



BUREAU of LABOR & INDUSTRIES

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

In the Matter of:

**STEPHEN G. BARTON and
MARLENE E. P. HAYES, dba THE
ROYAL CLOTHIERS,**

Respondents.

Case No. **02-20**

FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER

SYNOPSIS

The forum concluded that Respondents violated ORS 659A.030(1)(f), ORS 659A.199(1), and OAR 839-005-0125(1)-(3) and OAR 839-010-0100(1) when they terminated the Complainant because of her protected whistleblower activities. The forum awarded Complainant \$3,490 in lost wages and \$10,000 in emotional and mental suffering damages.

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 April 6-7, 2021, via the GoToMeeting video conference application.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Rachel Diamond-Cuneo, an employee of the Agency. Respondents were represented by their attorney, John Raschko. Complainant Peggy

1 Case ("Case") was present throughout the hearing; Stephen G. Barton ("Barton") and
2 Marlene E.P. Hayes ("Hayes") were present throughout the hearing, on behalf of
3 Respondents.

4 The Agency called Senior Civil Rights Investigator Stacy McKerlie ("McKerlie"),
5 Department of Human Services Investigator Bud Walker ("Walker") and Case as
6 witnesses.

7 Respondents called Barton, Hayes and Susan Rhyne ("Rhyne") as witnesses.

8 The forum received into evidence: (a) Administrative exhibits X1 through X15, (b)
9 Agency exhibits A1-A8 and (c) Respondents' exhibits R6, R9-R10, R16, R19, R23,¹
10 R28 and R29.

11 Having fully considered the entire record in this matter, I, Christina Stephenson,
12 Commissioner of the Bureau of Labor and Industries, hereby make the following
13 Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and
14 Order.

15 **FINDINGS OF FACT – PROCEDURAL**

16 1) Case filed a complaint with the Agency's Civil Rights Division on April 5,
17 2018, alleging that Respondents engaged in unlawful employment practices based on
18 her whistleblowing activities by harassing her and terminating her from employment.
19 (Testimony of McKerlie; Ex. A1)

20 2) On April 5, 2019, the Agency's Civil Rights Division issued a Notice of
21 Substantial Evidence Determination ("SED") in which it found substantial evidence that

22 _____
23 ¹ The portion of Ex. R23 above the line "On Wednesday * * *" was not received into evidence.
24

1 Respondents committed unlawful employment practices (retaliation and termination
2 because of Case's whistleblowing) in violation of ORS 659A.199. (Testimony of
3 McKerlie; Ex. A8)

4 3) On July 23, 2020, the forum issued a Notice of Hearing to Respondents,
5 the Agency, and Complainant stating the time and place of the hearing as January 26,
6 2021, beginning at 9:30 a.m., at the Worksource Oregon Employment Department,
7 1901 Adams Ave., La Grande Oregon. Together with the Notice of Hearing, the forum
8 sent a copy of the Agency's Formal Charges, a document entitled "Summary of
9 Contested Case Rights and Procedures" containing the information required by ORS
10 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," a
11 multi-language notice explaining the significance of the Notice of Hearing, and a copy of
12 the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0445. (Ex.
13 X2)

14 4) The Formal Charges alleged that Respondents violated ORS
15 659A.030(1)(f); ORS 659A.199(1); OAR 839-005-0125(1)-(3) and OAR 839-010-
16 0010(1) by discharging Case because she opposed an unlawful practice and evidence
17 that she reasonably believed was a violation of state or federal law. The Formal
18 Charges sought damages for lost wages in the amount of "at least \$12,500," and mental
19 and/or emotional distress in the amount of "at least \$10,000.00." The Formal Charges
20 also asked that Respondents be trained, at their expense, "on whistleblower protections
21 under Oregon law" and that Respondents be enjoined from violating laws. In addition,
22 the Formal Charges asked that Respondents be required to provide training to its
23 managers, supervisors and human resources personnel on whistleblower protections
24

1 under Oregon law. (Ex. X2a)

2 5) On August 11, 2020, Respondents filed an answer in which Respondents
3 denied that Respondents had committed the alleged violations. (Ex. X3)

4 6) On August 18, 2020, the forum issued an Interim Order Requiring Case
5 Summaries, which set May 19, 2021, as the deadline for filing Case Summaries. (Ex.
6 X5)

7 7) Attorney John Raschko filed a Notice of Appearance on August 24, 2020,
8 stating that he represented Respondents in this matter and was counsel of record on
9 their behalf. (Ex. X6)

