to three  
19 days a week, and that M. Doss came there almost every Thursday. This rebuts

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21  
22 <sup>16</sup> Respondents provided testimony about a policy against harassment that was in hiring packets provided  
23 to employees. They also testified about a BOLI poster hanging on the wall. However, they did not introduce  
24 these documents into evidence. The forum draws no conclusion as to whether the hiring packet or BOLI  
poster sufficiently notified employees about discrimination policies and who could receive such reports.  
However, Contreras acknowledged in her testimony that Williams was an appropriate person to whom she  
could make a report.

1 Contreras's testimony that they were not available to receive complaints.

2 Contreras also testified that she told Iverson about the harassment and that  
3 Iverson was going to talk to Williams, but there was no evidence that Iverson was a  
4 supervisor or that Iverson relayed such a report to Williams. Williams denied having any  
5 knowledge of alleged harassment or discrimination towards Contreras. Accordingly, even  
6 if harassment occurred, there is insufficient evidence that Contreras's employer knew or  
7 should have known of the harassment.

### 8 **LIABILITY OF OSTERMILLER AND WILLIAMS FOR AIDING OR ABETTING**

9 In the Amended Formal Charges, the Agency alleges that Ostermiller and Williams  
10 "aided [or] abetted the unlawful actions." (Ex. X8) ORS 659A.030(1)(g) provides that it  
11 is an unlawful employment practice "[f]or any person, whether an employer or employee,  
12 to aid, abet, incite, compel or coerce the doing of any of the acts of this chapter or to  
13 attempt to do so." A corporate officer and owner who commits acts rendering the  
14 corporation liable for an unlawful employment practice may be found to have aided or  
15 abetted the corporation's unlawful employment practice. *In the Matter of Bravo Event*  
16 *Services, Inc. and Dan Kor*, 36 BOLI 250, 268 (2018); *see also Allison v. Dolich*, 321 Or  
17 App. 721, 725, 518 P3d 591 (2022).

18 In this case, since there were no unlawful actions, no one can be liable as an aider  
19 and abettor. Moreover, the Agency did not sustain its burden of proof to demonstrate that  
20 Williams had any knowledge of any unlawful actions towards Contreras. Because there  
21 is no proof of unlawful actions and there is insufficient evidence of Williams's knowledge  
22 of any alleged unlawful behavior, Ostermiller and Williams are not liable as aiders and  
23 abettors.

1 **Exceptions to the Proposed Order**

2 The Proposed Order was issued on April 12, 2023. Since the tenth day, April 22,  
3 2023, fell on a Saturday, the parties had until Monday, April 24, 2023, to file any  
4 exceptions. See OAR 839-050-0380(4) (stating that exceptions “must” be filed “within  
5 ten days of the date of issuance of the Proposed Order” unless a party seeks an extension  
6 of time “as provided in OAR 839-050-0050.”)

7 The Agency filed its Exceptions on April 27, 2023, and did not file a request seeking  
8 an extension of time. The Agency’s Exceptions state that the Proposed Order was issued  
9 on April 18, 2023, but the Proposed Order clearly contains an issue date and service date  
10 of April 12, 2023. Accordingly, the forum rejects the Agency’s Exceptions because they  
11 were not timely filed.<sup>17</sup> See *In the Matter of Green Thumb Landscape and Maintenance,*  
12 *Inc.*, 32 BOLI 185, 189 (2013) (failure to follow written directions in the Proposed Order’s  
13 “Exception Notice” did not constitute “good cause” for granting an extension); see also *In*  
14 *the Matter of Stahler*, 34 BOLI 56, 65 (2015).

15 ORDER  
16 NOW, THEREFORE, the charges against all Respondents are DISMISSED.

17  
18 \_\_\_\_\_  
Christina Stephenson, Commissioner  
Bureau of Labor and Industries

19  
20 ISSUED ON: \_\_\_\_\_

5/16/23

21  
22 \_\_\_\_\_  
23 <sup>17</sup> Most of the Agency’s Exceptions refer to scrivener’s errors and do not take exception to the conclusions  
24 in the Proposed Order. When appropriate, revisions were made in this Final Order to correct scrivener’s  
errors.