10 8) After the Agency and Respondents' counsel indicated by email that they
11 consented to accept filings by email, the ALJ issued an interim order stating that parties
12 could file documents by email and containing instructions for the temporary filing
13 procedures. (Ex. X7)

14 9) On December 1, 2020, the forum issued an interim order informing the
15 parties of the potential for a video conference hearing due to rising COVID-19 case
16 numbers in Oregon and current state office closures. The interim order also provided
17 the parties with the opportunity to file objections, and required parties who did not file
18 objections to inform the ALJ by email that objections would not be filed. Respondents
19 timely filed objections on December 9, 2020. On December 10, 2020, the ALJ issued an
20 interim order which stated, in pertinent part:

21 "Respondents' [objections to a video hearing] essentially fall into three
22 categories. First, Respondents argue that Respondent Marlene Hayes and
23 Respondents' counsel would be forced to place themselves at risk of contracting
24 the COVID-19 virus because Respondents' counsel will need to travel from his
office to meet with his clients and witnesses. Second, Respondents argue that
the applicable statutes and rules do not allow for video hearings. Finally,

1 Respondents expressed concerns about the video hearing format, including the
2 opportunity to confront and cross examine witnesses, and the inability to see
3 what is going on around the person testifying. Each of these three categories of
objections is addressed below.³

4 “Respondents first express safety concerns about the potential for
5 contracting COVID-19. Respondents’ counsel represents that he would need to
6 travel from Kennewick, Washington, to the location of his clients in LaGrande,
7 Oregon or, alternatively, his clients would need to travel to his location. He cites
8 various health concerns for both himself and Respondent Hayes regarding the
9 potential contraction of COVID-19, which are legitimate concerns. However,
10 notably, the forum’s reasoning for holding a video conference hearing is to *avoid*
the very type of travel risks mentioned in Respondents’ objections. The
objections do not address why counsel cannot meet with clients and witnesses
via video conference or by telephone. Additionally, the forum takes official notice
of the expansion of the use of video conference communications among
government agencies, courts, schools, businesses and private citizens since the
beginning of the COVID-19 pandemic.⁴ Accordingly, Respondents’ argument of
the need to travel for in-person meetings is not persuasive.

11 “Second, Respondents argue that ORS 183.310 provides for a contested
12 case hearing in which parties are ‘entitled to appear and be heard,’ and that
13 statutes and rules do not allow for video conference hearings. However, BOLI’s
14 Contested Case rules do provide that the ALJ has the discretion to hold a
15 hearing by telephone. See OAR 839-050-0255(2); see also OAR 839-050-
16 0240(1)(d) (the scheduling of hearings is within the purview of the ALJ). A
17 ‘telephone hearing’ is defined as ‘one in which at least one participant is not
physically present at the hearing but participates by telephone or other two-way
communication device.’ OAR 839-050-0225(1)(Emphasis added.) Accordingly,
BOLI’s Contested Case rules provide the ALJ with the authority to decide to hold
a hearing using a ‘two-way communication device’ such as a video conference
application.

18 ³ Respondents also asked for a continuance of the hearing to a later date when it can be held in person.
19 The forum need not address this request because Respondents did not file a written motion to postpone
20 pursuant to OAR 839-050-0150(5). Moreover, it is unclear when pandemic conditions or public health
guidelines will change to allow for a safe in-person hearing.

21 ⁴ See, e.g. <https://union-county.org/commission-meetings> (providing that citizens may participate in Union
County commission meetings by video conference due to COVID-19); <https://www.oregon.gov/wcb/Pages/index.aspx> (Oregon Workers’ Compensation Board hearings are
22 being held by telephone or video due to COVID-19); [https://www.oregon.gov/dsl/About/Pages/Public-
Meetings-and-Engagement.aspx](https://www.oregon.gov/dsl/About/Pages/Public-Meetings-and-Engagement.aspx) (providing that all Oregon Department of State Lands public meetings
23 “are being held remotely” by video conference); [https://www.americanbar.org/advocacy/the-aba-task-
force-on-legal-needs-arising-out-of-the-2020-pandem](https://www.americanbar.org/advocacy/the-aba-task-force-on-legal-needs-arising-out-of-the-2020-pandem) (containing various resources for attorneys for
24 remote working due to COVID-19).

1 "Finally, Respondents raise the following concerns regarding video
2 hearings:

3 'The ability to confront and cross-examine a live witness is a hallmark of
4 these hearings. While there is little doubt that the [ALJ] will be able to
5 make credibility determinations based on video, I think everyone would
6 recognize that the ability to do so in person provides the ideal situation.
7 The inability to see what is going on around the persons testifying is an
obvious concern as the appearance in this matter already requires the
witness to be on a computer and there is no way to know what is on their
screen or who else is in the room. While this is not to suggest that a party
or witness will engage in nefarious actions, live testimony negates that
possibility.'

8 "Respondents' argument that an in-person hearing is 'ideal' is well taken.
9 Nevertheless, given the uncertainty of the ongoing pandemic, the forum will not
10 be able to operate under 'ideal' circumstances for an unknown length of time. To
11 address Respondents' concerns outlined above, all witnesses will be asked,
12 under oath, whether they are viewing any documents on their screen and to
confirm that there are no additional persons in the room while they are testifying.
Moreover, while telephone witnesses are allowed, the parties should attempt to
present all key witnesses by video conference so that credibility can be
assessed, if needed.

13 "For all the foregoing reasons, Respondents' objections are DENIED and
14 this hearing will be held by video conference at the date and time set forth in the
15 Notice of Hearing (Tuesday, January 26, 2021, at 9:30 a.m.). Instructions for
participating in the hearing follow on the next page.

16 **"IT IS SO ORDERED."**

17 (Exs. X8-X10)

18 10) On January 11, 2021, Respondents filed a motion for postponement
19 because an emergency health issue arose for Hayes. The declaration supporting the
20 motion contained a record regarding the medical issue and an email indicating that the
21 Agency did not oppose the postponement request.

22 In an interim order dated January 12, 2021, the ALJ granted Respondents'
23 motion. The interim order further stated that the hearing date and the case summary
24

1 deadline were canceled, and will be reset during a prehearing telephone conference.
2 (Ex. X11-X12)

3 11) A prehearing telephone conference was held on Tuesday, January 26,
4 2021, at 9:30 a.m. Administrative Prosecutor Rachel Diamond-Cuneo appeared on
5 behalf of the Agency. Respondents' counsel John Raschko appeared on behalf of
6 Respondents. Based on the availability of the forum and the parties, the forum issued
7 an interim order rescheduling the hearing and case summary deadlines as follows:

8 New Hearing Date: April 6, 2021, at 9:30 a.m.

9 New Case Summary Deadline: March 23, 2021

10 The interim order also including a GoToMeeting link, access code and telephone
11 number for participation in the virtual hearing. (Ex. X13)

12 12) The Agency and Respondents filed their case summaries on May 19,
13 2021. (Exs. X6-X7)

14 13) At the start of hearing, pursuant to ORS 183.415(7), the ALJ orally
15 informed the participants of the issues to be addressed, the matters to be proved, and
16 the procedures governing the conduct of the hearing. (Hearing Record)

17 14) On September 18, 2023, the ALJ issued a proposed order that notified the
18 participants they were entitled to file exceptions to the proposed order within ten days of
19 its issuance. After the forum granted Respondents' request for an extension of time until
20 November 17, 2023, to file exceptions, no exceptions were filed.

21 **FINDINGS OF FACT – THE MERITS**

22 *Case's Relationship with RC*

23 1) Barton and Hayes are a couple in a long-term relationship. They operated
24

1 a consignment clothing store under the assumed business name of "The Royal
2 Clothiers" ("RC") in LaGrande, Oregon. (Testimony of McKerlie, Barton; Exs. A2, A3)

3 2) RC needed help when Hayes was experiencing some health issues, and
4 Case began working as a sales clerk in the store on March 16, 2017. (Testimony of
5 Case, Hayes)

6 3) When Case began working at RC, Hayes and Barton did not know the
7 rules regarding whether they could allow unpaid volunteers to work in the store.
8 (Testimony of Barton, Hayes)

9 4) Case provided services to RC. (Testimony of Barton, Hayes)

10 5) Case had experience working in the retail clothing business and generally
11 "knew what to do" in the store. Barton set her schedule and sometimes asked her to
12 perform specific tasks. Barton paid Case in cash at the end of each week. She earned
13 \$5 per hour. She worked 15-20 hours some weeks or 15-30 hours other weeks,
14 depending on RC's needs. (Testimony of Case)

15 6) One day when both Hayes and Case were working in the store, Hayes
16 noticed that Case brought a man upstairs to try on clothes in the women's fitting room.
17 Hayes approached Case and told her not to do that again because it might make some
18 women uncomfortable to have a man next to them in the changing room. (Testimony of
19 Hayes)

20 *Case's Report to DHS and the Subsequent Investigation*

21 7) In 2017, Barton and Hayes also owned Tudor Holdings LLC ("Tudor").
22 Tudor owned and operated rental properties, including a property that was rented to one
23 of RC's employees. (Testimony of Barton, Hayes)

1 8) While working at RC, Case overheard the co-worker who lived in the
2 home owned by Barton's company talking about several things she was cooking and
3 buying. Case knew that the co-worker received food stamps and was on the Oregon
4 Health Plan. The co-worker also had low-income housing assistance that she used to
5 rent a home from Barton's company. Case had witnessed the co-worker being paid by
6 RC, and felt it was dishonest and wrong for her to receive low-income benefits when
7 she was working for RC. (Testimony of Case)

8 9) Barton and Hayes were aware that Case had been watching and noticing
9 the actions of the employee who rented the home from their company. Barton and
10 Hayes thought that Case "was after" the employee. Case told Hayes and others in the
11 store that the employee "had hundreds of dollars in her handbag." Hayes thought Case
12 was "stalking" the employee and that the employee's activities were "none of [Case's]
13 business." (Testimony of Hayes)

14 10) Walker is a criminal fraud investigator for the Oregon Department of
15 Human Services ("DHS"). He investigates allegations of fraud in obtaining public
16 assistance benefits. On July 25, 2017, Walker received an email from Case in which
17 Case said that she was concerned that someone she worked with was receiving
18 benefits she was not entitled to receive. (Testimony of Walker)

19 11) Case's email prompted Walker to conduct an investigation. Walker made
20 site visits to RC during his investigation. During his initial site visits, he did not make
21 himself known but eventually disclosed his identity. (Testimony of Walker)

22 12) Part of Walker's investigation involved examining whether Barton, as the
23 landlord for RC's employee who received public assistance benefits, had facilitated a
24

1 DHS client's ability to misrepresent her income and employment status. (Testimony of
2 Walker)

3 13) Walker met Barton in person on August 24, 2017. Barton later provided a
4 typed clarification statement. (Testimony of Walker, Barton)

5 14) Case was one of seven witnesses, but she was not the primary witness in
6 Walker's investigation. Walker made his best efforts to not disclose the names of the
7 witnesses to anyone. (Testimony of Walker)

8 15) When Barton was in Walker's office during the course of the investigation,
9 Barton saw a photograph that he thought showed his business accounts and it bothered
10 him. When Barton returned to RC, it still was bothering him that someone had taken
11 and submitted the photograph. He wanted to try to find out who did that. Barton
12 approached a group of employees, including Case, and told them about the DHS
13 investigation. He told them that he was "going to get to the bottom of this." He believed
14 that it was normal for a business to want to know who the "traitor" was. He felt like
15 "someone is against us" and that RC "[didn't] need them around." (Testimony of Barton)

16 16) In early September of 2017, Barton told Case that her services were no
17 longer needed.⁵ (Testimony of Case, Barton)

18 *Post-Termination*

19 17) After RC terminated Case, she was shocked and did not understand why
20 RC discharged her. She felt sad and had a hard time sleeping. (Testimony of Case)

21 _____
22 ⁵ Case and Barton disagree as to whether this conversation took place before or after Case went on
23 vacation. It is not necessary for the forum to resolve this dispute given that both Case and Barton agree
24 that the conversation took place in early September after Barton's conversation about "getting to the
bottom" of the DHS investigation.

1 18) Case earned income from housecleaning work after her termination In
2 January of 2018. She was paid \$15 per hour and worked approximately 3.5⁶ hours per
3 week. In 2018, Case opened her own coffee shop and vintage clothing store with a
4 business partner. On January 18, 2018, Case and her business partner began working
5 at the new business site to make the space ready to operate their business. Case and
6 her partner started paying rent on the location on May 1, 2018, and the shop opened its
7 doors to customers on June 3, 2018. (Testimony of Case)

8 19) The RC business closed in March of 2020. At the time of the hearing, the
9 business was for sale. (Testimony of Barton)

10 *Credibility*

11 20) There were some minor differences between the dates Case provided in
12 her testimony and dates contained in documents. For example, Case testified that she
13 filed a complaint with DHS in August of 2017, but Walker testified that he received an
14 email with a complaint from Case on July 25, 2017. The forum credited the dates in the
15 actual documents if they differed from Case's testimony. Given the relatively minor
16 nature of the date discrepancies and that over three years had passed since some of
17 the events, the forum concludes these minor date discrepancies did not negatively
18 impact Case's credibility.

19 21) Portions of the testimony of Case, Barton, Hayes and Rhyne involved
20 relaying impressions and characterizations of events and people's personalities, such
21 as the tone of voice used by someone or how they viewed the person's role in the local

22 _____
23 ⁶ This number is an approximation based on Case's testimony that she worked 2-5 hours per week
24 cleaning houses for a realtor, and that the hours differed based on the needs of the realtor.

1 community. Unless it was relevant, the forum focused on testimony about the facts of
2 what occurred, rather than these types of characterizations.

3 22) The credibility of Barton was negatively impacted in that he often provided
4 answers that were not responsive to questions and added additional editorial
5 comments. As well, Barton's testimony that he did not know who complained to DHS
6 was undermined by Hayes's testimony that Case had been talking to Barton and Hayes
7 their tenant who was an RC employee, and described Case's behavior as "stalking" the
8 other employee.

9 CONCLUSIONS OF LAW

10 1) At all times material herein, Respondents Barton and Hayes owned and
11 operated a consignment clothing store in LaGrande, Oregon, as a partnership under the
12 assumed business name of The Royal Clothiers.

13 2) At all times material herein, Barton and Hayes were employers as defined
14 in ORS 659A.001 (4)(a) and employed Case.

15 3) The actions of Barton and Hayes, taken through Barton, of discharging
16 Case from employment violated ORS 659A.030(1)(f), and OAR 839-005-0125(1)-(3).

17 4) Case, acting in good faith and while employed by Barton and Hayes,
18 reported information that she believed was evidence of a violation of a state law.

19 5) RC, acting through Barton, terminated Case, because of her good faith
20 reports about potential public assistance fraud, thereby violating ORS 659A.199(1) and
21 OAR 839-010-0100(1).

22 6) The Commissioner of the Bureau of Labor and Industries has jurisdiction
23 of the persons and of the subject matter herein. ORS 659A.800 - ORS 659A.865.

1 7) Pursuant to ORS 659A.850(4)(a)(B), the Commissioner of the Bureau of
2 Labor and Industries has the authority under the facts and circumstances of this case to
3 issue an award requiring training, and the award of lost wages and compensatory
4 damages to Complainant, based on Respondents' unlawful practices. The sum of
5 money awarded and the other actions required of Respondents in the Order below are
6 an appropriate exercise of that authority.

7 **OPINION**

8 The Agency's Formal Charges include the following two alleged violations:

- 9 1. Respondents discharged Case because she opposed an unlawful practice, in
10 violation of 659A.030(1)(f), OAR 839-005-0125(1)-(3).
11 2. Respondents terminated Case because of her good faith reports about
12 information that she believed was a violation of a state or federal law, rule or
13 regulation, thereby violating ORS 659A.199(1) and OAR 839-010-0100(1).

14 The Agency seeks lost wages and emotional distress damages for Case and
15 requests an order requiring Respondents to undergo training on whistleblower
16 protections under Oregon law.

17 **TERMINATION FOR OPPOSING UNLAWFUL PRACTICE**

18 The Agency alleges in its Formal Charges that Respondents violated ORS
19 659A.030(1)(f) by terminating Case's employment, because she opposed what she
20 reasonably believed to be an unlawful practice (assisting an employee with fraudulently
21 obtaining public benefits). The Agency's prima facie case consists of the following
22 elements: (1) Barton and Hayes were employers as defined by statute; (2) Barton and
23 Hayes employed Case; (3) Case explicitly or implicitly opposed an unlawful practice or
24 what she reasonably believed to be an unlawful practice; (4) Barton and Hayes
subjected Case to adverse treatment and (5) there is a causal connection between the

1 protected activity and the adverse treatment. OAR 839-005-0125(2)(a),(b),(c). See also
2 *In the Matter of Sis-Q Cellular, LLC*, 38 BOLI _ (2022); *In the Matter of Andrew W.*
3 *Engel, DMD, PC*, 32 BOLI 94, 132 (2012); *In the Matter of From the Wilderness*, 30
4 BOLI 227, 288 (2009).

5 The forum first addresses Elements 1 and 2. RC contends that Case was a
6 volunteer who was not employed by Respondents and, thus, is not subject to the
7 protections of the statutes at issue in this case. ORS 659A.001(4)(a) defines an
8 “Employer” as “any person who in this state, directly or through an agent, engages or
9 uses the personal service of one or more employees, reserving the right to control the
10 means by which such service is or will be performed.” The Oregon Court of Appeals
11 has identified “four nonexclusive factors for consideration in assessing the right to
12 control: ‘(1) direct evidence of the right to, or the exercise of, control; (2) the method of
13 payment; (3) the furnishing of equipment; and (4) the right to fire.’” *McClusky v. City of*
14 *N. Bend*, 308 Or App 138, 142–43, 481 P3d 431(2020), *rev den*, 368 Or 37 (2021)
15 (citing *Oregon Country Fair v. Natl. Council on Comp. Ins.*, 129 Or App 73, 78, 877 P.2d
16 1207 (1994)). The forum finds that these factors were satisfied in this matter. First,
17 there was direct evidence of the exercise of the right to control in that Barton set Case’s
18 work hours and gave her work tasks. As well, on at least one occasion, Hayes gave
19 directions to Case about who could use the upstairs changing room. Second, the
20 “method of payment” was cash paid to Case at the end of each week. Third, RC
21 furnished the equipment in the RC store for Case to use. Fourth, Barton demonstrated
22 the “right to fire” when he told Case that her services were no longer needed.
23 Therefore, the forum concludes that Barton and Hayes were employers who employed
24

1 Case.

2 As to Element 3 (report), the evidence is undisputed that Case made a report to
3 the DHS on July 25, 2017. In the report, she stated that one of RC's employees was
4 receiving public assistance benefits that she was not entitled to receive.

5 With respect to Element 4 (adverse action), the record is undisputed that Barton
6 told Case that her services were no longer needed in September of 2017.

7 Finally, as to Element 5 (causation), the Agency must prove that an unlawful
8 motive "was a substantial factor" in the decision to terminate Case's employment. "[I]n
9 other words," the Agency must prove that Case "would have been treated differently in
10 the absence of the unlawful motive." *In the Matter of Horizontal Motorsports, Inc.*, 37
11 BOLI at 217 (quoting *Harper v. Mt. Hood Cmty. Coll.*, 283 Or App 207, 214, 388 P3d
12 1170, 1174 (2016)). See also *Crosbie v. Asante*, 322 Or App 250, 256, 519 P3d 551,
13 556 (2022), *rev den*, 370 Or 827 (2023) (noting that the proponent of a discrimination
14 claim under Oregon law must prove that "the protected trait or activity was a 'substantial
15 factor'" in the adverse decision); *Ossanna v. Nike, Inc.*, 365 Or 196, 214, 445 P3d 281,
16 292 (2019) (recognizing that the causation standard for assessing violations of ORS
17 659A.199(1) is "the substantial-factor standard of causation").

18 As well, proof of a causal connection between protected conduct and a materially
19 adverse action can be established "[1] *indirectly*, by showing that the protected activity
20 was followed closely by discriminatory treatment or through other evidence such as
21 disparate treatment of fellow employees who engaged in similar conduct or [2] *directly*,
22 through evidence of retaliatory animus directed against a [complainant] by the
23
24

1 [respondent].” *Boynton-Burns v. University of Oregon*, 197 Or App 373, 380, 105 P3d
2 893 (2005) (emphases in original; internal quotation marks omitted).

3 RC argues that Barton told Case that her services were no longer needed
4 because Hayes had recovered from her illness and returned to work in the RC store.
5 However, Barton told Case that she was terminated in early September 2017, within a
6 couple of weeks after Barton learned of the DHS investigation. This timing is indirect
7 evidence of causation.

8 Additionally, after Barton was contacted by the DHS, he admitted that he was
9 “bothered” when he saw a photo taken of RC’s accounts in the folder of the DHS
10 investigator. Barton came back to RC and spoke to his employees, including Case,
11 about the DHS investigation. He told them that he wanted to “get to the bottom” of it.
12 Barton admitted that he thought the person who made the report was a “traitor” and that
13 he felt like “someone is against us” and that RC “[didn’t] need them around.” Hayes’s
14 testimony confirmed that Barton and Hayes were aware that Case had been watching
15 the employee who received DHS benefits and that Case had commented on the amount
16 of cash in the employee’s purse. Hayes also testified that she and Barton felt that Case
17 was commenting on something that was “none of her business.” These facts, taken
18 together, lead to an inference that Barton and Hayes were aware of the fact that Case
19 was the person who made the report to DHS and that Barton considered that person to
20 be a traitor that he did not want around. This provides evidence of retaliatory animus.
21 Accordingly, the Agency satisfied its burden to establish that Case’s report to DHS was
22 a substantial factor in the decision to end her employment.

1 **TERMINATION DUE TO REPORT OF UNLAWFUL PRACTICE**

2 The Agency also alleges that RC violated ORS 659A.199 when it terminated
3 Case. The analysis used in determining that Case violated ORS 659A.030(1)(f) applies
4 equally to the Agency's ORS 659A.199 claim. The forum also notes that the Agency
5 established that Case made a good faith report of information she believed was
6 evidence of a violation of state law (fraudulently receiving low income assistance
7 benefits). Accordingly, the forum's conclusion that RC violated 659A.030(1)(f) also
8 leads to the conclusion that RC violated ORS 659A.199(1) when it terminated her
9 employment after her report of a violation of state law. See *Vision International*, 37
10 BOLI at 199; *In the Matter of Grand Management Services, Inc.*, 38 BOLI _ (2022).

11 **DAMAGES**

12 *Lost Wages*

13 The Formal Charges sought lost wages of "at least \$12,600." The purpose of a
14 back pay award in an employment discrimination case is to compensate a complainant
15 for the lost wages she would have received but for the unlawful employment practice.
16 *Vision International*, 37 BOLI at 200. Back pay awards are calculated to make a
17 complainant whole for injuries suffered as a result of the unlawful termination. *Id.*

18 "In order to recover damages for lost wages, the aggrieved person will generally
19 be required to mitigate damages by seeking employment." OAR 839-003-0090(4).
20 "Earned income from employment may be deducted from lost wage damages." OAR
21 839-003-0090(4)(a). A complainant who is seeking damages for back pay is required to
22 mitigate damages by using reasonable diligence in finding other suitable employment.
23 *In the Matter of Blue Gryphon, LLC, and Flora Turnbull*, 34 BOLI 216, 238 (2015). The
24

1 burden of proof of showing the failure to mitigate damages lies with Respondents. *In*
2 *the Matter of Wal-Mart Stores, Inc.*, 24 BOLI 37, 65 (2003).

3 In the Agency's closing argument, it requested damages on behalf of Case from
4 the date of her termination until she opened her own business in 2018. The forum
5 concludes that it would be appropriate to award Case lost wages from the date of her
6 termination (September 17, 2017) until Case's new business opened to customers on
7 June 3, 2018. Had she continued to remain employed by RC during this time, she
8 would have earned \$3,700 in wages (\$5/hour x 20⁷ hours/week x 37 weeks).

9 Case earned income from housecleaning work after her termination in January of
10 2018 in the approximate amount of \$210 (\$15/hour x 3.5 hours/week x 4 weeks).

11 Accordingly, her total lost income minus the income she earned from other work
12 is \$3,490.

13 *Emotional Distress Damages*

14 The Agency seeks damages on behalf of Complainant in the amount of "at least
15 \$10,000" for physical, mental and emotional suffering. Pursuant to ORS 659A.850, the
16 Commissioner of the Bureau of Labor and Industries has the authority to award money
17 damages for emotional, mental, and physical suffering sustained. *Oregon Truck*
18 *Painting, LLC, On Time Painting, Inc., Richard Bowman, and Amanda M. Marin*, 37
19 BOLI 87, 1154-15 (2018). The commissioner has the authority to fashion a remedy
20 adequate to eliminate the effects of unlawful employment practices. *Id.* at 115.

21 In determining an award for emotional and physical suffering, the forum

22 _____
23 ⁷ This number is an approximation based on Case's testimony that she worked 15-20 hours some weeks,
24 or 15-30 hours other weeks, depending on RC's needs. (See Finding of Fact #5)

1 considers the type of discriminatory conduct, and the duration, frequency, and severity
2 of the conduct. It also considers the type and duration of the mental distress and the
3 vulnerability of the aggrieved persons. A complainant's testimony, if believed, is
4 sufficient to support a claim for mental suffering damages. *Id.*, citing *In the Matter of Dr.*
5 *Andrew Engel, DMD, PC*, 32 BOLI 94, 141 (2012).

6 Case testified that she felt uncomfortable when Barton spoke to her about being
7 investigated. After RC terminated her, Case was shocked and did not understand why
8 RC discharged her. She felt sad and had a hard time sleeping.

9 A review of past emotional distress damage awards in similar cases is instructive
10 when determining an appropriate emotional distress damages award. The evidence in
11 this case supports an award of \$10,000. See *In the Matter of 4Rs Associates, LLC*, 38
12 BOLI _ (2022) (awarding \$10,000 to a complainant who felt devastated and depressed
13 after being fired after he asked his employer for wages owed to him); *In the Matter of*
14 *Insight Global, LLC*, 37 BOLI 229, 242 (2020) (awarding complainant \$15,000 in
15 emotional distress damages to a complainant who felt horrible and dejected when
16 unlawfully asked about a criminal conviction). See also *In the Matter of Blue Gryphon,*
17 *LLC, and Flora Turnbull*, 34 BOLI 216, 239 (2015) (awarding \$20,000 to a complainant
18 who felt "confused," "angry" and "sad" after he was unlawfully discharged for
19 whistleblowing); *In the Matter of Hey Beautiful Enterprises, Ltd.*, 34 BOLI 80, 101 (2015)
20 (awarding \$10,000 to a complainant who felt angry and emotionally distraught after
21 being discharged for complaining about unpaid wages).

22 **OTHER REQUESTED RELIEF**

23 In its Formal Charges, the Agency asked that Respondents and Respondents'
24

1 managers and supervisors be trained, at Respondents' expense, "on whistleblower
2 protections under Oregon law" by "the Bureau of Labor and Industries Technical
3 Assistance Unit,⁸ or another trainer agreeable to and approved by the Agency." BOLI's
4 Commissioner is authorized to issue an appropriate cease and desist order reasonably
5 calculated to eliminate the effects of any unlawful practice found. ORS 659A.850(4).

6 Among other things, that may include requiring a respondent to:

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

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

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

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

16 This statute gives the Commissioner the authority to require Respondents and
17 Respondents' managers and supervisors to undergo training of the type sought in the
18 Formal Charges. The forum finds that this requirement is appropriate in this case.

19 ORDER

20 A. NOW, THEREFORE, as authorized by ORS 659A.850(2) and ORS
21 659A.850(4), and to eliminate the effects of the violations of ORS 659A.030(1)(f), ORS
22 659A.199(1), OAR 839-010-0100(1) and OAR 839-005-0125(1)-(3) by Respondents
23 **Stephen G. Barton and Marlene E. P. Hayes, dba The Royal Clothiers**, and as
24 payment of the damages awarded, the Commissioner of the Bureau of Labor and
Industries hereby orders Respondents **Stephen G. Barton and Marlene E. P. Hayes**,

⁸ This unit is now called the "Employer Assistance Unit."

1 **dba The Royal Clothiers** to deliver to the Administrative Prosecution Unit of the
2 Bureau of Labor and Industries, 1800 SW 1st Ave, Suite 500, Portland, Oregon 97201-
3 5322, a certified check payable to the Bureau of Labor and Industries in trust for **Peggy**
4 **Case** in the amount of:

5 1) THREE THOUSAND FOUR HUNDRED AND NINETY DOLLARS
6 (\$3,490), less lawful deductions, representing wages lost by Peggy Case as a
7 result of Respondents' unlawful employment practices found herein; plus,

8 2) TEN THOUSAND DOLLARS (\$10,000), representing
9 compensatory damages for emotional and physical suffering experienced by
10 Peggy Case as a result of Respondents' unlawful employment practices found
11 herein; plus,

12 2) Interest at the legal rate on the sum of THIRTEEN THOUSAND
13 FOUR HUNDRED AND NINETY DOLLARS (\$13,490), until paid.

14 B. NOW, THEREFORE, as authorized by ORS 659A.850(2) and
15 659A.850(4), and to eliminate the effects of Respondents' unlawful employment
16 practices found herein, the Commissioner of the Bureau of Labor and Industries hereby
17 orders Respondents **Stephen G. Barton and Marlene E. P. Hayes, dba The Royal**
18 **Clothiers** to participate in training on the correct interpretation and application of the
19 Oregon laws pertaining to whistleblower protections by the Bureau of Labor and
20 Industries Employer Assistance Unit or another trainer agreeable to the Agency. This
21 training shall be completed no later than June 30, 2024.



22
23
24
Christina Stephenson, Commissioner
Bureau of Labor and Industries

ISSUED ON: December 8, 2023